

# PRISON

## Legal News

VOL. 23 No. 1

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

January 2012

### Days Without End: Life Sentences and Penal Reform

*by Marie Gottschalk*

*Death fades into insignificance when compared with life imprisonment. To spend each night in jail, day after day, year after year, gazing at the bars and longing for freedom, is indeed expiation.*

—Lewis E. Lawes, warden of Sing Sing prison, 1920–41

The Great Recession has spurred the reexamination of many penal policies, from the war on drugs to alternatives to incarceration, but not the widespread use of life sentences.<sup>1</sup> The United States continues to be deeply attached to condemning huge numbers of offenders to the “other death penalty” despite mounting evidence that lengthy sentences have

minimal impact on reducing the crime rate and enhancing public safety.

Life sentences have become so commonplace that about one out of eleven people imprisoned in the United States is serving one. Nearly one-third of these life-sentenced offenders have been sentenced to life in prison without the possibility of parole (LWOP). The total life-sentenced population in the United States is about 141,000 people – or about twice the size of the *entire* incarcerated population in Japan. These figures on life sentences do not fully capture the extraordinary number of people who will spend all or much of their lives in U.S. prisons. They do not include the “virtual lifers,” offenders who received sentences that exceed a natural life span and who will likely die in prison long before reaching their parole-eligibility or release dates.

A life sentence has become an acceptable punishment not only for murder, but also for a wide variety of other crimes, some of them quite trivial. Under California’s draconian three-strikes laws, people have received 25 years-to-life sentences for minor infractions like stealing pizza from children and stealing change from a parked car. In November 2011, a circuit court judge in Florida sentenced a 26-year-old man whose home computer contained hundreds of pornographic images to life in prison without the possibility of parole.

Keeping so many older prisoners incarcerated does not significantly reduce the crime rate and is extremely expensive. The population of imprisoned elderly adults is growing rapidly. Between 1999

and 2007, the number of people age 55 or older in state and federal prisons grew by nearly 77 percent. Because of their greater need for expensive health-care services, prisons spend two to three times more to incarcerate an elderly prisoner than a younger one, or on average about \$70,000 a year.

The explosion in the number of lifers in the United States since the 1970s is a dramatic change in U.S. penal policy. For much of the last century, a life sentence rarely meant a lifetime behind bars. In 1913, a “life” sentence in the federal system was officially defined as 15 years. Many states had comparable rules. Until the early 1970s, even in a hard-line state like Louisiana, which today has the country’s highest incarceration rate, a life sentence typically meant ten years and six months. For almost five decades, the 10/6 law, enacted in 1926, governed life sentences in Louisiana. Lifers were routinely released in Louisiana after serving about a decade if they had good conduct records and the warden’s support. The years that prisoners spent in Louisiana’s infamous Angola prison were oftentimes brutal and dehumanizing, but they nearly always had an end date. That changed almost overnight in the 1970s, as lawmakers dramatically increased the minimum time served to be considered for clemency and then in 1979 mandated that all life sentences would be served without the possibility of parole. In 1970, just 143 people were serving LWOP sentences in Louisiana. By 2009, it had mushroomed to 4,270 – or to about 11 percent of the state’s entire prison population.

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*PLN* is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

## **Days Without End (cont.)**

### **Little Judicial Relief**

The U.S. public has been largely indifferent to the proliferation of life sentences and of disproportionate and arbitrary punishments. Likewise, the political process has failed to engage in a serious debate about these issues. For these reasons, the courts appear to some observers to be the most promising arena to check excessive punishments like life sentences.

In the 2010 *Graham v. Florida* decision, the Supreme Court ruled that sentencing juveniles convicted of nonhomicidal crimes to life imprisonment without the possibility of parole was unconstitutional. In November 2011, the Supreme Court announced it would hear arguments in two cases challenging the constitutionality of LWOP for juveniles convicted of homicide (*Miller v. Alabama* and *Jackson v. Hobbs*). These actions have bolstered faith in focusing on legal strategies to reduce the lifer population. But this confidence in the judiciary's greater potential to lead the way in curtailng extreme sentences in the United States may be unwarranted.

In the absence of a wider political push to challenge life sentences, the courts can be counted on at best to chip away at the life-sentenced population without making a major dent in it. Moreover, an excessive focus on judicial strategies may come at the cost of developing successful complementary political and legislative strategies to shrink the lifer population.

The Supreme Court has been extremely supportive of life sentences and of grossly disproportionate sentences. In *Schick v. Reed* (1974), it dismissed any notion that LWOP was unconstitutional. In *Harmelin v. Michigan* (1991), it ruled that LWOP sentences do not require the same "super due process" procedures mandated in capital punishment cases. Thus, LWOP has become cheaper and easier to mete out than a death sentence. Most people sentenced to life do not have any real chance of getting their sentences overturned or reduced. They often have fewer legal resources to challenge their sentences because they are not entitled to the automatic appeals process available to prisoners on death row. Moreover, most post-conviction law offices and organizations focus almost exclusively on capital cases which are paid for by the federal judiciary or otherwise receive special funding.

The Supreme Court has consistently given legislators and judges wide berth to impose whatever punishments they see fit – short of death – without significant judicial oversight. In *Lockyer v. Andrade* (2003), the U.S. Supreme Court affirmed two 25 years-to-life sentences for a California man whose third strike was the theft of \$153 worth of videotapes intended as Christmas gifts for his nieces. In *Ewing v. California*, it sanctioned a 25 years-to-life sentence under California's three-strikes law for the theft of three golf clubs.

Capital punishment is one area of criminal law where the Supreme Court has at least nominally sought to define a robust oversight process and curb excessive punishment. The Court requires states to have clear guidelines for the imposition of a capital sentence so that it is not imposed capriciously and arbitrarily. It has banned mandatory death sentences and insisted that capital defendants have the opportunity to present all kinds of mitigating evidence in the sentencing phase of their trial. It has sought to make the punishment fit the crime in capital cases, thus forbidding the execution of people convicted of rape and greatly restricting the use of the death penalty in felony murder cases.

By contrast, life sentences are imposed today in a manner that is similar in some ways to how death sentences were imposed in the pre-*Furman* and pre-*Gregg* eras before the Supreme Court nationalized capital punishment and began to regulate it through its new death-is-different doctrine. Some legal observers contend that pushing the courts to extend the death-is-different doctrine to lifers may be the most fruitful way to curtail use of this extreme sentence.

But the Supreme Court has been scrupulous about keeping "its death penalty jurisprudence from bleeding into other areas of criminal justice by repeating the truism that death is different," explains Rachel Barlow of the NYU School of Law. Furthermore, one thing that both supporters and opponents of the death penalty agree on is that the Supreme Court's regulation of capital punishment has not been a success. As Justice Harry Blackmun famously declared in 1994, a decade and a half after he voted in favor of reinstating the death penalty in the *Gregg* decision, "The death penalty experiment has failed."

Today, the death penalty is entangled in a highly complex web of rules and procedures. Yet opponents of the death penalty complain that capital defendants are regu-

## Days Without End (cont.)

larly denied due process and that capital punishment continues to be imposed in a capricious, arbitrary and discriminatory fashion. Meanwhile, supporters of capital punishment lament the lengthy, often unending legal appeals process in death penalty cases that in their view denies victims' families the closure that a timely execution reportedly brings.

Compared to the virtually nonexistent oversight of noncapital cases, the death penalty review process may look robust. However, on its own, the body of rules, principles and precedents that has developed over the past four decades to govern capital punishment is notoriously confusing and often contradictory. Moreover, in the early 1980s the Supreme Court and then Congress began dismantling or weakening some of the legal protections erected for capital defendants in a shift toward "deregulating death."

It would be a mistake to view the *Graham* decision as a major departure from these general trends or to interpret it as a signal that the judiciary is the Promised Land to roll back life sentences in the United States. In *Graham*, as in the *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) decisions, which respectively banned the execution of the mentally retarded and juvenile offenders, the Court emphasized that it was dealing with an extremely rare sentencing practice. The Court singled out

the rare use of this sentence as one piece of evidence that these particular LWOP sentences were at odds with "evolving standards of decency," a key pillar of its death penalty jurisprudence, and thus were cruel, unusual and unconstitutional. To gauge "evolving standards of decency," it weighed not just how many states had this sentence on the books, but also how few actually imposed it. The Court further noted that international opinion and practice were arrayed against LWOP sentences for juvenile offenders, as were some key professional associations.

Even though the Court borrowed from the capital punishment canon to invalidate LWOP for these particular juvenile offenders, "evolving standards of decency" does not look like a promising avenue to mount a broader legal challenge to LWOP or other life sentences. It is hard to make the case that the American public has become disenchanted with LWOP or life sentences more generally for most adult offenders. Prior to the 1970s, LWOP was virtually nonexistent. Today 49 states have some form of LWOP on the books, up from 16 in the mid-1990s. In six states – Illinois, Iowa, Louisiana, Maine, Pennsylvania and South Dakota – all life sentences mean life without the possibility of parole. The same is true for life sentences in the federal system, which ended parole eligibility for life-sentenced prisoners in 1987.

Since the early 1980s, the U.S. incarceration rate has quadrupled while the

LWOP population is 100 times greater than it was then. Public opinion polls indicate growing and strong support for LWOP as an alternative to the death penalty. Although international practice and opinion are decidedly against LWOP and the widespread use of other kinds of life sentences, international sentiment has been at best a second-tier consideration for the Court in gauging "evolving standards of decency."

In the *Graham* decision, the Supreme Court identified the "denial of hope" as another reason to declare that these specific juvenile LWOP sentences were unconstitutional. The Court indicated that an LWOP sentence for certain juvenile offenders may be unacceptable because it means that "good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the offender], he will remain in prison for the rest of his days."

However, "denial of hope" does not look like a fruitful opening to challenge life sentences more broadly. Lifers exhibit a wide range of behaviors and coping strategies, much as one would find among the terminally ill or chronically disabled at various stages of their diagnoses and illnesses. Anyone who has spent some time with lifers – especially lifers who have been incarcerated for a decade or more – cannot fail to be impressed with how hopeful many of them appear to be. Many lifers doggedly seek purpose in their lives despite what may appear to many

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outsiders to be bleak living conditions and bleak life prospects.

Recent research suggests that many lifers cope with the extraordinarily difficult circumstances of their confinement by cultivating optimism about their own personal efficacy, by compiling impeccable disciplinary records, and by strictly adhering to daily routines defined by a whirlwind of educational, volunteer, religious and other activities. This helps explain why lifers tend to be leaders in creating a more stable and livable atmosphere in prisons.

This is not to deny or minimize the severe psychological distress that often comes with a life sentence. These sentences are like a death in slow motion for many prisoners, causing great mental and sometimes great physical distress. Furthermore, the conditions of confinement for lifers in the United States tend to be far worse than those for the general prison population and are more likely to fall below international human rights standards.

### Recidivism and Life Sentences

The political and legislative obstacles to rethinking the widespread use of life sentences are almost as daunting as the

judicial ones. The U.S. commitment to life sentences remains deep despite a formidable consensus among experts on sentencing and crime that imprisonment and lengthy sentences do not necessarily deter offenders and would-be offenders from committing crimes. State-of-the-art research in criminology is substantiating Italian philosopher Cesare Beccaria's provocative claim in the 18<sup>th</sup> century that the certainty of punishment is a far greater deterrent to crime than the severity of punishment.

The deterrent and incapacitative effects of lengthy sentences are so modest for several reasons. First, offenders tend to be present-oriented. Thus, lengthening the sentence from, say, 15 years for a certain offense to life in prison is unlikely to have much of an effect on whether someone commits that crime or not. Moreover, the evidence that people age out of crime is compelling. Researchers have persistently found that age is one of the most important predictors of criminality. Criminal activity tends to peak in late adolescence or early adulthood and then declines as a person ages. Finally, many lifers are first-time offenders convicted of homicide. The phrase "one, then done" is commonly used to sum up their criminal proclivities. [Edi-

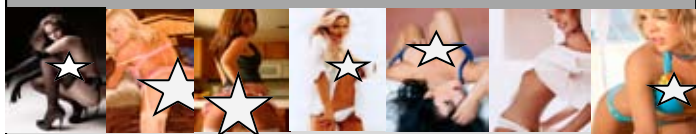
*tor's Note:* As someone who has served a life sentence, I can note that the severity of the punishment is immaterial to criminals who do not think they will be caught or are immune from punishment and this applies equally to pickpockets, armed robbers, corporate leaders and heads of state.]

Older prisoners who have served lengthy sentences are much less likely to return to prison due to the commission of a serious crime than younger prisoners who have served shorter sentences. The recidivism rate for lifers is much lower by far than for other offenders. Lifers released from prison were less than one-third as likely to be rearrested as all released prisoners, according to an analysis by The Sentencing Project. Of the 368 people convicted of murder who were granted parole in New York between 1999 and 2003, only six, or less than 2 percent, returned to prison within three years for a new felony conviction, and none of those were reimprisoned for a violent offense according to a 2011 study by the New York State parole board.

### The War on the War on Drugs

Even though life sentences and decades-long sentences contribute little to enhancing public safety and are socially

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## Days Without End (cont.)

and economically very costly, rethinking their widespread use is not high up on the penal reform agenda for several reasons. One reason has to do with how the political mobilization against the war on drugs has developed. The battle against the war on drugs has been premised in part on lightening up on drug offenders and other nonviolent offenders while getting tough with the “really bad guys.” This quid pro quo has reinforced the misleading belief that there are two very distinct and immutable categories of offenders, the violent ones and the nonviolent ones, which has been to the detriment of lifers. It obscures the reality that the United States, relatively speaking, is already quite punitive toward violent offenders and property offenders and has been so for a long time now. It also fuels the misperception that the war on drugs has been the primary engine of mass incarceration and that ending it would significantly reduce the country’s incarcerated population while leaving the “really bad guys” in prison where they belong.

All the attention that opponents of the war on drugs, most notably the Drug Policy Alliance, have brought to bear on the excesses of the war on drugs have fueled the public perception that the country’s hard-line drug policies have been the primary engine of prison growth. But new research by William Sabol, the chief statistician for the U.S. Bureau of Justice Statistics, challenges this widespread belief. The contribution of violent offenders to the prison population now significantly dwarfs the contribution of drug offenders. Overall, drug offenders were responsible for 13 percent of the growth in the state prison population from 1994 to 2006. By contrast, in the face of plummeting violent crimes

rates, defendants convicted of violent crimes accounted for almost two-thirds of the overall growth in state prisoners from 1994 to 2006. These figures indicate that ending the war on drugs – one of the top priorities for many penal reformers – will not necessarily end mass incarceration in the United States because drug offenders have not been the primary engine of recent growth in the prison population.

Opposition to the war on drugs has dominated the penal reform movement, overshadowing the plight of the “really bad guys” left behind. This is largely due to the funding priorities of foundations that have lavished funding on anti-drug war groups while doing little or nothing to challenge sentencing of non-drug prisoners. Recently lawmakers in several states have enacted comprehensive penal reform packages that reduce the penalties and/or provide alternatives to incarceration for drug possession and other nonviolent crimes while simultaneously ratcheting up the punishments for other crimes. For example, in 2010, South Carolina legislators approved a number of laudable sentencing reforms with bipartisan support. These reforms included equalizing the penalties for possession of crack and powder cocaine, authorizing greater use of alternatives to incarceration for people convicted of non-trafficking drug offenses and reducing the maximum penalty for burglary. But South Carolina lawmakers also added two dozen offenses to the “violent crime” list and expanded the list of crimes that are eligible for LWOP sentences.

Over the past few years, maverick district attorneys launched into office in major urban areas with the backing of broad penal reform coalitions have served as important beachheads to engineer wider statewide shifts in penal policy. However, most of their focus has been on the shortcomings of the war on drugs. The plight of people serving lengthy sentences for serious or violent crimes has not been part of their reform agenda.

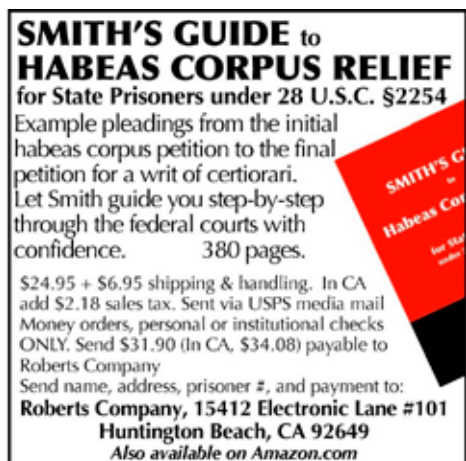
New York State is a good case in point. After years of political agitation by the “Drop the Rock” campaign, the state legislature finally enacted a reform package in 2009 that eviscerated what remained of the draconian Rockefeller drug laws. But at the same time, legislators rejected an extremely moderate recommendation from the New York State Commission on Sentencing Reform to extend “merit time” to a very limited pool of people convicted of violent offenses, making them eligible

to have a few months at most shaved off their sentences. These were offenders who had served decades in the system, had stellar behavior records, and had earned college degrees and/or other markers of rehabilitation.

The political strategy to draw a firm line between nonviolent drug offenders and violent offenders contributes to the further demonization of “serious” or “violent” offenders in the public imagination and in policy debates. It reinforces the misleading view that there are two clear-cut, largely immutable categories of offenders who are defined most meaningfully by the seriousness of the offense that sent them away. However, on closer examination, these fixed categories – the nonviolent drug offender on one hand and the serious violent offender on the other – are more porous.

Certainly many drug offenders are in prison because their primary criminal activities were drug possession or trafficking. However, many people serving time for a nonviolent crime have been convicted of a violent offense in the past. Furthermore, police, prosecutors and some scholars claim that drug charges often serve as surrogates for a violent crime. This is so because of the difficulties that the police and prosecutors face in trying to enforce violent felonies straight up in many poor inner-city neighborhoods due to no snitchin’ norms and the vulnerability of eyewitnesses. Another factor is the fall in the clearance rates for violent felonies, partly due to a rise in stranger homicides of strangers and robbery-murders, and a relative decline in friend-and-family murders, which are easier to solve. “For all these reasons, the substitution of drug prosecutions for violent cases was natural,” according to the late William Stuntz of Harvard Law School.

Just as all drug convictions may not necessarily be what they first appear, on closer inspection all “violent” offenders are not necessarily what they seem. Many of the people sent to prison for violent offenses are not necessarily violent years later. But the widespread perception is that they still are despite stellar prison conduct records, ample evidence of rehabilitation through education, volunteering and other programs, and mounting research about deterrence and aging out of crime. Witness the uproar after the North Carolina Supreme Court declined in October 2009 to review a 2008 decision by the appellate court that a life sentence is to be consid-



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ered 80 years under the state's statutes. After the ruling, the state's Department of Correction announced its intention to release dozens of lifers who were eligible for early release thanks to the good time and merit time credits they had accumulated. Governor Beverly Perdue stepped in to stop the releases amid numerous reports in the media that many "rapists and murderers" were about to go free. This brouhaha spurred a spate of news stories that featured outraged victims and their families and which recounted the gruesome details of crimes committed decades earlier. In August 2010, the North Carolina Supreme Court reversed course, ruling that the prisoners sentenced to life in the 1970s were not eligible for parole.

### From Pizza Thieves to Serial Killers

The life-sentenced population includes not only drug offenders, but also middle-aged serial killers, getaway drivers in convenience store robberies gone awry, aging political radicals from the 1960s and 1970s, women who killed their abusive partners, three-strikers serving 25 years-to-life for trivial infractions like stealing two pieces of pizza, and men who killed their teenage girlfriends decades ago in a fit of jealous rage. Many of the people serving life sentences today were the main perpetrators of a violent crime like homicide. But a great number of them were sent away for life for far less serious infractions. A central question facing any penal reform movement concerned about the lifer issue is whether to concentrate on challenging the fundamental legitimacy of all life sentences not subject to a meaningful parole review process or to concentrate on a subset of lifers who appear less culpable and more likely to garner public sympathy.

In the 1980s and 1990s, the penal reform movement at Louisiana's Angola prison splintered and floundered over this very issue.<sup>1</sup> Old timers sentenced during the more permissive 10/6 regime were at odds with more recent lifers sentenced under tougher new statutes. Angola's Lifers Association excluded "practical lifers," that is, the men with the "basketball sentences" of a high number of years that exceed a natural life span. Lifers who were first-time offenders wearied of the all-or-nothing push for parole eligibility for all lifers, and attempted to form their own organization. They believed legislators would be more receptive to consider parole eligibility for them than for repeat

offenders. Norris Henderson, a leader of Angola's lifers who became a penal reformer on the outside, said recently, "While I think the life sentence is in itself the problem, I also believe we have to go for the low-hanging fruit. We've now done that with the drug lifers, so the next thing might be to see how many 10/6 lifers are here and work on them. Then how many 20-year lifers and work on them."

The enormous heterogeneity of the life-sentenced population presents an enormous political challenge. It renders political and legal arguments based on going after the "low-hanging fruit" by emphasizing degrees of culpability and relative fairness extremely attractive. However, such strategies could be costly over the long term. They potentially sow divisions among lifers and also among their advocates on the outside. Moreover, they also threaten to undermine more universalistic arguments about redemption, rehabilitation, mercy and aging out of crime that would encompass a broader swath of the life-sentenced population. More narrowly tailored arguments may win the release of individual lifers or certain categories of lifers but may worsen the odds of other lifers left behind.

### Felony Murder

The United States is exceptional not only for its widespread use of life sentences but also for the persistence of the felony murder rule, which other common law countries have largely abolished. The felony murder doctrine generally refers to an unintended killing during a felony and/or an accomplice's role in a murder. An accomplice can be considered as liable as the triggerman for any murder committed during the commission of another felony, such as burglary or robbery. And the definition of accomplice can be quite capacious. Lending your car to a friend who ends up using it to commit a murder can send you away for life in some states. Prosecutions for felony murder have been relatively common in the more than 30 states that allow them.

Political and legal strategies highlighting the lesser culpability of people convicted of felony murder and the gross disproportionality of their sentences can end up pitting one group of lifers and their advocates against another. One lifer appears more deserving of release by highlighting how less deserving other lifers are. This may win the eventual release of that offender who had only minimal involvement in a



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## Days Without End (cont.)

particular crime but perhaps at the cost of bolstering the view that the main perpetrators – or the “really bad guys” – got what they deserved and should be forever defined by the crime they committed.

### Juvenile Lifers

The plight of juvenile offenders sentenced to life without the possibility of parole is another good case in point. Approximately 2,500 people currently are serving LWOP sentences for offenses committed when they were juveniles. This sentencing practice violates the 1989 United Nations Convention on the Rights of the Child and other international human rights agreements and norms. Many youths sentenced to LWOP are incarcerated in adult facilities while they are still juveniles. Despite efforts to segregate these juveniles from the adult population, often in supermax-type conditions until they turn 18, many youths in adult prisons are still subject to physical and other abuses, including rape, by adult prisoners and staff alike.

States are beginning to rethink LWOP for juvenile offenders, or JLWOP. In recent years, legislation that would eliminate or restrict the use of JLWOP has been introduced in at least nine states. As discussed earlier, *Graham v. Florida* and *Roper v. Simmons* have been major catalysts for the reconsideration of JLWOP sentences. These two cases rested on persuasive new research in brain science and psychology about adolescent brain development, most notably that the prefrontal cortex of the brain, which regulates impulse control, is not fully developed in teenagers. Opponents of executing juveniles and of condemning them to life in prison argued that children and teenagers should not be considered fully culpable for the crimes they commit, however heinous or violent, because their brains are not fully developed until they are in their 20s. As a consequence, they have greater trouble controlling their impulses and resisting peer pressure.

Political and legal strategies rooted in arguments about the underdevelopment of teenage brains have proven to be an extremely promising avenue to end or at least limit the use of JLWOP sentences. However, these strategies could be costly over the long term for those offenders who were sent away for life for crimes they committed as adults and thus when they presumably had fully-developed brains.

Stressing that teenagers are not fully culpable reinforces in a backhanded way the idea that adults who commit serious crimes should have known better and thus are fully culpable. The brain scan approach to criminal justice bolsters narrow biologically deterministic arguments about why people commit crimes, which are enjoying a renaissance in criminology and in public debates about crime and punishment not seen since the heyday of the eugenics movement a century ago. This approach reinforces the popular view that people who commit serious crimes are biologically incapable of fundamentally changing.

Pennsylvania has about 450 juvenile lifers, or one-fifth of the country's total, which is more than any other jurisdiction in the world. Under Pennsylvania law, mandatory life is the only sentence available to adults and youths convicted of first- or second-degree murder, and there is no minimum age for which a juvenile can be tried as an adult. The case of Jordan Brown, initially charged as an adult in early 2010 for killing his father's fiancée when he was eleven years old, put an unflattering national spotlight on JLWOP in Pennsylvania (Jordan's case has since been transferred to juvenile court). Pennsylvania has been persistently unwilling to commute the sentences of juvenile lifers who have served decades behind bars, even in instances where members of the homicide victim's family have called for mercy and release. A newly formed statewide coalition is currently engaged in an uphill battle to get Pennsylvania legislators to reconsider the state's widespread use of JLWOP sentences. At a legislative hearing in August 2010, JLWOP opponents focused extensively on the adolescent brain development argument.

The relative culpability of juveniles convicted of felony murder was also a central issue. One of the main witnesses testifying in favor of the legislation was Anita Colón, a charismatic, articulate woman whose brother, Robert Holbrook, is serving a life sentence in Pennsylvania for a felony murder conviction when he was 16. In her testimony, Colón underscored that almost 60 percent of Pennsylvania's juvenile lifers were first-time offenders who had never been convicted of a previous crime and that about a third were sent away for life for a felony murder conviction. This is slightly above the national average of about 25 percent. Members of the House Judiciary Committee focused much of their attention at the hearing on

the relative fairness of felony murder for juvenile lifers rather than on alternative arguments raised by Colón and other witnesses about redemption, aging out of crime and the huge economic cost of incarcerating so many youths until the end of their days.

In opposing the legislation, the Pennsylvania District Attorneys Association commended the Judiciary Committee's recent efforts to reduce the state's prison population by focusing on diversionary and other programs directed at people convicted of less violent offenses. “That is the cohort group our collective attention should be focused on – not on letting murderers out early,” the association declared in its written testimony.

The DAs' association and other opponents framed the proposed legislation as a violation of the rights of victims and of Pennsylvania's commitment to truth-in-sentencing. “It would be devastating and unfair to change the rules long after families of murder victims who were told that the person who murdered their child, spouse, parent or other family members would spend the rest of his or her life behind bars,” the DAs argued. Representatives of victims' organizations and other opponents of the legislation echoed this view and devoted much of their testimony to recounting gruesome details of crimes committed by juvenile lifers.

The debate over JLWOP illustrates how the death penalty continues to cast a long shadow over the broader politics of punishment and penal reform. As *Roper v. Simmons* wound its way through the courts, organizations representing the victims of juvenile offenders generally did not mobilize in support of executing juvenile offenders. Assurances that juveniles who were spared the death penalty would spend all their remaining days behind bars were an important reason why. At the Pennsylvania hearings, representatives of victims' organizations portrayed ending JLWOP retroactively and making juvenile lifers eligible for parole consideration as a betrayal. They contended that many victims' families agreed to not push for a charge of capital murder due to assurances from prosecutors that the perpetrator would be locked up for life, thus sparing the family the seemingly endless appeals process of death penalty cases.

### Striking Out in the Golden State

California has been teetering at the brink of fiscal Armageddon for several

years now and is struggling to comply with a federal court order, upheld in 2011 by a divided Supreme Court, to devise a plan that would reduce the state's dangerously overcrowded prison population by more than 40,000, or to about 138 percent of capacity (compared to 200 percent in recent years). Nonetheless, the state's commitment to incarcerating people for lengthy or life sentences at an average cost of nearly \$50,000 per year has not diminished much. California operates the largest state prison system and also has the highest number of life-sentenced prisoners – about 34,000, or around one-quarter of the nation's total. This is more than triple the number in 1992, before the state enacted the country's toughest three-strikes law. About one in five prisoners

in California is serving a life sentence, or about double the national average.

California's life-sentenced population is exceptional not only for its sheer size but also for its extreme heterogeneity as measured by sentencing offense. The three-strikes law in California, which has become a towering symbol of the state's commitment to crime victims and of its uncompromising stance toward punishing offenders, poses a huge hurdle to devising effective political and legislative strategies to dismantle the "other death penalty" in the Golden State.

California's 1994 three-strikes law doubles the minimum sentence for anyone convicted of a felony who has one prior serious or violent felony. For those with two or more prior serious or violent strikes,

a third conviction for *any* felony generally means a minimum sentence of 25 years-to-life if a prosecutor chooses to invoke the three-strikes law. Unlike three-strikes statutes in many other states and the federal system, in California the third strike need not be for a serious or violent offense. Moreover, California has an extremely permissive definition of what constitutes a felony, and prosecutors have enormous leeway to upgrade misdemeanors to felonies. As a consequence, the state's prison population includes a considerable number of people convicted under the three-strikes law who are serving lengthy sentences for trivial infractions like petty theft, minor drug possession or minor drug sales.

The proportion of three strikers in California's prisons increased dramati-



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cally between 1994 and 2001, going from about 2½ percent to about 25 percent, where it has stabilized. The readiness of California's district attorneys to invoke their three-strikes prerogative varies enormously around the state and even between seemingly similar cases in a single county. Offenders sentenced under the state's three-strikes law receive on average sentences that are nine years longer than they would have received otherwise. A 2009 report by the state's auditor estimated that the 43,500 prisoners currently serving time under California's three-strikes law will cost the state approximately \$19 billion in additional costs. More than half of those prisoners are imprisoned for a felony that is not considered violent or serious, at an additional cost of \$7.5 billion.

The last major attempt to reform the state's three-strikes law, Proposition 66, went down to a resounding defeat in 2004 after the political establishment in California, including then-Governor Arnold Schwarzenegger and current Governor Jerry Brown, rallied against the measure in the final days before the election. They joined a well-funded campaign against Proposition 66 spearheaded by conservative victims' groups allied with the California Correctional Peace Officers Association (CCPOA), arguably the most powerful union in the state and unquestionably the country's savviest prison guards' union. The well-funded eleventh hour blitz of television and radio commercials exploited negative racial stereotypes and fearsome images of reviled criminals to defeat the measure.

Some lawyers and law students in California have started mobilizing to exploit a 1998 ruling by the California Supreme Court that permits trial judges, in considering a bid for leniency in a three-strikes case, to weigh whether mitigating factors like a defendant's "background, character and prospects" place him or her outside the "spirit" of three-strikes. The Stanford Three Strikes Project has litigated various aspects of the administration of the three-strikes law in both state and federal court. Defense attorney Michael Romano, who helped found the Stanford clinic, argues that legal clinics should concentrate their efforts on gaining the release of sympathetic three-strikers "who haven't done terrible things, who haven't actually hurt anyone."<sup>2</sup> On the positive side, these

below-the-radar efforts have resulted in the release of a handful of three-strikers. But given the huge size of the three-striker and life-sentenced population, it is hard to see how these below-the-radar efforts will significantly reduce the number of lifers in California.

Political support for three-strikes is not as steadfast as it once was in California. Steven Cooley, district attorney of Los Angeles and the 2010 Republican candidate for attorney general, has been an outspoken critic of some aspects of the state's three-strikes law, earning him the umbrage of the California District Attorneys Association. Kamala Harris, who triumphed over Cooley in a tight race, pursued relatively few three-strikes cases when she was San Francisco's district attorney.

A group of Stanford University law professors is seeking to put a new three-strikes reform measure on the ballot in 2012. The new initiative is much narrower than Proposition 66, which sought to restrict felonies that trigger a third strike to violent or serious crimes. The new proposed measure would still permit putting away for life people who had once been convicted of serious crimes like rape, murder and child molestation, and then are subsequently convicted of *any* third-strike felony, including a trivial infraction like shoplifting. For other repeat offenders, it would restrict the use of the tough third-strike provisions to crimes that are serious and violent offenses. The proposed measure would not change the existing second-strike provision, which doubles the sentence length for many second-strike offenders, even if the offense is not serious or violent. In promoting this new ballot initiative, its supporters appear to be embracing some of the negative, demonizing language that opponents of Proposition 66 used in 2004. "We're making absolutely sure that these [hard-core] criminals get no benefit whatsoever from the reform, no matter what third strike they commit," said Dan Newman, a spokesman for the new campaign to reform three-strikes in California.<sup>3</sup>

Despite these developments, a major overhaul of the three-strikes law in California via the ballot box faces a tough uphill battle. The political establishment's commitment to three-strikes is almost theological in California. Any time that politicians' faith appeared to waver, victims' groups working closely with the CCPOA have had the money and organizational resources to bring them back into the fold. The CCPOA and its allies have been steadfast in their

opposition to revising three-strikes, even in the case of the pizza thief, the petty drug dealer and other minor offenders. The prison guards provided a key campaign endorsement to Jerry Brown, the state's new governor, who has assiduously cultivated the union over the years.

The case of John Wesley Ewell, charged in late 2010 with murdering four people in home-invasion robberies, has also set back the cause of three-strikes reform. Ewell, who had multiple felony convictions, had campaigned against California's three-strikes law and had managed to escape its harsh sentencing guidelines four times. Any future ballot initiative to reform three-strikes will likely provide yet another occasion to demonstrate that California's prisons are full of the "worst of the worst" who should not be released for a very long time – if ever.

### The "Worst of the Worst"

What to do about "the worst of the worst" lurks in the background of any discussion of life sentences. Just reciting the names Charles Manson, Jeffrey Dahmer and Ted Bundy is enough to abort any serious discussion about developing political and legislative strategies to challenge the fundamental legitimacy of *all* LWOP sentences and of *all* life sentences that are not subject to meaningful parole reviews. The two key issues here are retribution and risk. Some mistakenly interpret calls to abolish all LWOP sentences and to entitle all prisoners to a parole eligibility hearing after a certain number of years as an assault on the whole idea of retribution, which has been a guiding principle, if not the preeminent philosophy, of the criminal justice system in the United States for decades, at least as applied to the poor.

The retribution issue is a familiar one from debates over capital punishment. As demonstrated most starkly with the death penalty, what constitutes an acceptable punishment is culturally, politically and socially constructed and thus varies enormously over time. Centuries ago, a mere execution was not enough to express society's reprobation. The condemned often were publicly tortured and mutilated, and then their bodies were dissected for good measure and left on public display. By contrast, the maximum sentence available today to the International Criminal Court, which tries the gravest of crimes, including war crimes, crimes against humanity and genocide, is a life sentence reviewable every 25 years. Under California law,



Charles Manson has been getting a parole eligibility hearing every two years for decades, as has Sirhan Sirhan, the assailant of Robert F. Kennedy. This is hardly a sign that California, whose prison population has increased more than 800 percent since Manson and Sirhan were convicted, has somehow forsaken retribution.

The “worst of the worst” will always present a daunting challenge to penal policy. For ages, this issue dominated all discussions of capital punishment. In deciding on how best to challenge the widespread use of LWOP and whether to declare all LWOP sentences unacceptable, penal reformers certainly need to consider the realities of the broader political environment. But as Hugo Adam Bedau, a prominent death penalty abolitionist who did not endorse LWOP as an alternative to capital punishment, eloquently reminds us, “[I]t is not the task of penal reform – or of the movement against the death penalty – to present to the public whatever it will accept. The task, rather, is to argue for a punitive policy that is humane, feasible, and effective, whatever the crime and whoever the offender, and regardless of the current climate of public opinion.”

One of the country’s premier penal

reform groups appears to have made an important shift in its stance on the abolition of LWOP. The Sentencing Project is the author of two path-breaking reports in 2004 and 2009 on life sentences that were invaluable in drawing public, journalistic and scholarly attention to this invisible issue. In the earlier report, The Sentencing Project called for abolishing LWOP “in all but exceptional cases.” In the follow-up report, it recommended eliminating *all* sentences of life without the possibility of parole.

### The Waning of Mercy

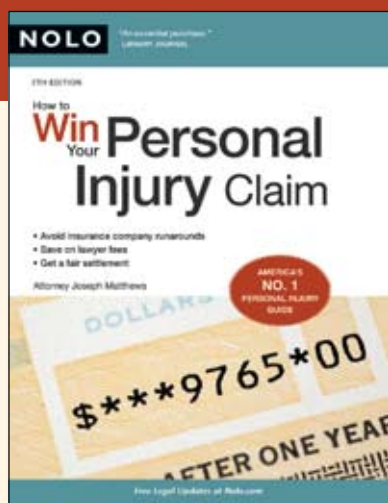
Governors and other public officials today remain deeply opposed to releasing serious and long-time offenders, no matter how many decades they have served behind bars, no matter the pile of evidence showing that they have turned their lives around, and no matter the compelling research findings about deterrence and aging out of crime. For example, in 2008 Governor Schwarzenegger and prosecutors in California vehemently opposed the compassionate release of Susan Atkins, a former follower of Charles Manson who was convicted in the infamous 1969 Tate-LaBianca murders. Atkins, who was paralyzed and dying of brain cancer,

had become a model prisoner in her four decades behind bars. Explaining why he refused to commute Atkins’ sentence when she was gravely ill, Schwarzenegger said, “[T]hose kinds of crimes are just so unbelievable that I’m not for the compassionate release.” For Schwarzenegger and many other politicians, the retributive endpoint for certain crimes is infinity. Atkins died in prison on September 24, 2009.

Over the past four decades or so, retribution has become a central feature of U.S. penal policy, supplanting rehabilitation and even public safety as the chief aim. As a consequence, mercy, forgiveness and redemption, which have been central considerations in religious, philosophical and political debates about punishment for centuries – indeed millennia – have been sidelined. This is starkly evident not only in the sharp drop in the use of executive clemency today but also in the marked change in how public officials justify the few pardons and commutations that they do grant.

Pardons and commutations were vital features of the U.S. criminal justice system throughout the 19<sup>th</sup> century and much of the 20<sup>th</sup> century. Executive clemency was a key mechanism to manage the prison population, correct miscarriages of jus-

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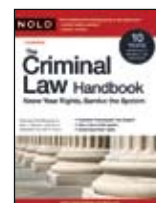
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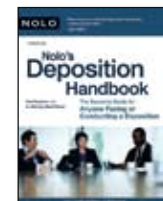
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## Days Without End (cont.)

tice, restore the rights of former offenders and make far-reaching public statements about the criminal justice system.

Presidents and governors continued to wield their powers of executive clemency even in the face of public uproars over particular pardons or commutations. On Christmas Day in 1912, Governor George Donaghey of Arkansas, a fierce opponent of the brutal convict leasing system, pardoned hundreds of state prisoners in one fell swoop in a gesture that made national headlines. In the 1930s at the height of the Jim Crow era, Governor Mike Conner traveled to Parchman Farm to investigate the “forgotten men” of Mississippi’s infamous penal farm. At his “mercy courts,” Conner freed dozens of black prisoners in the face of charges that he was granting “amnesty for ancient coons.”

Compare that with the modern-day commutation record of Pennsylvania, one of six states where life means life and where the lifer population has increased eleven-fold since the early 1970s. Between 1967 and 1994, Pennsylvania’s governors and pardon board commuted the life sentences of nearly 400 prisoners. Since then, only six commutations have been granted. Democrat Ed Rendell commuted only five life sentences during his two terms as governor. Three of those were announced just weeks before he left office in early 2011. Pennsylvania vigorously battled a lawsuit filed on behalf of prisoners sentenced prior to 1997, when the commutation rules changed significantly. That lawsuit dragged on for more than a dozen years – or about as long as a typical lifer spent in prison in Pennsylvania in the 1970s before being released.

In the first half of the 20<sup>th</sup> century,

Woodrow Wilson, Franklin D. Roosevelt and Harry Truman issued hundreds and in some cases thousands of pardons and commutations during their terms. The number of presidential pardons began to ebb during the Eisenhower years and severely dropped off with President George H. W. Bush and his successors.

The American Bar Association’s Justice Kennedy Commission wisely recommended in 2004 that states and the federal government revitalize the clemency process. It urged them “to establish standards and provide an accessible process by which prisoners may request a reduction of sentence in exceptional circumstances,” including but not limited to “old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering.” The commission also called for ensuring that procedures are in place to aid prisoners who are unable to advocate for themselves to seek clemency.

Standardizing procedures for seeking clemency and providing prisoners with more assistance to navigate the clemency process are noble goals. But they will not on their own revitalize the use of clemency and significantly reduce the lifer population. Public officials need once again to be willing to assume the political risks that come with releasing offenders early. In the past, governors and presidents were willing to weather charges of being anti-democratic or corrupt when they invoked their clemency powers. Now that crime has become such a persistent political tripwire in the United States, they need to steel themselves – and prepare the public – for the rare but inevitable instance when a released prisoner goes on to commit a front-page crime.

Although the recidivism rate for older prisoners who have served lengthy sentences is comparatively lower, it is not – and will never be – zero. Despite all of the attention focused these days on developing better risk assessment tools, we will never be able to predict with complete certainty who will commit a serious crime if released and who will not. Lifers are not likely to commit murders or assaults while in prison or after release. However, a few will. If public officials are going to revitalize executive clemency and parole, they need to improve their rehabilitation programs and risk assessment tools. They also must do more to educate the public that prisoners who are released after serving lengthy terms are

unlikely to commit violent offenses – but are not risk-free.

Governors willing to assume that risk remain the exception today. Governor Janet Granholm of Michigan commuted more sentences than her three predecessors combined before she left office in 2011. In his first six years in office, Arkansas governor Mike Huckabee granted 30 percent more clemencies than the previous three governors combined. His commutation and pardon record came under national scrutiny and spurred a spate of political obituaries for Huckabee after a man he had granted clemency in 2000 later killed four police officers in Tacoma, Washington in 2009. After a released parolee shot and killed a Massachusetts police officer in December 2010, Democratic governor Patrick Duval sought to replace much of the parole board with law enforcement appointees and introduced legislation that would further restrict parole eligibility for lifers in Massachusetts. Notably, Jerry Brown of California has been paroling a much higher proportion of lifers than his predecessors since returning to the governor’s mansion in 2011.

Some public officials have expressed interest in releasing infirm or elderly prisoners who do not pose a threat to society. One of the major obstacles is that older prisoners are more likely to have been incarcerated for a serious, violent or sexual offense. By late 2009, 15 states and the District of Columbia had established provisions for geriatric release. However, those jurisdictions rarely released elderly prisoners due to political considerations, public opinion, the narrow criteria for eligibility, Byzantine procedures that discourage prisoners from applying for release, and the complicated and lengthy referral and review process that often drags on right up until the time a prisoner dies while still incarcerated.

Released long-time offenders do not pose a widespread public threat. But they do pose a significant risk to political careers. Changes in the institutional structure of parole and pardon boards could provide public officials with some important political insulation from potentially controversial release decisions. States almost always staff such boards with political appointees, who are extremely vulnerable to the wrath of public opinion. Four decades ago, the President’s Commission on Law Enforcement and the Administration of Justice recommended that the boards be comprised of psychologists, social workers, corrections officials and other professionals with specialized training and expertise to



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evaluate offenders' suitability for release. That recommendation remains largely unrealized today.

As U.S. Senator James Webb said at a 2008 conference on prisoner reentry sponsored by the Hamilton Project, "The real question is about fear. And I think it invades the political process." Politicians and public officials can help neutralize that fear by educating the public about the nuances of deterrence, the limited utility of lengthy sentences for fighting crime, the phenomenon of aging out of crime, and the strengths and limits of risk assessment tools. However, they cannot guarantee that releasing offenders will be risk-free. As Glenn Martin of the Fortune Society said at the Hamilton Project conference, "[W]e need to increase our appetite for risk ... we have to at least accept the fact that some people are going to fail and some people are going to fail pretty significantly."

The public's and politicians' low appetite for risk is not the only obstacle to expanding the use of executive clemency and rethinking the widespread practice of condemning so many people to the "other death penalty." Another factor is the widespread belief today that clemency should only be used to remedy "miscarriages of justice," as Supreme Court Justice William Rehnquist famously argued. Governors are largely unwilling to treat mercy as a permissible reason for granting clemency. The few commutations and pardons that are granted today are usually justified as a means to rectify some shortcoming of the judicial process: the offender is innocent or has a credible claim of innocence; he or she did not receive a fair trial; the sentence is disproportionately severe compared to what other participants in the crime received. These "anti-mercy conceptions of clemency" wholly reject redemption, forgiveness, reconciliation and mercy as legitimate claims for clemency, greatly narrowing the pool of prisoners who might petition for a pardon or commutation. But they do more than that.

The impact of executive clemency extends far beyond all the individuals lucky enough – or not – to receive a pardon or commutation. Executive clemency is an important means to make a statement about the criminal justice system and, more broadly, about what kind of society we want. As such, it shapes the wider political environment in which issues of crime and punishment are debated and criminal justice policy is forged.

Governor Donaghey's wholesale pardon of hundreds of prisoners a century

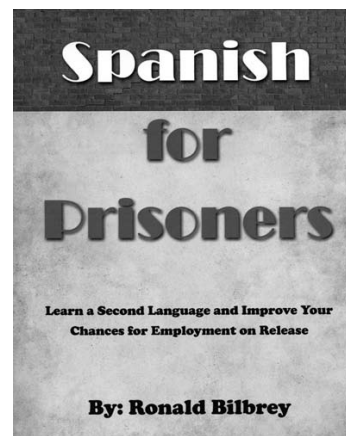
ago was intended as a searing denunciation of Alabama's system of convict leasing. Woodrow Wilson was an ardent supporter of temperance but opposed the Volstead Act, which imposed Prohibition. As president he pardoned hundreds of alcohol-related offenders. His pardons were widely understood at the time to be an indictment of Prohibition. Governors Lee Cruce of Oklahoma (1911-15), Winthrop Rockefeller of Arkansas (1966-70) and Toney Anaya of New Mexico (1982-86) issued mass commutations to empty their death rows, and justified their actions with calls for mercy for the condemned.

By contrast, of the four dozen commutations of people sentenced to death between 1976 and 2003, only four were based on what appeared to be merciful reasons. When Illinois Governor George Ryan pardoned four prisoners on death row and commuted the sentences of 167 others in 2003, he rejected mercy and compassion as legitimate explanations for his actions. He explained that he was acting because of problems in the way capital punishment was administered, not because the death penalty was fundamentally immoral. At the time, Ryan went out of his way to reaffirm his law-and-order credentials and to herald life in prison without the possibility of parole as a fate perhaps worse than death.

Supreme Court Justice Anthony Kennedy lamented in a 2003 speech to the American Bar Association, "The pardon process, of late, seems to have been drained of its moral force." As a consequence, many crimes remain eternally unforgivable and unforgettable. Their perpetrators are forever defined by the crime, despite all the evidence piling up over the decades of their incarceration that they are not the same person who committed that crime and they no longer pose a significant threat to public safety.

### Capital Punishment and the "Other Death Penalty"

The death penalty abolition movement and the tenacity of capital punishment in the United States pose two additional important challenges to reducing the lifer population. Thanks in part to the innocence movement, with its dramatic focus on people wrongly condemned to death, the death penalty is declining in the U.S. The number of people executed each year has fallen by about half since the late-1990s, and public opinion polls show support for capital punishment is waning.



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The new focus on the plight of the innocent has overshadowed the wider question of what constitutes justice for the guilty housed on death row and for the growing number of lifers who will likely die in prison or spend most of their lives there. The number of people sentenced to death and executed has fallen sharply, but at the cost of a huge spike in those sentenced to “death by incarceration.”

Over the years, many leading abolitionists have ardently supported LWOP. They have uncritically accepted LWOP as a viable alternative to the death penalty, thus helping to legitimize the wider use of a sentence that has many features in common with capital punishment. These abolitionists have helped normalize a sanction that, like the death penalty, is way out of line with human rights and sentencing norms in other developed countries. European countries generally do not permit LWOP, and those that do use it sparingly. In many European countries, if a “lifer” does not continue to pose a major threat to public safety, he or she is typically released after serving about a dozen years or so. As of 2007, Germany had about 2,000 prisoners serving life sentences, or about the same number as the state of Mississippi, whose total population is barely 4 percent of Germany’s population.

One has to be careful here about how much blame to apportion to death penalty abolitionists for the proliferation of life sentences in the United States, however. Neither opponents nor supporters of capital punishment could have predicted the fierce conservative backlash after the 1972 *Furman* decision and how it would spur the push for more punitive penal policies. At the time, the abolitionist movement was not really a movement at all but rather a consortium of elite public-interest lawyers. They could not have done much to stem the punitive stampede in the immediate wake of *Furman* as states rewrote their death penalty statutes and began to rethink life sentences.

Moreover, executive clemency still appeared to be a viable mechanism to secure the release of many lifers. Thus abolitionists at that time could endorse LWOP or a life sentence as an alternative to capital punishment, figuring that most lifers – even those serving LWOP sentences – would be released after a decade or two at the most. Indeed, there was an

expectation at the time that as states returned to determinate sentencing systems, the importance of executive clemency as a release mechanism was likely to grow.

Abolitionists likely played an important role in establishing the legitimacy of LWOP in the 1970s, 1980s and 1990s, but probably were quite incidental in most cases to the final legislative outcome. Some abolitionists ardently opposed promoting LWOP as an alternative to the death penalty. Hugo Adam Bedau, for example, declared, “The death penalty is not the only outrageous form of punishment active in our society, even if it is the worst.” But a number of prominent abolitionists enthusiastically promoted LWOP as an equally tough – or even tougher – retributive moral sanction, including Governor Mario Cuomo of New York, Sister Helen Prejean of *Dead Man Walking* fame, and Steven Brill, the founder of *The American Lawyer*. Leading abolitionist organizations generally took an ambiguous or agnostic position on LWOP in the 1980s and 1990s.

Capital defense attorneys have been deeply vested in retaining LWOP. Evidence suggests that the possibility of parole, however remote, is often a key factor for jurors in capital cases, who must decide whether to impose the death penalty or a life sentence. In those death penalty states where LWOP is an alternative option, capital defense attorneys, in making their pitch for life over death, emphasize that the defendant will never get out of prison and that a life sentence that stretches out for decades is actually more punitive than condemning someone to death. LWOP statutes appear to have played only a minor role in the recent drop in the number of executions in the United States. But they have contributed to a doubling or even tripling of the sentence lengths for offenders who never would have been sentenced to death in the first place or even been eligible for the death penalty. Lifers today serve on average 29 years in prison, up from about 21 years in 1991.

Prosecutors in capital punishment states have been some of the fiercest opponents of LWOP statutes. In states where parole is a possibility – however remote – for life-sentenced offenders, prosecutors often focus their closing arguments on warnings about the future threat the defendant poses if released on parole one day. For this reason, district attorneys in Texas long resisted LWOP statutes. That changed in 2005 when prosecutors in Harris County, the epicenter of the death penalty in the United States, dropped their

opposition to LWOP; thus, Texas was no longer the only remaining death penalty state that was a holdout against LWOP. Since then the LWOP population in the Lone Star State has skyrocketed while the number of people receiving death sentences appears to be dwindling.

The exploding lifer population and our growing understanding of the similarities between how life sentences and death sentences are imposed, and on whom, have not prompted a fundamental rethinking of the connections between death penalty abolitionism and wider penal policy. The abolitionist movement still operates quite independently of the wider penal reform movement to roll back the carceral state. Typical of many mainstream abolitionist organizations, Amnesty International remains notably agnostic on the question of alternatives to the death penalty – except in the case of juvenile lifers, which it has taken a forceful public position against.

In 2002, Amnesty International rejected a recommendation by its own internal review committee to “initiate a thorough discussion of alternatives to the death penalty,” even though its unwillingness to recommend or oppose substitute punishments might be undermining “the credibility of its overall argument for abolition.” As for the National Coalition Against the Death Penalty (NCADP), number 10 on its current list of “Ten Reasons Why Capital Punishment is Flawed Public Policy” is: “Life without parole is a sensible alternative to the death penalty.” The Campaign to End the Death Penalty is on record as opposing LWOP but does not prominently publicize its opposition.

Attorney Barry Scheck, one of the leading figures in the innocence movement today, continues to strongly defend LWOP as an alternative to capital punishment. Scheck and other foes of capital punishment who testified before the New Jersey Death Penalty Study Commission in 2006 generally did not raise any concerns about the state’s growing lifer population as they promoted LWOP as an alternative to the death penalty.

The Other Death Penalty Project, a new group composed exclusively of prisoners, has called upon death penalty abolitionists to stop promoting LWOP as a “supposedly humane alternative to lethal injection.” The group rejects the proposition that LWOP “is a necessary first step toward ultimate abolition of the death penalty.” Kenneth E. Hartman, a

founder of the group, is serving a LWOP sentence in California for killing a man in a fistfight more than three decades ago when he was 19 years old. Hartman describes a life sentence as an “execution in the form of a long, deliberate stoning that goes on for as long as I draw breath.”

The abolitionist experience is relevant to the debate over life sentences in another respect. Opponents of life sentences and LWOP should be wary of making some of the same missteps that death penalty abolitionists made in the 1960s and 1970s by focusing primarily on judicial strategies and largely ignoring the legislative or political arenas. An exclusive focus on judicial strategies forces an issue to be framed within the constraints of prior legal texts, rules and decisions. As a consequence, arguments and evidence that may be compelling in the political sphere fall to the wayside because the courts have been unreceptive to those approaches. For example, given the Supreme Court’s persistent indifference and/or hostility to claims about racial discrimination in the administration of criminal justice, it is not surprising that legal strategies to challenge life sentences do not stress the racial aspects of such sentences. However, the gross racial disparities in the administration of both capital punishment and LWOP are a potentially compelling political issue.

### Dead Men Walking

The current economic crisis presents an opportunity to redirect U.S. penal policy that opponents of the prison boom should exploit. However, framing this issue as primarily an economic one will not sustain the political momentum needed over the long haul to drastically reduce the prison population and bring about the end of LWOP and the release of large numbers of lifers.

Reentry has caught the political imagination of penal reformers, policy-makers and public officials spanning the political spectrum. But as reentry has skyrocketed to the top of the penal reform agenda, lifers are facing the prospect of a further deterioration in their conditions of confinement. Despite all the recent talk about reentry, funding for treatment, programs and services for prisoners is shockingly limited and continuing to shrink. In an age of tightening budgets and a fixation on reentry, lifers are increasingly being denied programs and activities that might make their days without end more bearable. As one lifer in California lamented, “The

thinking goes that since we will never get out of prison there is no point in expending scarce resources on dead men walking.”<sup>4</sup>

The prospects are bleak that the plight of lifers will become a leading issue on the penal reform agenda any time soon. This political quiescence in the face of exponential growth in the lifer population is particularly striking given the intense legal and political mobilization against capital punishment in recent years. There are currently about 3,300 prisoners on death row in the United States. Nearly all of them will die in prison of natural causes or suicide – not lethal injection. Compare that with the estimated 141,000 people now serving life sentences in the U.S. The reinstatement and transformation of capital punishment have been central legal and political issues for going on four decades now. Meanwhile the United States has been nonchalantly condemning tens of thousands of people to the “other death penalty” with barely a legal or political whimper. ■

*For complete citations and a more extensive discussion of these issues, see Marie Gottschalk, “No Way Out? Life Sentences and the Politics of Penal Reform,” in Charles Ogletree and Austin Sarat, eds., Life Without Parole: America’s New Death Penalty (New York: NYU Press, forthcoming).*

*Marie Gottschalk is a professor in the Department of Political Science at the University of Pennsylvania. She specializes in American politics, with a focus on criminal justice, health policy, the U.S. political economy, organized labor, the welfare state and the comparative politics of public policy. Among other works, she is the author of The Prison and the Gallows: The Politics of Mass Incarceration in America (Cambridge, 2006), which is available from PLN.*

### Endnotes

<sup>1</sup> I especially would like to thank the students in the Prison University Program at San Quentin for their thoughtful comments on an earlier version of this article.


<sup>2</sup> This account of the penal reform movement in Angola prison is based on Lane Nelson, “A History of Penal Reform in Angola, Parts 1

and 2,” *The Angolite*, September/October 2009 and November/December 2009.

<sup>3</sup> Quoted in Emily Bazelon, “Arguing Three Strikes,” *The New York Times Magazine*, May 21, 2010.

<sup>4</sup> Tracey Kaplan, “Stanford Law Professors Submit Proposed Initiative to Limit Three Strikes Law,” *The Mercury News*, November 2, 2011.

<sup>5</sup> Kenneth E. Hartman, “The Other Death Penalty,” in James Ridgeway and Jean Casella, “Voices from Solitary,” May 19, 2010, <http://solitarywatch.com/2010/05/19/voices-from-solitary-kenneth-e-hartman-on-the-other-death-penalty> (accessed Nov. 22, 2010).



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# From the Editor

by Paul Wright

Welcome to the first issue of *Prison Legal News* for 2012. If you have not yet donated to our annual fundraiser, it is not too late to do so. We rely on donations from our readers to fund the work we do on behalf of human rights in the U.S. prison system. I would like to thank all those who have already donated.

This month's cover story on lifers covers an important issue largely neglected by the corporate media, which is the story of those who are leaving prison in body bags due to life sentences. While the death penalty is in decline in the U.S., the penalty of death-by-incarceration is on the rise in a massive experiment never seen before in

human history, in which tens of thousands of people are condemned to die a slow and lingering death by incarceration.

Over the years hundreds, if not thousands, of our readers have written us letters telling us how *PLN* has helped them help themselves, provided information they needed and otherwise bettered their existence. We are seeking to compile a more complete list of the ways that *PLN* helps prisoners, and I think the best way to do so is for readers to tell us in their own words how our publication has improved their lives. If you are a current or former prisoner and *PLN* has helped you, please send us a clearly written, legible letter no

longer than 2 pages describing how *PLN* has been useful.

One of our goals for 2012 is to expand the number of book titles that *PLN* distributes. We have received many requests for more law and self-help books, and will be researching the lists of available titles. By summer we expect to add a significant number of new books to our existing list.

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## Family of Prisoner Strangled in Oklahoma GEO Private Prison Awarded \$6.5 Million

by Matt Clarke

In June 2011, the family members of an Oklahoma state prisoner who was murdered by his cellmate at a privately-operated GEO Group prison in Lawton, Oklahoma received a \$6.5 million jury award.

On January 30, 2005, Lawton Correctional Facility prisoner Ronald L. Sites, 48, was strangled to death in his cell by his cellmate, Robert M. Cooper. [See: *PLN*, June 2005, p.42]. Because Sites was supposed to be housed in isolation without a cell partner, and because prison medical officials knew that Cooper posed a threat to his cellmates before the murder, Sites' family hired the Tulsa law firm of Richardson Richardson Boudreaux Keesling to file a failure to protect suit against GEO Group, GEO employees and Cooper.

Throughout the week-long trial, the warden and vice president of GEO Group asserted that the company and its staff members had done nothing wrong. However, Cooper had already been sentenced to life in prison for killing Sites, and the judge at that trial had recommended a grand jury investigation into GEO's role in the murder. In the end, though, the grand jury investigation was blocked by the attorney general's office.

Sites was a former police officer who had suffered a traumatic brain injury in an oil-field accident. The injury rendered Sites incapable of controlling his constant talking, which made him annoying to

other prisoners and staff. Thus, he was supposed to be kept in protective custody with no cellmate. Despite that housing restriction, prison officials placed a series of other prisoners in Sites' cell, none of whom lasted very long due to his incessant talking.

According to Gary Richardson, one of the attorneys who represented Sites' family, the trial evidence proved that GEO had advance warning and knowledge of Cooper's violent tendencies toward his cellmates. In prison for murder, Cooper had previously stabbed another prisoner and had twice been caught with homemade knives.

Nine months before he murdered Sites, Cooper was placed in isolation because "he told a counselor he sat on his bunk with a sheet in his hand, fighting off the urge to kill his cellmate." Richardson's investigation also revealed that Cooper wanted to return to the maximum-security prison at McAlester and was convinced the only way to obtain a transfer was to kill someone.

What was the prison system's reaction to Sites' preventable murder?

"The State of Oklahoma conducted a window-dressing-type investigation," said Richardson. "They covered it up."

But the jurors in the civil suit were not so forgiving of GEO's conduct. On June 22, 2011 they awarded Sites' family \$6 million in actual damages and \$500,000 in

punitive damages. Additionally, in a Final Journal Entry of Judgment dated August 22, 2011, the state district court awarded "statutory prejudgment interest in the amount of \$1,905,493.15 on the compensatory damages award..." for a total award of \$8.4 million. Richardson learned after trial that two jurors had wanted to award the family \$25 million.

"It absolutely was a verdict that was given by very conscientious jurors who listened to seven days of testimony of conduct in a prison system that should not be acceptable," said Richardson. "I think it's fair to say that the jurors were appalled at the evidence we brought them of inconsistencies among the staff, some applying the rules and procedures of the facility, some not, and seemingly no disciplinary action taken to those that aren't applying rules and procedures." See: *Sites v. The GEO Group, Inc.*, District Court for Comanche County (OK), Case No. CJ-2007-84.

This case highlights yet another reason why private prisons are a bad idea. Due to the profit motive of private prison firms, they make more money when they put more prisoners in a cell, thus increasing their available bed space and per diem payments. In this case, that practice by GEO Group had tragic, fatal results. 📖

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# Florida, Arizona Sell and Lease Back Prisons and Other State Buildings

**L**ike a junkie seeking money for his next fix, the cash-strapped state of Arizona has pawned its possessions – prisons, government office buildings and other real estate – in an effort to balance a budget shortfall, through lease revenue bonds. Likewise, Florida has used lease revenue bonds for its prison system, which, according to a recent report, resulted in increased costs to taxpayers.

Arizona's fiscal problems began in 2007 and took a severe downturn the following year with the collapse of the housing bubble. Throughout 2009 the state continued operating in the red. With no relief in sight, the legislature approved the sale of various state-owned properties in an attempt to balance the budget in 2010.

Here's how the process works. The state sells its assets to investors via Certificates of Participation (COPS), a form of lease revenue bonds. The state maintains control of the buildings and leases them back at 4.37 to 4.75% interest over a maturity period ranging up to 30 years. If all of the payments are made, ownership of the buildings reverts back to the state.

Arizona raised \$735 million for its general fund through the first issue of COPS in January 2010, which included the sale and lease-back of the Executive Tower, legislative buildings, a state hospital, the Veterans Memorial Coliseum and six state prison buildings in Florence. A second round of sell-offs in June 2010 raised an additional \$300 million by pawning the state's Supreme Court building and other properties.

This is not easy money, though; the state will have to pay hundreds of millions of dollars in interest on the bonds. In fact, this short-sighted solution to the state's fiscal crisis drew criticism from several financial institutions.

On December 23, 2009, Moody's Investors Service downgraded the state's bond issue rating from A1 to A3. That same day, Standard & Poor downgraded Arizona's rating from AA to AA-minus.

Also critical of the legislature's decision to sell state properties was Arizona Treasurer Dean Martin. "It was a mistake to sell ... our state buildings because it continues to put our state's credit rating at risk, and looks foolish to the rest of the country," Martin said, stating the obvious.

In addition to selling off state prop-

erties in an effort to balance its budget, Arizona is expanding its contracts with private prison companies, ostensibly to save money. After a 2009 effort to privatize most of the state's prison system didn't pan out, Arizona officials issued a request for proposals seeking 5,000 more private prison beds. Four companies responded, although no action is being taken until after the state finishes a report on a comparison of public and private prisons. Arizona already houses around 6,000 of its 40,000 prisoners in privately-operated facilities.

In Florida, the use of lease revenue bonds to finance prison construction "has obscured both the near- and long-term costs of failing to make needed policy changes." That was the main conclusion drawn in an April 2011 report titled "A Billion Dollars and Growing: Why Prison Bonding is Tougher on Florida's Taxpayers Than on Crime," by the Collins Center on Public Policy and Florida Tax Watch.

Florida's prison population has grown from 20,000 prisoners in the 1980s to 102,000 in 2010. Over that same time period the cost to Florida taxpayers to fund the state's prison system has ballooned from \$169 million to \$2.4 billion annually.

Prior to 1993, Florida used fixed capital appropriations of general funds, or pay-as-you-go, to build and expand state prisons. The legislature created the Correctional Privatization Commission (CPC) in 1995 "for the purpose of entering into contracts for the design, construction and operation of prisons in Florida," with a requirement that private prisons cost at least seven percent less than state facilities. Studies have been unable to substantiate such cost savings.

The CPC quickly became involved in financing the construction of private prisons. COPS were used to fund the construction, and the state would make the lease payments out of general funds.

Many states, including Florida, require voter approval to issue general obligation bonds. A California law firm came up with lease revenue bonds, which traditionally were used to build projects such as toll roads, bridges, hospitals, parking facilities, recreational projects, telephone systems and colleges "that generate revenue to pay off the [bond] obligation."

According to a 2008 *Forbes* article, "crafty state treasurers" devised a plan to create a way for prisons to generate revenue. An entity or agency is created to build prisons, which it does by issuing lease revenue bonds. It then leases the prisons to the state, which pays the lease payments that service the bond debt.

"Essentially, the state takes money from one pocket (the general fund appropriations to the prison system) and puts it into another (the agency created for the facility), and then the agency distributes the money to bondholders," *Forbes* wrote in describing the scheme.

Similar to taking out a mortgage on a house, the state must pay the principal on the loan as well as interest on the principal.

The Florida Supreme Court has held that such financing does not violate the state's constitutional requirement of voter approval of debt, as the legislature can decide to cancel the bond payments; thus, the payments are not "real debt" because there is no definitive legal agreement to repay the bond obligation. Yet should the state default "on making the lease payments, its credit rating would suffer, and future debt would be incurred at higher rates."

With six Florida prisons built using COPS by 1996, of which all but one were private, millions of dollars were flowing to the CPC. Corruption ensued due to a lack of oversight. The head of the CPC, Mark Hodges, resigned in 2002 "amid a state ethics probe in which he ultimately was fined \$10,000. That investigation concluded he was profiting from business relationships with prison contractors outside his role as a privatization director." [See: *PLN*, Oct. 2003, p.21].

The scandal did not end there. Another former CPC director, Alan B. Duffee, pleaded guilty in 2006 to siphoning more than \$200,000 from a maintenance fund set up for private prisons. He eventually received a 33-month federal prison sentence. [See: *PLN*, May 2006, p.11]. The CPC was dissolved and the Bureau of Private Prison Monitoring, housed in the Department of Management Services, was created to oversee private prison contracts.

The CPC had created the Florida Correctional Finance Corporation (FCFC) to issue COPS for prison construction. The



FCFC was housed under the Division of Bond Finance of the State Board of Administration, which initially had no oversight role but took over when the CPC was dissolved.

"Between FY 2006-2007 and FY 2009-10, the Florida legislature appropriated a total of \$716,956,421 to the Department of Corrections (DOC) for construction and expansion expenses," the report stated. "This figure includes both 'pay-as-you-go' appropriations for prison construction costs and rental costs, but does not include the debt-service (or interest payment) obligations on past construction borrowing."

With those obligations included, the total cost is \$1.5 billion. Florida taxpayers still owe more than \$1 billion on the outstanding bonds and corresponding debt service payments. The state has spent \$100 million annually on prison construction or expansion between 2006 and 2010, and the rate of bond issues to fund such construction has increased by 43 percent.

Lease revenue bonds have also obligated taxpayers to pay for unneeded prison beds. To meet an estimated prison population of 111,836 by FY 2011-12, the 2009 General Appropriations Act

obligated taxpayers to cover \$340 million in debt to construct 17 prisons. Since then, estimates for the prison population have declined to 101,833 for FY 2011-12. "However, the bonds to finance this construction have already been issued and sold, obligating taxpayers despite this changing need," the report noted.

In spite of the fact that Florida has seen a decrease in both violent and non-violent crime since 2007, the state's incarceration rate has not declined. "In fact, Florida arguably leads the nation in incarceration rates and stringency in law and sentencing, making it the most punitive of the 50 states as measured by more than 40 variables, including average prison sentences, life imprisonment, and prison conditions."

Over the last 40 years, Florida's rate of incarceration, which is the percentage of the state's population in prison, has quadrupled from .13 percent to .54 percent. Tough-on-crime policy decisions have driven this increase – including the elimination of parole, longer sentences, mandatory minimum sentences, incarceration for technical probation violations and the use of prison instead of community-based alternatives.

The report found that 18 states have enacted criminal justice reforms designed to reduce costs and increase public safety, highlighting changes made by Texas, Mississippi and South Carolina. The report recommended that Florida join those states, urging legislators to review the state's criminal justice policies and practices, and calling for a moratorium on prison construction.

The current system allows Florida's elected officials to avoid hard choices related to prison building by using COPS funding, even though this results in greater long-term expenses for prison construction and operation. "Our political leaders are forfeiting our present and future by authorizing the underwriting of these costs as if the public debt was an open-ended credit card," the report stated. "However, the bill to taxpayers will come due when these political leaders have moved on and no longer can be held accountable." ■

Sources: "A Billion Dollars and Growing: Why Prison Bonding is Tougher on Florida's Taxpayers Than on Crime," Collins Center / Florida TaxWatch Special Report (April 2011); [www.forbes.com](http://www.forbes.com); *The Bond Buyer*; [www.businessweek.com](http://www.businessweek.com); *Arizona Republic*

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Charles de Secondat, Baron de Montesquieu said, "There is no crueller tyranny than that which is perpetrated under the shield of law and in the name of justice."

# The Societal Impact of the Prison Industrial Complex, or Incarceration for Fun and Profit—Mostly Profit

by Alex Friedmann

At the beginning of the 1980s there were no privately-operated adult correctional facilities in the United States. As of 2009, more than 129,300 state and federal prisoners were housed in for-profit lock-ups. Prison privatization has become an acceptable practice and the private prison industry is now a multi-billion dollar business. How did this drastic expansion of incarceration-for-profit occur, and more importantly how has it rearranged the criminal justice landscape?

The prison and jail population in the United States has increased exponentially over the past several decades, from 648,000 in 1983 to more than 2.3 million as of 2010. That doesn't include another 5 million people on parole and probation, plus millions more who were formerly incarcerated and are no longer under correctional supervision. Spending on prisons has outstripped expenditures on higher education in at least five states, including Michigan, Connecticut and California, as lawmakers engage in one-upmanship to prove who's tougher on crime.

Why has our nation's prison population grown to epic proportions, until the U.S. – with only 5 percent of the world's population – now has 25 percent of the world's prisoners? The succinct answer is because imprisonment has become enormously profitable as a result of politically-influenced decisions as to who should be locked up and for how long. In the 1980s and 90s a series of tough-on-crime laws were enacted, spurred by the so-called War on Drugs and the corporate

media's steady and often sensationalistic coverage of violent offenses. Such laws included mandatory minimums, truth-in-sentencing statutes and three-strikes laws, which required lengthy prison terms or life sentences for certain offenders.

Consequently, more and more people were arrested, prosecuted, convicted and sent to prison where they served longer periods of time under harsher sentencing statutes. Concurrently, prison release policies became more restrictive; for example, parole in the federal prison system was abolished in 1987. With more people entering the prison system to serve longer sentences and fewer leaving, the U.S. prison population grew rapidly – increasing over 350 percent from 1983 to the present.

This prison population boom created a market for companies that found they could profit by providing correctional services, and a multi-billion dollar industry was born to capitalize on crime and punishment. The industry, commonly referred to as the "Prison Industrial Complex," is composed of a confluence of business, policy and special interest groups that collectively profit from incarceration. The most overt members include private prisons companies such as Corrections Corporation of America (CCA), GEO Group (formerly Wackenhut Corrections), Management and Training Corp. (MTC), Cornell Corrections (acquired by GEO in 2010) and a bevy of smaller firms that operate detention facilities.

Beyond companies that own or operate prisons there are a number of other businesses that benefit from the prison boom – ranging from corporations that provide prison and jail food services (Aramark, Canteen Services), prison medical care (e.g., Prison Health Services and Correctional Medical Services, now combined into one company, Corizon), privatized probation supervision (such as Sentinel Offender Services) and prisoner transportation (TransCor, PTS of America), to the banks and investment firms that provide bond financing for new prisons, the construction companies that build them, suppliers of razor wire, surveillance cameras and other security equipment, etc. In short, the expansion of the U.S.

prison population created an enormously profitable market opportunity. CCA alone grossed \$1.67 billion in revenue in 2010; its closest competitor, GEO Group, grossed \$1.24 billion.

The private companies that comprise the Prison Industrial Complex have thus reaped substantial monetary benefits by surfing the wave of overincarceration that has swept over our nation's criminal justice system. They are the ones that most obviously benefit from putting more people in prison for longer periods of time. But what are the collateral consequences of for-profit incarceration as social policy?

## Frustrating Prison Reform Efforts

Criminal justice policies in the U.S. are based in large part on capacity – that is, the capacity of state and federal prison systems, as well as sentencing and parole policies that govern the number of people entering prison and being released. The need for bed space created by our nation's bloated prison population has outstripped existing capacity, leading states and the federal government to go on a prison-building binge and, when that solution failed to accommodate growing numbers of prisoners, to overcrowd correctional facilities by double- or triple-bunking cells and installing beds in prison gyms, classrooms and even chapels.

However, overcrowding – which leads to increased violence, decreased access to medical care for prisoners and a host of other problems – can only go so far. At some point it becomes impossible or impractical to cram more prisoners into already-packed cells, and too expensive to build more prisons. Enter CCA, GEO Group and other companies that finance and build their own correctional facilities, which provide public prison systems with supplemental bed space capacity. Notably, if private prison firms did not provide such additional beds, then state and federal governments would be forced to address the harsh sentencing laws and prison release policies that have resulted in overincarceration and prison overcrowding.

Thus the private prison industry – the moving force behind the Prison Industrial Complex – has served to stymie criminal justice reform efforts over the past several

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decades, particularly in terms of sentencing and release policies. Rather than being forced to deal with the repercussions of such policies, government officials have used private prisons as a safety valve. As an analogy, if our prison system was a bucket being filled to overflowing by a steady stream of prisoners, the extra bed space provided by the private prison industry allows prisoners to be siphoned off into another bucket. So long as this additional capacity is provided by private prisons, government officials can postpone having to deal with such politically-unpopular issues as sentencing reform or decreasing the prison population.

Indeed, more sensible, socially-beneficial criminal justice policies are considered a threat to private prison firms. According to CCA's 2010 annual report, "The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them."

Although private prisons hold only 8 percent of state and federal prisoners, that is an important 8 percent. In 2009, private prisons were utilized by the federal government and 32 states, of which some have become dependent on privatization

to accommodate their prison population levels. As of the end of 2009, ten states had 20 percent or more of their prisoners in privately-operated facilities, including New Mexico (43.3 percent), Montana (39.8 percent), Vermont (30.1 percent) and Hawaii (28.0 percent). The federal Bureau of Prisons houses 16.4 percent of its population in for-profit facilities – which does not include thousands of detainees held by Immigration and Customs Enforcement (ICE) in private detention centers. By leveraging a relatively small number of beds nationwide, the private prison industry has managed to forestall much-needed criminal justice reform that would address the problems of overincarceration and overcrowding in the U.S. prison system.

### **More Violence and Increased Recidivism**

Another deleterious aspect of the private prison industry is that, contrary to the claims of for-profit prison companies, prisoners held in privately-operated facilities are subjected to higher levels of violence. Also, when prisoners are released from such prisons they are less likely to be rehabilitated and more likely to recidivate.

Realizing why private prisons have higher levels of violence requires an understanding of the business model of the private prison industry and how the industry generates profit. At a basic level, public and private prisons have many similarities; both require cell blocks, fences, security staff, medical units, etc. In terms of operating costs, approximately 70-80 percent of a prison's expenses are related

to staffing. Specifically, how many staff members are employed, how much they are paid, what benefits they receive and the amount of training provided.

Since such a high percentage of operating expenses are related to staffing, that is where private prison firms cut costs to generate profit. On average, they employ fewer staff members than comparable public prisons; they pay less than in the public sector; they offer fewer (or less costly) benefits; and they provide less training. These tactics undeniably reduce expenses for private prison firms and boost their bottom line, but at what cost?

There is substantial evidence to support the business model of the private prison industry described above. For example, according to the 2000 Corrections Yearbook, the average starting salary for private prison guards was \$17,628 while the average starting salary in public prisons was \$23,002. More recently, when CCA announced plans not to renew its contract to operate the Hernando County Jail in Florida effective August 2010, the sheriff said he would resume control over the jail. He also said he would increase the salaries of qualified CCA employees retained at the facility by more than \$7,000 annually, to bring them in line with the salaries of the county's corrections deputies – indicating the pay differential between the public and private sector.

In terms of training for corrections employees, CCA vice president Ron Thompson stated in June 2010 that the company provides "a minimum of 200 hours of initial training, along with at least 40 hours of annual training."



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## Prison for Profit (cont.)

However, this is significantly less than the training that employees in some state prison systems receive. California, for example, requires “a sixteen-week, formal, comprehensive training program” consisting of 640 hours. In Alabama, state prison guards must “successfully complete 480 hours of correctional officer training at an approved Academy.” The New Jersey Dept. of Corrections requires a “14-week, in-residence NJ Police Training Commission course.” Less training allows private prison companies to cut costs, but at the expense of employing staff who are less prepared for work in a prison setting.

In regard to job benefits, private prison employees do not enjoy government retirement plans, civil service protection or generous health insurance available in the public sector.

As a result of paying lower wages, supplying less training and providing fewer benefits, private prisons have much higher staff turnover rates than their public counterparts. According to the last self-reported data from the private prison industry, published in the 2000 Corrections Yearbook, the average turnover rate at privately-operated facilities was 53 percent. The average rate in public prisons was 16 percent. More recently, a Texas Senate Committee on Criminal Justice report released in December 2008 found that the “correctional officer turnover rate at the seven private prisons [in Texas] was 90 percent (60 percent for the five privately-operated state jails), which in either case is higher than the 24 percent turnover rate for [state] correctional officers during FY 2008.”

High staff turnover rates, in turn, mean less experienced employees who

lack institutional knowledge about the facilities where they work, which results in greater instability in private prisons. Higher turnover also leads to understaffing, as employees who resign or are terminated leave vacant positions that are not immediately filled. The 2000 Corrections Yearbook found that public prisons had an average guard-to-prisoner ratio of 1 to 5.6, compared with a ratio of 1 to 8 in private prisons – which reflects significantly less staffing at privately-operated facilities. Private prison companies have a financial incentive to keep staff positions vacant, as vacant positions mean reduced payroll costs and thus higher profits.

Understaffing, instability and fewer experienced employees result in higher levels of violence. Several studies have shown that privately-operated prisons experience more violence, including a 2004 report in the *Federal Probation Journal* that found private prisons had over twice as many prisoner-on-prisoner assaults than in public prisons. A 2001 Bureau of Justice Assistance report found that private prisons had 65 percent more prisoner-on-prisoner assaults and 48 percent more prisoner-on-staff assaults than public prisons with comparable security levels. A more recent 2011 examination of private and public prisons in Tennessee revealed similar results, with privately-operated facilities having higher average numbers and rates of violent incidents than public prisons.

There is also anecdotal evidence that security problems and violence are more likely to occur at private prisons as a result of the industry’s business model, which results in high staff turnover and thus inexperienced staff and greater institutional instability. As just one example, during a four-month period from May to September 2004, CCA experienced four major riots at prisons in Colorado, Oklahoma, Mississippi and Kentucky, plus a hostage-taking at a jail in Florida.

A Department of Corrections report following the uprising in Colorado found that just 33 CCA guards were watching over 1,122 prisoners at the time of the riot – a ratio 1/7th that at Colorado state prisons (which had an average guard-to-prisoner ratio of 1 to 4.7). Some CCA employees had literally been “on the job for two days or less.” The CCA facility had a 45 percent staff turnover rate, and CCA guards were paid an average salary of \$1,818 per month compared

with \$2,774 for state prison officers. As indicated above, these deficiencies are a direct result of the business model of the private prison industry.

Certainly public prisons experience riots, violence and other problems, too – but the frequency and severity of such incidents in private prisons imply that those facilities are more prone to unrest and instability as a consequence of how the private prison industry cuts costs in order to generate profit.

A related issue concerns the rehabilitation of prisoners in privately-operated facilities. Consider that for-profit prison firms have a vested interest in maintaining – and increasing – the number of people behind bars. The sole purpose of companies like CCA and GEO Group is to generate profit, not to ensure public safety, aid in the rehabilitation of offenders or reduce recidivism and thus decrease the amount of crime and victimization in our communities.

During CCA’s annual meeting on May 14, 2010, CCA vice president Dennis Bradby confirmed that the company had not conducted any studies to determine whether the rehabilitative programs offered at its for-profit prisons were effective in terms of reducing recidivism. Independent research, however, has found that prisoners released from privately-operated facilities may have a higher rate of reoffending.

A 2003 joint study by the Florida Dept. of Corrections, Florida State University and Correctional Privatization Commission found that while there were no significant differences in recidivism rates among prisoners in private and public facilities, “in only one of thirty-six comparisons was there evidence that private prisons were more effective than public prisons in terms of reducing recidivism.” More tellingly, a research study published in *Crime and Delinquency* in 2008, which tracked over 23,000 prison releases, found that “private prison inmates had a greater hazard of recidivism in all eight models tested, six of which were statistically significant.”

Thus, another outcome of the private prison industry is that prisoners are subjected to higher levels of violence due to the way private prison firms cut staffing costs to generate profit. Further, while the private prison industry benefits by keeping prisoners behind bars, those same prisoners are more likely to reoffend following their release – resulting in greater

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societal costs in terms of a recurring cycle of crime and incarceration.

### **Institutionalizing For-Profit Imprisonment**

Perhaps the most deleterious effect of the private prison industry is that it has successfully legitimized the concept of for-profit incarceration. While people might question the notion of a privatized police force that benefits financially when people are arrested, allowing companies to profit from people's imprisonment has become an accepted and normalized part of our nation's criminal justice system.

Private prison companies and other members of the Prison Industrial Complex do not operate in a vacuum, of course, nor are they solely responsible for crafting an industry that profits from incarceration. They certainly contribute to that state of affairs, though – sometimes literally. As with many other industries, private prison companies make campaign contributions to lawmakers and engage in political influence-peddling through lobbyists.

CCA, the nation's largest private prison firm, spent about \$1 million in both 2009 and 2010 on direct lobbying expenses on the federal level alone. The company and its Political Action Committee further gave over \$812,000 in federal and state political donations in 2009 and more than \$722,000 in 2010. And that is just one company among many that comprise the Prison Industrial Complex. Through such spending, the private prison industry is able to influence and obtain the support of politicians to further its goals

of greater investment in incarceration and expanded privatization in the criminal justice system.

Private prison companies also wield influence by hiring former public officials, mainly from corrections and law enforcement agencies, who use their connections to grease the political wheels that drive the private prison industry machine. CCA's executives and board members include a former director of Ohio's prison system, the former chief of facility operations for the New York City Dept. of Corrections, two former directors of the federal Bureau of Prisons, a former deputy assistant secretary of the U.S. Department of Defense, a former U.S. Senator and Thurgood Marshall, Jr. – son of the late U.S. Supreme Court Justice, who served as Secretary to the Cabinet in the Clinton administration.

The private prison industry has further enlisted supposedly-impartial research allies to produce studies that laud the benefits of privatization. For example, the Reason Foundation, a Los Angeles-based libertarian think-tank that promotes privatization of governmental services, receives funding from private prison companies – which it conveniently neglects to mention in its research. GEO Group was listed as a Platinum-level supporter of the Reason Foundation in a 2009 donor report, while CCA was listed as a Gold-level supporter.

Discredited former University of Florida professor Charles Thomas, who operated an academic project that studied the private prison industry, also produced research favorable to private prison com-

panies. It was subsequently discovered that Thomas owned stock in the companies he was studying, sat on the board of Prison Realty Trust (a CCA spin-off) and had been paid \$3 million by Prison Realty/CCA. Thomas retired from his University position after those conflicts became known; he was fined \$20,000 by the Florida Commission on Ethics.

Additionally, members of the Prison Industrial Complex have formed their own industry trade group, the Association of Private Correctional & Treatment Organizations. APTCO and CCA jointly funded a 2007 Vanderbilt University study that, not surprisingly, found benefits from prison privatization.

More disturbingly, private prison companies have been accused of working behind the scenes to promote harsh sentencing laws that result in more people going to prison for longer periods of time – which, of course, benefits the private prison industry. For instance, in the 1990s and early 2000s, CCA executives John Rees and Brad Wiggins served on the Criminal Justice Task Force of the American Legislative Exchange Council (ALEC). ALEC is a powerful free-market organization that describes itself as a “public-private partnership” between state lawmakers and private-sector businesses. ALEC claims almost 2,000 lawmakers as members – one-third of the nation's state legislators – plus over 250 private companies and foundation members, including Wal-Mart, ExxonMobil, the American Bail Coalition and the National Rifle Association.

ALEC produces model laws that are

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## Prison for Profit (cont.)

introduced by legislative members in their home states. The organization's Criminal Justice Task Force (which has since been folded into the Public Safety and Elections Task Force) has drafted tough-on-crime model legislation for mandatory minimum laws, truth-in-sentencing statutes, three-strike laws and habitual offender laws – all of which result in longer prison terms that directly contribute to overincarceration and prison overcrowding.

ALEC has further promoted model legislation to benefit the private prison industry, including the Private Correctional Facilities Act, which permits state governments to contract with private prison companies. CCA senior director of business development Laurie Shanblum served as a member of ALEC's Public Safety and Elections Task Force, and in 2010 CCA was tied to ALEC model legislation introduced in Arizona, SB 1070, that is expected to result in an increase in immigrant detention. CCA operates three facilities in Arizona that house ICE detainees.

CCA has denied that it influences legislation that results in more incarceration or longer sentences. However, why would a private prison firm participate in ALEC except to influence criminal justice policy and help craft legislation beneficial to the company? The nation's second-largest private prison operator, GEO Group, has also been a member of ALEC, though both GEO and CCA no longer have active memberships with the organization.

By currying political favor through lobbying and substantial campaign contributions, by funding academics who produce supposedly-independent private prison studies, and by hiring former public officials, creating its own industry trade group and influencing criminal justice policy-making through participation in ALEC, the private prison industry has established its own legitimacy and ensured that profit trumps public policy when it comes to our nation's criminal justice priorities.

### Conclusion

This, then, is the egregious and lasting legacy of the Prison Industrial Complex.

While private prisons companies comprise only a small part of the overall corrections system in the United States,

they have managed to hinder much-needed criminal justice reform – particularly in the areas of sentencing and prison release policies – by supplying supplemental bed space for overcrowded public prisons.

Prisoners held in for-profit facilities are exposed to higher levels of violence due to the private prison industry's business model of reducing staffing costs, which results in higher staff turnover rates, understaffing and instability. Prisoners released from privately-run facilities have higher recidivism rates, thus endangering public safety.

But the most harmful consequence of the private prison industry is that it has made imprisonment-for-profit politically and socially acceptable, thereby perpetuating an insidious business model that benefits from incarceration while instilling the notion that justice literally is for sale

and crime does in fact pay – for private prison firms and their shareholders.

Hopefully, at some point in the future we will look back on this time when private prisons were considered sensible and wonder how such a socially-destructive concept was allowed to exist, much as we now look back on the institution of slavery. For now, though, we must deal with the harsh realities of for-profit prisons and their role in the Prison Industrial Complex, including their many flaws and harmful effects on prisoners, our justice system and society as a whole. ■

*A footnoted version of this article is being included as a chapter in a soon-to-be-published book, "And the Criminals with Him: Essays in Honor of Will D. Campbell and All the Reconciled," edited by Richard C. Goode (Cascade Books, forthcoming).*

## Virginia Wrongful Death Jail Suit Against Correct Care Solutions Settled for \$1 Million

A nurse employed by Correct Care Solutions (CCS), the company responsible for medical treatment at the Alexandria Detention Center in Virginia, was fired for lying about the care she provided to a prisoner who later died.

The CCS nurse, Nigist Ketema, was also named as a defendant, along with CCS, in a wrongful death lawsuit filed by Obah Farah Walker, the sister of 24-year-old Farah Saleh Farah. Farah was incarcerated at the Alexandria Detention Center for a probation violation at the time of his death on January 23, 2008.

According to court records, CCS fired Ketema upon determining that she had "fabricated" the vital signs she documented for Farah in a medical log book.

Farah, a schizophrenic, had stopped taking his medication and was not eating or drinking prior to his death. Those factors, along with his "cadaverous" appearance, should have alerted jail staff to Farah's need for emergency medical care, Walker claimed in her suit.

Farah died two days after Ketema reported that she had logged his vital signs. Video footage from the jail, however, cast doubt on whether Ketema spent sufficient time in Farah's cell to actually take his vitals. Deputies who were present denied that she took Farah's vital signs, and the video did not show her doing so. The video footage, however, had a 22-second gap.

When CCS president Jerry Boyle visited the jail after Farah's death, he and medical administrator Merry Brinkley conducted an informal test to see whether Ketema could have taken Farah's vital signs within that 22-second time frame. "There's no way she could have done that," Brinkley concluded, and Boyle agreed.

On April 27, 2011, U.S. District Court Judge Gerald Bruce Lee ruled that the actions of Ketema and another nurse named in Walker's lawsuit might have violated Farah's Eighth Amendment rights. However, to the extent that they acted with deliberate indifference to Farah's serious medical needs, their actions were not attributable to CCS company policies. Summary judgment was therefore granted to CCS but denied as to the individual defendants.

In June 2011, Walker notified the court that she had accepted the defendants' second offer of judgment to resolve the case, in the amount of \$1 million. Accordingly, the court entered judgment in favor of Walker and ordered disbursement of the settlement funds, including \$333,333 for attorney fees, \$69,667 for costs and \$597,000 to Farah's surviving family members. See: *Walker v. Correct Care Solutions, LLC*, U.S.D.C. (E.D. Vir.), Case No. 1:10-cv-01012. ■

Additional source: *Washington Examiner*

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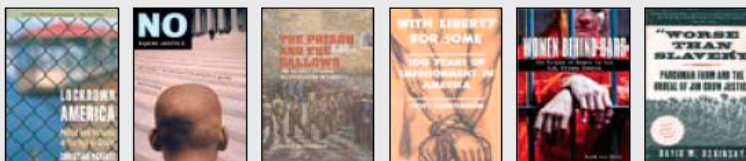


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## Problems at North Carolina State Bureau of Investigation Crime Lab

Recent revelations of shoddy blood analysis at the North Carolina State Bureau of Investigation (SBI) crime lab led to an investigation that uncovered at least 190 cases of serious blood work errors in criminal cases. Those cases included three death penalty convictions that resulted in executions, four other capital punishment cases where the prisoners remain on death row, and 40 cases that never went to trial.

The most common error was a failure of lab personnel to note in their reports the fact that a subsequent, more accurate test had shown that blood was not found after a less-accurate preliminary test indicated the presence of blood. Other errors included failing to mention inconclusive or negative results in repeated tests, making entries that contradicted the actual test findings, and claiming that no follow-up testing was done when it had been. The fact that such errors always favored the prosecution indicates they were intentional, not random mistakes or oversights.

North Carolina Attorney General Roy Cooper commissioned former FBI special agents Chris Swecker and Michael Wolf to conduct a comprehensive audit of SBI blood analysis cases between 1987 and 2003. Their investigation of 15,000 crime lab files, released in August 2010, revealed the 190 errors. [See: *PLN*, Oct. 2010, p.1].

Several high-profile cases led to the audit, including that of Kernerville dentist Kirk Turner, who killed his wife in what he claimed was self-defense after she attacked him with a 7-foot spear. Prosecutors alleged that Turner slit his wife's throat with a pocketknife, wiped the blade on his shirt, then stabbed himself twice in the thigh with the spear to make the killing look like self-defense.

SBI bloodstain pattern analyst Gerald Thomas filed a report which indicated a stain on Turner's shirt was a transfer bloodstain consistent with a hand being wiped on the shirt. After he was told of the prosecutor's theory of the case, however, he and his mentor, SBI analyst Duane Deaver, conducted unscientific tests to see if they could duplicate the stain using a knife. They were able to do so, but only if the knife had blood only on the very edge of the blade.

After the experiment, and without mentioning that he was changing the report, Thomas modified his report to state that the shirt stain was "consistent with a pointed object, consistent with a knife, being wiped on the surface of the shirt." Kirk's defense attorney was accidentally given a copy of the first, unmodified report and the change was discovered. Turner was acquitted at a trial in which the jury foreman said the jury was shocked at the SBI's conduct.

"Politically, socially, religiously, I'm conservative; I'm a law-and-order man," said the jury foreman, an insurance claims adjuster. "But I don't know what other word to use but fraud" to describe the SBI's actions.

The case that finally led the Governor and Attorney General to order an investigation into the SBI crime lab was that of Greg Taylor. Taylor spent nearly 17 years in prison for a murder he did not commit after Deaver said a substance found on the fender of Taylor's SUV was blood. Deaver never told the defense – or the prosecution – that a confirmatory test ruled out the presence of blood on the fender.

Deaver even testified before the North Carolina Innocence Commission in 2009 that he had not performed the second test. However, copies of Deaver's 1991

lab notes, discovered by Taylor's attorneys in early 2010, showed that he performed the test and it was negative. At a February 2010 hearing, Deaver testified that his superiors at the lab ordered him to exclude negative confirmatory tests from his final lab reports.

Taylor, who was exonerated based on "clear and convincing evidence," has since filed suit against Deaver and other crime lab officials, alleging that they deliberately withheld evidence from his defense counsel.

Deaver, 51, had been the principal training officer at the SBI blood lab for 22 years. He had been at the vortex of other controversial cases. For example, in one case he testified that he routinely ignored evidence that might be helpful to the defense and did not tell the defense about such evidence or include it in his reports. Another time he stated that, in criminal cases, he routinely testified that blood was present based solely on a preliminary test without doing a confirmatory test. The preliminary test is well-known to yield false positives.

Deaver even tried to testify that a defendant was the one, of several people present, who hit a man over the head with a 2-by-4, killing him, based upon the splatter patterns of pumpkins Deaver smashed with a 2-by-4. The judge refused to admit that testimony into evidence.

What made Deaver and the people he trained at the SBI crime lab so dangerous was their lack of scientific qualifications coupled with an intense self-righteousness. The National Academy of Sciences, the nation's most prestigious science organization, examined crime labs nationwide in a 2009 report and recommended that analysts have a minimum of a bachelor's degree in a science field such as biology or chemistry.

Deaver had a bachelor's degree in zoology from North Carolina State University and took only two outside courses in bloodstain pattern analysis – one in 1987 at the Midwestern Association of Forensic Science and the other at Florida's Valencia College. SBI analyst Gerald Thomas, 40, had a bachelor's degree in political science from Greensboro College and a master's degree in sociology from UNC-Greensboro. In 2008, he testified that he never even took classes in chem-

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istry or physics. Thomas' training was all in-house or at the Guilford County Sheriff's Department.

Deaver's boss, then-SBI crime lab director Jerry Richardson, had a bachelor's degree in communications. He came to the lab after a failed attempt at a career in television, when he was looking for a government job.

"I knew TV was no way to make a living, and I wanted to make a living. A good, stable one," he said.

Like many people who came to work at the SBI crime lab in the 1980s and 1990s, Richardson was a backyard scientist with little or no academic training in the sciences. Instead of formal training, SBI trained its employees in-house. That would not be such a problem had SBI's in-house practices not been so out-of-step with the practices of the rest of the national and international forensic sciences community.

But SBI lab workers were isolated

from their professional peers. Deaver had never been a member of the International Association of Bloodstain Pattern Analysis, the Scientific Working Group on Bloodstain Pattern Analysis or the International Association of Identification. Such isolation allowed SBI workers to practice self-deception in the name of science and help convict the innocent with egotistical self-assurance.

According to Jed Taub, who retired in 2004 after 30 years at the SBI blood lab and now works as a forensic investigator for the Pitt County Sheriff's Office, SBI blood analysts didn't report a negative result in confirmatory tests because they believed the preliminary tests were infallible.

"We didn't report the negative result of a confirmatory test because, really, it's misleading," Taub said. "We couldn't be sure it wasn't blood, so those tests don't really matter."

George Goode was sentenced to

death for a 1993 murder after Deaver testified that he found evidence of blood on Goode's boots. The stain was invisible to the naked eye. The test was preliminary and there was no evidence that a confirmatory test was performed. In 2009, a federal judge reduced Goode's sentence to life based in part on his lawyer's failure to challenge Deaver's findings. In so doing the judge said that Deaver had given "misleading testimony." See: *Goode v. Branker*, U.S.D.C. (E.D. NC), Case No. 5:07-hc-02192-H.

It is accepted throughout the community of forensic scientists that a preliminary blood residue test, using phenolphthalein, can give false positives when other substances, such as plant and animal matter, are present. That is why analysts use a second, more accurate (but more expensive) test to confirm the presence of blood. SBI analysts, however, were trained to prefer the less-accurate preliminary test over the more-accurate confirmatory

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## N. Carolina Crime Lab (cont.)

test because in-house experiments with vegetable matter were allegedly unable to produce false positives.

Stuart James is one of the world's leading experts on bloodstain analysis. He was hired by Kirk Turner's attorney to examine the evidence in that case. Following Turner's acquittal, James has shown videos of SBI experiments in conferences and workshops in both the U.S. and Europe, with the result that every forensic scientist who saw them deemed the work unscientific.

"They thought it was a bunch of malarky," said James. "They were aghast at it."

Swecker, a former prosecutor, federal agent and high-ranking FBI official, described the SBI crime lab as a renegade agency with flawed policies.

"What surprised me was the sort of looseness there, specifically with policy regarding reporting results," Swecker stated. "What that created was a very subjective environment with cases."

Unfortunately, the ineptitude at SBI extended beyond the lab's blood analysis work. For example, in the case of novelist Michael Peterson, who was convicted of bludgeoning his wife to death in 2003, evidence discovered by Peterson's lawyers, but overlooked by the SBI, indicated that an owl may have killed Kathleen Peterson.

Kathleen's body was discovered at the bottom of an outdoor staircase in a pool of blood. Overlooked at the time of the investigation were owl feathers and lacerations to Kathleen's scalp which neurosurgeon and owl expert Dr. Alan van Norman testified in an affidavit were inconsistent with a blunt instrument, but consistent with a large bird of prey. Microscopic owl feathers were also found embedded in Kathleen's hands and a sliver of tree limb was found in her hair. Van Norman testified that he believed Kathleen became entangled with the owl and suffered fatal injuries while ripping it from the back of her head. Peterson, serving a life sentence, is seeking a new trial; Deaver had testified about blood evidence in his case.

In another case, Floyd Brown, 47, was convicted of beating a retired school teacher to death in 1993 based on a confession he gave to SBI Agent Mark Isley. However, the confession used sophisticated language and Brown had the mind of a 7-year-old boy and half the average

IQ. In other words, Brown, who wasn't able to recite the alphabet beyond the letter K, could not have given the confession that Isley claimed he had transcribed verbatim.

"The confession is a work of fiction," according to Raleigh attorney Mike Klinkosum, who represented Brown until a state judge threw out the murder charge and ordered his release in 2007.

Further, the murder conviction of Derrick Michael Allen was dismissed in March 2011 after a state court found that a former district attorney had colluded with an SBI lab technician to prevent DNA testing of a piece of evidence they thought "would not prove inculpatory to [Allen] and could possibly inculcate others." The report submitted by the SBI crime lab contained misleading findings which falsely implied the victim's blood had been found on the evidence; the court criticized the lab for having "a pro-prosecution bias." Allen served 12 years in prison.

Union County District Attorney John Snyder has said that he will review all past homicide cases, except those with a confession, to ensure they weren't tainted with SBI crime lab error.

"The irony is, we have the best science being made in North Carolina, but down the road at the SBI lab we have bad science being used to take away someone's liberty," Snyder stated.

Then again, given the situation in the Brown case, perhaps he should include cases with confessions in his review.

The North Carolina Police Benevolent Association has called for state and federal criminal investigations into whether SBI personnel violated any defendants' federal civil rights, and whether state criminal laws were violated.

"Undoubtedly, no future laboratory analysis can be trusted to a lab under the current control of SBI leadership," said John Midgette, the association's executive director. That seemed to be a call to establish a crime lab independent of the SBI, just the kind of solution recommended by the National Academy of Sciences. A bill introduced in the state legislature in March 2011 (SB483) would create "a separate, autonomous" state forensics laboratory that is separate from the SBI, answers to the Attorney General's office and does not employ sworn law enforcement officers.

The North Carolina legislature has already passed a bill that creates an advisory board of forensic scientists to

oversee the crime lab, and which requires the lab to meet international accreditation standards.

In July 2010, Attorney General Roy Cooper suspended bloodstain pattern analysis work at the SBI lab and removed Robin Pendergraft from the SBI director job she had held since 2001.

Charlotte attorney Jim Cooney, who has represented both police departments and death row prisoners, said the SBI's failure to deal with its problems for so many years was an indication that it was probably incapable of reforming itself. He was also baffled as to why the state's largest investigative agency was not being run by an expert in the field.

"You don't need a lawyer or a legislative assistant to run it, you need an investigative professional, someone with management experience to run a law enforcement agency of this size and complexity," Cooney said.

The current director of the SBI crime lab (now known as the North Carolina State Crime Laboratory) is Joseph R. John, Sr., a retired judge with no apparent forensics training. He is assisted by two deputy directors who have science backgrounds. "After spending months talking with individual analysts, viewing their work and reading comments from judges and attorneys regarding their testimony in court, I feel confident that lab scientists are focused upon analyzing the approximately 43,000 cases received annually in a responsible, accurate and ethical manner," John wrote in a September 2011 editorial, while acknowledging past problems at the lab in "cases from the 1980s and 1990s."

SBI analyst Duane Deaver was charged with contempt by the Innocence Inquiry Commission for giving false and misleading testimony, and fired in January 2011. He appealed. "I think I was treated unfairly, and I'm going to prevail," Deaver insisted. Indeed, on September 14, 2011, a state court judge dismissed the contempt charge as part of a mediated settlement agreement. Deaver acknowledged "the confusing nature of his testimony, and ... how the Commission could have been misled"; in exchange, the contempt charge was dropped. ■

Sources: *Raleigh News & Observer*, *Charlotte Observer*, *Greensboro News-Record*, *Winston-Salem Journal*, *Ashville Citizen-Times*, *Huffington Post*, [www.wwaytv3.com](http://www.wwaytv3.com), *CNN*, [www2.journalnow.com](http://www2.journalnow.com), [www.heraldsun.com](http://www.heraldsun.com), [www.wral.com](http://www.wral.com)

## Federal Judge Sanctions Florida Sheriff's Attorney for Threatening Plaintiff with Arrest

On February 10, 2011, a federal judge admonished and sanctioned a Florida lawyer defending Nassau County Sheriff Tommy Seagraves for using information obtained from the National Crime Information Center (NCIC) database to threaten with arrest a plaintiff in a civil suit who was suing Seagraves for damages.

Norman L. Gladney was arrested and spent five months in a Nassau County jail after he returned to the sheriff's department, as instructed, to pick up \$14,500 that deputies had seized from him during a 2005 traffic stop. The money had been bequeathed to Gladney by his mother, and he claimed it was improperly confiscated.

When he returned to get his money back, however, Gladney was arrested on a charge of having false identification. According to his lawsuit, the charges were dropped after prosecutors determined that he was in fact who he said he was.

The mystery, of course – and no doubt what prompted the lawsuit (at least in part) – is how the deputies who had seized the money from Gladney could not identify him when he returned, as they had instructed him, to get his money back. Deepening the mystery is the fact that law enforcement officials

could not unravel Gladney's identity before he had spent five months in custody – and then, adding insult to injury, they still did not return the \$14,500 they had taken from him.

When Gladney filed suit against Seagraves in federal court, alleging unlawful arrest and seeking return of the confiscated funds, Seagraves' lawyer, John Jolly, Jr., informed Gladney's attorney that Nassau County deputies would arrest Gladney if he showed up for trial based on a South Carolina warrant they had uncovered in the NCIC database. Jolly also lowered his proffered settlement amount in the case after discovering the outstanding warrant.

Senior U.S. District Court Judge Henry Adams was not amused by the fact that Jolly himself had directed the search of the NCIC database for warrants against Gladney. The South Carolina warrant, Judge Adams noted, had since been voided. In any event, Gladney's lawyers argued, NCIC was intended to be used by authorities searching for information on a person relative to a pending criminal matter – not to gain advantage in a civil lawsuit.

Jolly told the district court he was “not apologetic” for acting as he did. The court in turn found that Jolly had acted in bad faith and sanctioned him.

“Mr. Jolly intentionally sought to deter plaintiff from asserting his civil rights to gain advantage in this civil proceeding,” Judge Adams wrote. He added, “the fact that Mr. Jolly insists he did absolutely nothing wrong, and frequently represents various governmental entities in [federal court], underlines the need for admonishment.” Jolly was ordered to pay Gladney's attorney fees for “the time necessarily incurred in prosecuting” the motion for sanctions.

Sheriff Seagraves was dismissed from Gladney's suit, which went to trial against the remaining defendant, deputy Clyde Osborne, on February 14, 2011. However, the judge declared a mistrial. According to plaintiff's attorney Edward B. Gaines, the case then settled the following month for \$98,000 inclusive of all attorney fees, costs and sanctions. See: *Gladney v. Seagraves*, U.S.D.C. (M.D. Fla.), Case No. 3:08-cv-01052-HLA-JBT. ■

Additional source: *The Florida Times-Union*

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# PLN Wins \$230,000 in Settlement that Ends Spokane, Washington Jail's Postcard-Only Rule

by Matt Clarke

In July 2011, the Board of County Commissioners of Spokane County, Washington agreed to pay \$230,000 to Prison Legal News to settle a federal lawsuit challenging unconstitutional restrictions on prisoners' mail at the Spokane County Jail.

On September 1, 2010, new policies were enacted at the jail that limited incoming and outgoing prisoner mail to 5.5" x 8.5" non-glossy, pre-franked postcards. The only exceptions to the policy were "legal and official mail" and "newspapers, paperback books and approved magazines" specified in the policy. The policy listed fifteen approved magazines, which did not include PLN.

The new policy did not require the jail to notify the sender of rejected mail that it had been censored, give the reasons for censorship or allow the sender an opportunity to appeal censorship decisions.

Once the policy was in effect the jail censored copies of *PLN* mailed in envelopes personally addressed to prisoners at the jail, a soft-covered book titled *Protecting Your Health and Safety*, informational and subscription brochures, and a brochure of books sold by PLN. The jail censored these mailings, returning 23 PLN magazines stamped "unauthorized content" and one stamped "not a postcard." The jail returned 27 one-page informational brochures with "unauthorized content" stamped on thirteen of the envelopes, "unauthorized content" and "postcard policy" stamped on three envelopes, "unauthorized content" and "not a post card" stamped on eight envelopes, and "exceeds 1/4" thickness/size limit" stamped on three envelopes which did not exceed 1/4" in thickness.

The jail also returned four copies of *Protecting Your Health and Safety* that were stamped "unauthorized content." No further information or justification for the censorship was provided. PLN was not afforded an opportunity to appeal the censorship of its publications by Spokane County Jail officials.

On January 21, 2011, PLN filed a civil rights action in U.S. District Court for the Eastern District of Washington pursuant to 42 U.S.C. § 1983, alleging that the jail's new mail policy was unconstitutional be-

cause it violated PLN's First Amendment right to correspond with prisoners and due process rights under the Fourteenth Amendment. On February 14, 2011, the jail amended the policy to eliminate the postcard-only restriction on outgoing prisoner correspondence. Three days later, the policy was again amended to eliminate the postcard-only restriction on incoming business, official and legal mail, and to remove the limitation on only allowing approved magazines. The policy specifically retained a postcard-only restriction for incoming non-business mail.

On July 19, 2011, the defendants settled the case by signing a consent decree and paying PLN \$55,000 in damages, \$172,867.40 in attorney fees and \$2,132.60 in costs, for a total of \$230,000. In the consent decree, the defendants conceded that the mail policy violated the First and Fourteenth Amendments insofar as they failed to provide notice and an opportu-

nity to be heard to senders of censored mail, allowed jail officials to reject incoming business mail because it was not in postcard form, and restricted the delivery of publications to newspapers, paperback books and approved magazines while rejecting all other types of publications.

While maintaining that the remaining incoming mail postcard-only restriction was constitutional, the defendants agreed to an injunction issued by the court prohibiting them from enforcing the policy, subject to revision should the Supreme Court or the Ninth Circuit Court of Appeals uphold a similar policy. *PLN* was ably represented by Jesse Wing and Katie Chamberlain of the Seattle law firm McDonald, Hogue and Bayless, and Lance Weber, Litigation Director of the Human Rights Defense Center, which publishes *PLN*. See: *Prison Legal News v. Spokane County*, U.S.D.C. (E.D. Wash.), Case No. 2:11-cv-00029-RHW. ■

## Budget Crisis Closes Oregon Prison for First Time in 159 Years

Oregon prison officials recently proved that desperate times truly do call for desperate measures, as the state closed a prison for the first time since opening its first correctional facility in 1851 – nine years before Oregon became a state.

Since the 1985-87 biennium, the Oregon Department of Corrections (ODOC) "has increased expenditures by 209 percent," according to state officials. ODOC "now accounts for 53 percent of all public safety spending." [See: *PLN*, Dec. 2011, p.44].

ODOC's current 2-year budget of \$1.26 billion has soared 250 percent in the last two decades according to former Governor Theodore Kulongoski. That "number ... is expected to grow at an unsustainable rate if we continue the policies in place today," Kulongoski said.

"Over the past twenty years, Oregon has more than doubled the number of offenders incarcerated in the state corrections system – largely through the adoption of mandatory minimum sentencing structures by the voters," a Public Safety Subcommittee noted. Now the state cannot afford to

run all the prisons it has built.

One of the last to come on-line was the \$120 million Deer Ridge Correctional Institution (DRCI) in the small high desert town of Madras, Oregon. Built to hold 1,872 prisoners – 644 minimum security and 1,228 medium security – the medium security beds have sat empty since DRCI opened in 2007. In September 2010, 65 percent of the prison's bed space remained vacant, and plans to open the medium security beds have been postponed until at least 2013.

In mid-2010, ODOC Director and former state senator Max Williams joined Kulongoski in vowing not to close any prisons. However, they quickly broke that promise on October 29, 2010 when they closed a 176-bed minimum-security prison in Salem, Oregon as part of a \$2.5 million budget cut. "This is a major event," said Mike Gower, an ODOC assistant director. "We are closing a prison."

That facility first opened in 1964 as the Oregon Women's Correctional Center (OWCC), just outside the 25-foot gray walls of the Oregon State Penitentiary (OSP), Oregon's oldest and only



maximum-security prison.

When overcrowding forced ODOC to move women prisoners to the Coffee Creek Correctional Facility (CCCF) in 2001, OWCC became OSP-Minimum, a men's facility for prisoners on work crews or in substance abuse treatment programs. OSP-Minimum prisoners also raised food in the prison's garden, including 13,000 pounds of produce donated to local food banks in 2010.

Closing OSP-Minimum was part of a move to eliminate 76 ODOC positions department-wide. None of the last 120 OSP-Minimum prisoners were released early, so they had to be transferred to other facilities. The closure also prematurely ended substance abuse treatment for about 50 prisoners.

Williams informed ODOC's 4,400 employees of the layoffs in a September 29, 2010 email. A "bumping" procedure allowed the 35 OSP-Minimum staff to transfer to other facilities and take positions held by employees with less seniority.

Thirteen of the 76 positions slated for elimination were already vacant, so a total of 63 employees were laid off. Those included nine DRCI employees who were hired in anticipation of opening the facil-

ity's medium security beds. The Inspector General's office, which oversees ODOC's Special Investigations Unit (i.e. Internal Affairs), also lost three employees. Williams told staff members that it was "worth noting that we have been careful to ensure that position eliminations are distributed among both represented and non-represented staff, from both institutions and administrative offices."

The 2011-2013 draft budget of Oregon's new Governor, John Kitzhaber, raised the unlikely possibility of closing another six minimum-security prisons. This would require the adoption of some form of early release authority or significant sentencing reform, according to a budget note. The closures would have released 2,561 prisoners in order to maintain a prison population – which now exceeds 14,000 – of about 12,000 prisoners. The move also would have eliminated 682 ODOC staff positions statewide.

The final state budget did not include any additional prison closures, though it did include some modest staff cuts, including 72 prison medical positions. The ODOC's biennial budget for 2011-2013 was set at \$1.3 billion. "This is as tight a budget as we've ever been given," said Williams.

ODOC officials still remain hopeful that the governor and legislative leaders will allow them to re-open OSP-Minimum. If so, they plan to convert it back into a women's facility to ease potential overcrowding at CCCF. However, another \$9 million in savings may be realized by keeping the facility shuttered during the 2011-13 budget cycle, according to ODOC projections.

A prisoner work crew has been performing maintenance and repairs at OSP-Minimum in anticipation of reactivating the facility.

Optimistic prison officials have ordered staff to keep the mothballed prison ready to re-open within two weeks of any reactivation decision, said Physical Plant Manager Roger Gilbertson.

"I think, on my end, it can be ready in four or five days," said Gilbertson. He also noted that he had carried out orders from his supervisors to keep tight control on all OSP-Minimum property.

"From a fiscal standpoint, I was told to be very protective and not let anybody have anything," said Gilbertson. "I did that. I didn't make a lot of friends."

Sources: *The Oregonian*, *Statesman Journal*

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# Deaths at Texas Jail Reveal Health Care Deficiencies

When Amy Lynn Cowling, 33, was arrested for speeding and outstanding misdemeanor theft warrants, no one expected that she would receive the death penalty. But Cowling never even had the opportunity to present her case to a judge or jury; five days after she was arrested, she died in the Gregg County Jail in Longview, Texas.

Cowling, who suffered from bipolar disorder, had a history of prescription drug abuse. Arrested for possessing a fraudulent prescription in 2001, she had been using methadone to keep herself clean for a decade. She was also receiving Seroquel for bipolar disorder and medication for arthritis, high blood pressure, a failing kidney and heart problems. Cowling and her mother, Vicki Bankhead, begged jail officials to give her the medication that was in Cowling's purse located in the jail's property room, to no avail. Jail policy prohibited the use of methadone and Seroquel.

Cowling died on December 29, 2010 after a horrific day of screaming and seizures. She became the ninth prisoner to die at the Gregg County Jail since 2005 – far more prisoner deaths than reported at other comparably-sized jails during the same time period. [See: *PLN*, May 2011, p.16]. Since Cowling's death, another Gregg County prisoner – also on methadone – has died at the jail. Micah Aaron Garner, 30, died on June 6, 2011; the cause of his death was ruled undetermined.

Dr. Lewis A. Browne, county health administrator and the jail's doctor for nearly two decades, is the official who decides which drugs prisoners are allowed. He prohibits methadone and Seroquel because they are frequently traded among prisoners. Gregg County officials claim that Cowling was given appropriate substitute medications.

However, a report submitted to the Texas Attorney General stated that Cowling had been experiencing "seizure activity," and a nurse at the jail had called Dr. Browne and reported that Cowling was "howling and uncooperative." Dr. Browne reportedly told the nurse to administer a dose of Haldol, an antipsychotic drug, and ordered a second dose later when Cowling resumed yelling. He also had her placed on suicide watch.

According to an autopsy report, the "probable" cause of Cowling's death was seizure due to methadone and prescription

drug withdrawal. A second opinion was requested by county officials, who turned to the time-honored tactic of blaming the victim. They said Cowling was not honest about her medical condition.

"I absolutely do not believe that the jail or jail staff contributed to this inmate's death whatsoever," said Robert Davis, an attorney for the county.

"They didn't watch her," countered Cowling's aunt, Lisa Doolan. "She died on their watch."

Following Cowling's death, Gregg County Sheriff Maxey Cerliano initiated an investigation. As a result, five jailers were fired and a sixth, Darrell McClen-ton, resigned. Not all of the misconduct discovered during the investigation was related to Cowling's death, but one jailer was terminated for falsifying observation logs on the night she died. The guards who were fired included Brian West, Tomeka Cross, Kashena Davis, Jacqueline Smiddy and Gary Lewis. West and Cross were charged with tampering with a government document.

"I'm pretty disappointed for the way this happened, and we're trying to ensure that we have an isolated incident and not a widespread problem," said Sheriff Cerliano. However, he also remarked that jail personnel had followed medical protocol in regard to Cowling.

But who determines whether a jail's medical protocols are adequate? Gregg County Jail prisoners have filed over twenty complaints with the Texas Commission on Jail Standards since 2008 – most of them citing inadequate medical treatment.

One prisoner who hanged himself in 2009 had complained that he was being refused the medication he was taking before he was arrested. Nearly all of the complaints received the same answer from Adan Muñoz, Jr., the commission's executive director: "The Texas Commission on Jail Standards does not question the professional opinion of medical personnel." Indeed, state standards merely require that a jail provide prisoners with medical treatment according to the facility's health care plan. So long as the jail has a plan on file and follows it, the commission will not intervene.

Dr. Browne, who also has a family medical practice in Longview, receives more than \$100,000 a year to be the jail's physician and the county's health administrator. Blaming the prisoners for the jail's

health care problems, he said prisoners are often uncooperative and dishonest about their medical conditions. He remarked that many are drug addicts, which presents a challenge to medical personnel, and also complained of difficulty in retaining medical staff at the jail.

In fact the Gregg County Jail has difficulty retaining all of its employees. In 2009 and 2010, over 40% of the jail's 167 employees quit or were fired. Sheriff Cerliano blamed low pay, challenging work conditions, months of training and having to pass drug tests as reasons for the high staff turnover. Logically only the first two factors would make jail employees want to quit, whereas the last two might make it harder to attract new employees. Further, the reasons cited by Cerliano are faced by all county jails, yet other jails don't have such a high turnover rate.

Brazoria County Sheriff's Department Lt. David Drosche, president of the Texas Jail Association, said that retaining jailers is difficult but called the 40 percent turnover rate at Gregg County "extremely high."

Diana Claitor, executive director of the Texas Jail Project, an organization that advocates for improving jail conditions, said monitoring jail employee turnover rates and improving health care standards could help prevent deaths like Cowling's. She noted that over 280 Texas jail prisoners statewide had died from medical conditions between January 2005 and September 2009.

"One of the chief factors playing into mistreatment or neglect would be ill-trained, inexperienced staff," said Claitor. But she also noted that the state budget crunch made it unlikely that additional oversight of county jails would be approved.

Recently, the Texas legislature passed a bill (SB 1687) that requires county jails to report monthly staff turnover data to the Texas Commission on Jail Standards. "I think it will help put a spotlight on the problem and hopefully lead to more scrutiny," said state Senator Rodney Ellis. The measure was signed into law in June 2011 and became effective on September 1. However, the legislation does nothing to lower staff turnover rates or ensure adequate staffing, including medical staffing, at county jails.

The courts are apparently not the answer to substandard health care at

Texas jails, either. Since 2005, prisoners have twice sued Sheriff Cerliano and Dr. Browne alleging deliberate indifference to their serious medical needs. However, the court held that Dr. Browne and the jail had attempted to provide adequate care, which was sufficient to defeat a deliberate indifference claim.

Another suit against Gregg County

was filed in June 2011 by the family of Amy Lynn Cowlin, alleging inadequate medical care at the jail. The second autopsy requested by county officials confirmed that she had died due to seizures resulting from medication withdrawal. See: *Bankhead v. Gregg County*, U.S.D.C. (E.D. Tex.), Case No. 2:11-cv-00279.

PLN has previously reported on

deaths in Texas jails due to inadequate medical care, dating back to 2007. Apparently not much has changed over the past five years. [See: *PLN*, May 2011, p.16; July 2010, p.16; Oct. 2009, p.1; Sept. 2007, p.9].

Sources: *Texas Tribune*, *New York Times*, *www.news-journal.com*

## California Prison Industry Authority Offers to Replace Offensive Grave Markers

Over fifty years ago, during the construction of Folsom Dam, the U.S. Army Corps of Engineers needed to relocate graves from a California grave site known as Negro Hill Cemetery. The Corps moved the graves in 1954. It even placed headstones over the 36 relocated (but previously unmarked) graves, marking them as having been moved from their prior location.

But in the 1950s, racial insensitivity was more blatantly ingrained in the fabric of American society than it is today. Thus, rather than marking the relocated graves with the actual name of the original cemetery, the Corps stamped the new headstones as having been "Moved from Nigger Hill Cemetery" – language that, in the words of the Corps. Lt. Col. Andrew B. Kiger, reflected "a shameful period in American history when racial intolerance was more commonplace."

The racist language remained on the headstones until 2011, despite offending for years the sensitivities of the El Dorado

Hills community in which the transferred graves are now located. Why? Due to bureaucratic red tape.

In May 2011, the California Prison Industry Authority offered to replace the offensive headstones free of charge. "That graveyard is right around the corner from our offices, and it's pretty easy to know that that's the right thing to do," said Charles Pattillo, the agency's general manager. The El Dorado County Board convened to discuss the issue and the prison industry's proposal, but took no action at that time.

Apparently, however, publicity helps to cut through red tape. Following news reports about the offensive grave markers, including national media attention, the El Dorado County supervisors voted unanimously on May 24, 2011 to replace the

headstones that included the racist language.

"Thirty-six markers are going to be removed," said El Dorado Supervisor John Knight. "The offensive words are going to be gone."

The headstones were finally removed in June 2011 after more than five decades. According to Eric Reslock, a spokesman for the California Prison Industry Authority, new markers without the racist language will be installed using "free" prisoner slave labor.

Sources: *news.blogs.cnn.com*, *New York Times*, *Sacramento Bee*



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# Oregon Prisoner Property Claims Cost State \$60,000 Annually

On average, Oregon prison officials pay about \$60,000 a year due to prisoner property claims, according to an internal audit of the Oregon Department of Corrections (ODOC). The state spends far more than that amount defending against such claims in court.

ODOC prisoners cannot seek compensation if another prisoner steals or damages their property, but they can file a claim if prison officials lose or damage their property during transfers, cell searches or otherwise. Each year, Oregon prisoners file about 1,000 property claims. Prison officials occasionally grant such claims but most are routinely denied, leaving small claims court as the only recourse.

Property claims can be fairly lucrative for prisoners. Take Nathan J. Bennett, for example, who suffered the improper confiscation of 250 pages of pornography. He can buy quite a few *Playboys* with the \$125 he received for his loss. Prisoner Edward Thomas sought \$675 for nine family photos that were taken from his cell. "My pictures are priceless and I just want some gratuity for my losses," he wrote.

When ODOC denied his claim, Thomas went to court and a judge ordered the state to pay him \$9.00, or \$1 per picture. The state also had to pay him a \$100 prevailing party fee, on top of the \$700 it spent defending against his claim.

ODOC prisoner Todd A. Ritchey alleged that guards damaged his television set during a March 2009 cell search. Five months later, the state paid him \$260 to purchase a new one.

Prisoner Paul M. Moore filed a claim seeking replacement of sunglasses that were taken from his cell. He tried to persuade prison officials to settle his case, noting that he had won two prior property claims.

"I seem to be winning and only costing the state more money," wrote Moore. ODOC stubbornly refused to bow to the taunt, only to have a judge order them to pay Moore another \$215 for the sunglasses. The state spent \$3,436 fighting his claim. Those were some expensive sunglasses; ODOC's commissary sells sunglasses for \$4.00.

While many prisoner property claims are settled for token amounts, cases such as those described above led prison officials to seek passage of Senate Bill 77 (2011), which would make it more diffi-

cult for prisoners to bring and prevail on claims for lost or damaged property.

ODOC officials told state auditors that prisoners have too much property, because rules limiting their property are rarely enforced. Additionally, ODOC does not use a centralized automated tracking system for prisoner property. Each prison has devised its own system for logging property on handwritten inventory forms, making it difficult to track property when prisoners are transferred from one facility to another.

"Staff members often find themselves e-mailing, calling and faxing property records back and forth among institutions in order to respond" to prisoner complaints about lost or damaged property, according to the audit.

ODOC officials are months behind in implementing changes recommended by the auditors, such as tightening property limits and improving prisoner property tracking. Two years ago, the ODOC tested property tracking software developed by Canadian prison officials, but the program

has not yet been fully implemented.

Oregon prisoners will have to work harder to win future property claims, though, because Senate Bill 77 was signed into law on June 7, 2011. The legislation provides, among other provisions, that small claims cases filed against the ODOC must also be served on the Attorney General's office, and the state has 30 days to respond. Small claims cases may be transferred to circuit court upon the request of the ODOC or the Attorney General's office. Further, before obtaining a default judgment, prisoners must file a notice of intent to apply for an order of default ten days before such an order is entered. The intent of the law is to make it more onerous for prisoners to file property claims in small claims court.

Of course, if ODOC employees stopped damaging, improperly taking and losing prisoners' property, that might reduce the number of claims, too. ■

Sources: *Statesman Journal*, [www.leg.state.or.us](http://www.leg.state.or.us)

## Texas Prisoner's Denial of Dentures Claim Affirmed in Part, Reversed in Part by Fifth Circuit

Nicolas Marquez, a Texas Department of Criminal Justice (TDCJ) prisoner held at the Polunsky Unit, has no teeth. He requested dentures but the request was denied because his Body Mass Index (BMI) was too high. He was told that TDCJ dental policy requires prisoners to have a BMI of less than 18.5 to qualify for dentures. Marquez, who weighed around 122-135 pounds, had a BMI between 20 and 23. He had been issued a soft food pass, which the Food Services Department reportedly refused to honor, and at times was given blended food.

Marquez filed a civil rights suit pursuant to 42 U.S.C. § 1983 against a TDCJ dentist, dental assistant, nurse, facilities practice manager, food services officer, dental hygienist, the warden, a regional director and the TDCJ's director, alleging deliberate indifference to serious medical needs in violation of the Eighth Amendment. The district court held an evidentiary hearing, during which a nurse testified regarding Marquez's prison medical records.

After conducting a review of recent unpublished Fifth Circuit decisions related to prisoners and dentures, the court held that Marquez's complaints of "an inability to chew food, stomach cramps, gas, spastic colon and GERD [gastroesophageal reflux disease], which resulted in a loss of weight of 13 pounds since his arrival at the prison system, are consistent with the type of problems listed in several recent cases that led the Fifth Circuit to conclude that inmates had a serious medical need."

Therefore, the district court allowed his suit to proceed in an August 12, 2009 ruling. However, the dental hygienist, warden, regional director and TDCJ director were dismissed because they were not directly involved in the denial of Marquez's request for dentures. See: *Marquez v. Quarterman*, 652 F.Supp.2d 785 (E.D.Tex. 2009).

The court subsequently denied several motions to dismiss filed by Dr. Tanya Woody, who Marquez claimed was one of the TDCJ dentists who had refused to



provide him with dentures. The district court found that Marquez had a potentially meritorious federal civil rights claim against Dr. Woody for being deliberately indifferent to his serious medical needs by denying him dentures.

But on March 18, 2010, the district court dismissed Marquez's complaint in its entirety after it was transferred to another judge. The court found that Dr. Woody had never treated Marquez or denied him dentures; rather, it was two other prison dentists, not named as defendants, who had turned down his requests for dentures. Marquez insisted that he had seen Dr. Woody, whom he alleged "did not electronically sign an entry [in his medical file] because she was only employed as a part-time dentist under contract and was not able to sign an entry under her own name."

In dismissing the lawsuit, the court found that Marquez had failed to present evidence showing he had a serious medical need or that prison officials were deliberately indifferent to that need, and held the defendants were entitled to qualified immunity. Further, Marquez had failed to exhaust the prison grievance process with respect to one of the defendants, Lemaster, as required by the Prison Litigation Reform Act. See: *Marquez v. Quartermaster*, U.S.D.C. (E.D. Tex.), Case No. 9:09-cv-00071-JKG.

Marquez appealed to the Fifth Circuit, which affirmed the dismissal in part and reversed in part on September 6,

2011. The Court of Appeals agreed that Marquez "did not show that any of the medical providers acted with deliberate indifference to his medical needs," but reversed the dismissal of Lemaster based on failure to exhaust the grievance process, finding that Marquez had in fact named Lemaster in a grievance and Lemaster was not entitled to qualified immunity.

Additionally, the Fifth Circuit reversed the dismissal of injunctive relief claims against TDCJ director Rick Thaler, because the district court had "erroneously concluded that Marquez was suing Thaler solely because of his supervisory role, ignoring the fact that Thaler may be held liable if he implemented a policy that itself causes a constitutional violation." See: *Marquez v. Woody*, U.S. Court of Appeals for the Fifth Circuit, Case No. 10-40378; 2011 WL 3911080 (unpublished).

However, the district court dismissed the case following remand on November 1, 2011, as Marquez had since been released from prison and did not provide the court with his new mailing address.

This case illustrates the importance of suing the correct defendants, including those who actually caused the constitutional violation and, where prison policies are being challenged, those who are responsible for promulgating the policies. It also highlights the need for released prisoners to inform the court of their new address; had Marquez done so, he may have ultimately prevailed on the remanded claims. ■

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# Review: Directory of Inmate Shopping Services E-Commerce

by Mike Brodheim

**D**iSSE, short for Directory of Inmate Shopping Services E-Commerce, promotes itself as “America’s largest inmate shopping guide.” Edited by George Kayer, currently on death row in Arizona, DiSSE is a compilation of companies, organizations and individuals who do business with and/or provide paid services to prisoners. The publication is updated periodically, although precisely how often is unclear; this review is of DiSSE’s holiday edition with a publication date of October 30, 2010. *PLN* has received more recent copies since this review was written.

For \$12.98, DiSSE provides not only lists of companies but also reviews and ratings of those companies. The reviews are by Kayer himself, which, depending on your point of view, is either the strength or the weakness of DiSSE. The impression of this reviewer is that Kayer is a convict with integrity who is trying to make a buck, under extremely difficult circumstances, while at the same time providing a legitimate and useful service to other prisoners.

The holiday edition of DiSSE was 166 pages. It included lists for those interested in developing their writing skills or publishing books, pen pal services and websites, hobby and craft hookups, art info, sports journals, contests (over 50 with cash prizes totaling more than \$20,000 for fiction, nonfiction, poems and screenplays), “motor head” magazines, and other businesses (over 350) organized into 89 categories, ranging from legal services to gift services, education to music, personal assistants to magazines for prisoners.

Sprinkled throughout DiSSE are photos of scantily clad women – enticements to purchase a catalog of fantasy photos from a company that uses DiSSE to promote its products. Indeed, DiSSE offers any business that markets to prisoners – as well as any prisoner with a “hustle” – the opportunity to place classified ads in each issue.

Kayer gives *Prison Legal News* a 10+ rating. He is frank and forthright in his reviews; to borrow a popular baseball expression, he calls ‘em as he sees ‘em – and for that, at least to the extent that his opinions are reflective of other prisoners’ assessments generally, he is to be commended.

In this reviewer’s eyes, however, DiSSE has a ways to go before it is worthy

of a “10” rating itself. Most of Kayer’s reviews are handwritten, not typeset, for example. Also, there are too many typos. Lastly the organization of the directory is somewhat difficult to navigate. One hopes that these shortcomings will be corrected in future editions, as DiSSE is an excellent resource for prisoners.

DiSSE can be ordered by contacting:

## Typewriters Alive and Well in American Prisons Despite Reports of Their Demise

**A** recent article in *The Daily Mail* reported the demise of the venerable typewriter in today’s computer age. “Godrej and Boyce – the last company left in the world that was still manufacturing typewriters – has shut down its productions plant in Mumbai, India with just a few hundred machines left in stock. Although typewriters became obsolete years ago in the west, they were still common in India – until recently. Demand for the machines has sunk in the last ten years as consumers switch to computers.”

However, new typewriters are still being sold ... in American prisons.

Ed Michael, general manager of sales for Swintec, a New Jersey-based company, observed that there are still typewriter manufacturers. “We have manufacturers making typewriters for us in China, Japan, Indonesia,” he said, noting that Swintec owns those factories. “We have contracts with correctional facilities in 43 states to supply clear typewriters for inmates so they can’t hide contraband inside them.”

Swintec makes different types of typewriters available depending on a prison system’s regulations. For example, Model 2416DM CC is available in six versions, all with different amounts of memory capable of storing from 4,000 to 128,000 characters. It takes about 2,000 characters to print the average business letter; a full page of double-spaced text is estimated at 2,000 characters.

Michigan allows 128,000 characters of typewriter memory, while New York restricts memory to 7,000 characters and Washington State permits 64,000. Swintec also manufactures typewriters with no memory, such as Model 2410CC, for the most restrictive states (such as Texas). Some prison systems, such as Florida

Tia Tormen Productions, P.O. Box 8069, Pittsburgh, PA 15216. The book is also available from other sources, including Amazon.com. A more recent edition, dated May 7, 2011, is currently available for \$12.98 plus shipping. Note that prior ordering addresses in Kingman, Arizona and Hillsboro, Oregon are no longer valid. 📧

and Oregon, have banned typewriters and word processors entirely.

Although not coming anytime soon, there are initial signs that prison typewriters may be going the way of typewriters on the outside. The federal Bureau of Prisons is deploying its Trust Fund Limited Inmate Computer System (TRULINCS), which allows prisoners to send and receive emails of up to 13,000 characters at dedicated kiosks but does not provide direct access to the Internet. [See: *PLN*, Dec. 2009, p.24].

Washington State’s prison system is also experimenting with email. Dan Pacholke, Washington’s director of prisons, touts email for prisoners because it “reduces smuggling threats and costs less to process and read than paper mail.”

“I would say that email is more secure in the sense that we can translate it from a foreign language to English. You can read the handwriting. It doesn’t lend itself to encryption. You can’t use meth-soaked paper. You can’t put white powder in the envelope,” he said.

A number of other state prison systems are providing various types of email services to prisoners, such as those offered by a company called JPay, which supplies money transfers, video visitation and email to prisons and jails in 27 states, for a fee.

So is email an existential threat to the prison typewriter? Perhaps. But presently, no prison offers an email system that would allow a prisoner to compose and submit legal pleadings to a court or write the great American novel. Thus, for now, Swintec’s future is safe and secure – inside American prisons. 📧

Sources: [www.minyanville.com](http://www.minyanville.com), [www.strikethru.net](http://www.strikethru.net)



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# Washington Prison Guard's Murder Results in Demotions, Firings and \$26,000 Fine

by Mark Wilson

An outside investigation has determined that the murder of a Washington Department of Corrections (WDOC) guard was the result of poor staff management and training by prison officials.

On January 29, 2011, prisoner Byron Scherf, 52, strangled WDOC guard Jayme Biendl, 34, to death in the chapel of the Monroe Correctional Complex, sparking both internal and external investigations into factors that contributed to Biendl's murder.

In July 2011 the WDOC released the results of its internal investigation, which faulted line staff who were slow in discovering that Biendl was missing and in locating her body. Biendl's body was not found for almost two hours; she had been strangled with an amplifier cord.

"We carefully reviewed every action that occurred on that night and found that nearly every staff member followed procedures and policies," said Superintendent Scott Franks. "However, we did find some staff members who did not take appropriate actions or intentionally misled investigators."

Seven WDOC employees were disciplined as a result of the internal report's findings: Lt. Jose Briones, Lt. Rodney Shimogawa, Sgt. Christopher Johnson, and guards Brenda Fredricks, George Lyons, Charles Maynard and David Young. Briones and Shimogawa were reprimanded for failing to properly account for Biendl and failing to notify perimeter staff when Scherf was reported missing. Johnson was demoted. Fredricks was reprimanded for failing to conduct a complete search of the chapel area before declaring it clear. Lyons, Young and Maynard were fired. Lyons had "falsely logged that the Chapel cleared at 2045 hours (8:45p.m.)," while Maynard "failed to properly inspect and secure the Chapel" and Young was not in his assigned area.

Subsequently, the Washington Department of Labor and Industries (L&I) issued an investigative report that placed the blame a bit higher up the WDOC's supervisory chain.

The L&I investigation found that prison managers had failed to enforce rules, including one that directed Biendl to assist staff in a nearby building once her chapel duties were complete. The order was not consistently followed or

enforced by prison supervisors, so no one was alarmed by Biendl's absence, according to the report.

Outside investigators also determined the WDOC had failed to ensure that guards had reviewed orders, as required by policy. Other policies, such as how to respond to emergency radio transmissions, were found to be lacking as well. The L&I investigation resulted in a \$26,000 fine against the WDOC due to those deficiencies.

Teamsters Local 117 noted that the L&I investigation exposed a culture of complacency and neglect among WDOC management. "The organization must be held accountable," said Local 117 Secretary-Treasurer Tracy Thompson. "Safety measures must be put into place immediately to protect all correctional employees."

Washington Corrections Secretary Bernie Warner said the WDOC is addressing the deficiencies cited in the L&I investigation through additional staff train-

ing and a review of safety procedures.

Scherf, charged with murdering Biendl, faces the death penalty. He had been serving a life sentence for multiple rapes under Washington's three strikes law, and allegedly told investigators that he targeted Biendl because he had a grudge against her.

As a result of Biendl's death, improved security measures were instituted at WDOC facilities – including panic alarms and tracking devices for guards. Also, a number of programs for prisoners, including volunteer and religious programs, were curtailed. Biendl was the first Washington DOC employee allegedly killed by a prisoner since 1979. Two other Washington DOC guards were murdered by their co-workers during that time period. ■

Sources: *Associated Press*, [www.seattlepi.com](http://www.seattlepi.com), [www.komonews.com](http://www.komonews.com), [www.kuow.org](http://www.kuow.org), *Seattle Times*, *Washington DOC employee discipline letters*

## California Criminalizes Cell Phone Smuggling, Seeks Technology to Block Cell Phone Calls from Prisons

In April 2011, Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation (CDCR), announced that he intended to enlist the aid of companies that bid for the state's lucrative prison phone service contract in an effort to stem the ever-increasing tide of unauthorized cell phone calls made by prisoners.

Cate's motivation is simple. CDCR cannot afford the estimated \$16.5 million to \$33 million it would cost to install up-to-date "managed access" technology at all 33 state prisons to block cellular signals. The motivation for the phone companies to help combat cell phone use by prisoners is equally simple: profits. As the number of contraband cell phones in the CDCR has grown, the prison phone system's revenue has fallen.

In a recent interview, Cate put it bluntly. "If cell phones are inoperable, the company will make more money," he said. That is, without contraband cell phones, prisoners who want to call family

members and friends will have only one other option – prison pay phones, which will generate more money for the prison system's phone service contractor, currently Global Tel\*Link.

Cell phone jamming systems are used in prisons in Mexico, France, Australia and other countries, but face roadblocks in the U.S. due to a federal law that prohibits deliberate interference with radio signals, including cellular signals. Managed access systems circumvent that restriction by creating an electronic "umbrella" in a specific area that intercepts and blocks unauthorized cell phone signals within that area.

During a one-day test of a managed access system at a single CDCR facility, the system intercepted over 4,000 cell phone calls, texts and Internet access attempts. In the days after the test, usage of the prison phone system increased by 64%. The first managed access system in a U.S. prison was installed at the Mississippi State Penitentiary in Parchman in August 2010.



More importantly to prison officials, cracking down on contraband cell phones has public safety implications. They allege, while citing few if any concrete examples, that prisoners use cell phones to run criminal enterprises, arrange assaults and conduct other illicit business.

"We know that inmates with cell phones are ordering murders, organizing escapes, facilitating drug deals, controlling street gangs and terrorizing rape victims," said state Senator Alex Padilla.

To make their point, public officials invariably note that Charles Manson, convicted of orchestrating several infamous killings in the 1960s, has been found in possession of a cell phone not once but twice. Then again, there is no evidence that Manson was doing anything illegal with those phones.

CDCR records reflect that in 2006 guards confiscated 261 cell phones. By 2010, that number had ballooned to over 10,000. Given the bulkiness of cell phones – and the fact that while visitors must go through metal detectors, most employees are not searched before entering prison grounds – legislators believe that CDCR staff members are the most likely source of smuggled cell phones.

Certainly, at the prevailing black market rate of \$400 and up for a cell phone, smuggling cell phones into prison (which until recently was not a crime in California) can be a profitable enterprise, even for an otherwise highly-paid prison employee.

Whatever the source, the demand for cell phones among prisoners is high. Absent access to contraband cell phones, CDCR prisoners must use the prison phone system – and then only at inflated rates that, while less than in many other state prison systems, are higher than rates available to the non-incarcerated public (e.g., a 15-minute long distance call costs

\$6.65). [See: *PLN*, April 2011, p.1]. Thus, from a prisoner's perspective, purchasing a cell phone, even at the risk of possible disciplinary action, makes economic sense.

Indeed, while talk of "public safety" may fuel the debate over cell phone use by prisoners, ultimately the outcome may be determined simply by what makes economic sense to all the stakeholders. And the state has a financial stake, too, to be sure, as it continues to receive a kickback – \$800,000 in 2011 – from the company that provides the CDCR's prison phone service.

Meanwhile, legislation that criminalizes the smuggling of cell phones to prisoners, SB 26, was signed into law on October 5, 2011. The law provides that "a person who possesses with the intent to deliver, or delivers [to prisoners] any cellular telephone or other wireless communication device or any component thereof ..." is subject to a misdemeanor charge punishable by a six-month jail sentence or a \$5,000 fine, or both. Visitors who inadvertently carry a cell phone onto prison property but who do not intend to deliver it to a prisoner will have the phone confiscated and returned the same day (presumably after their visit). Prisoners who are caught with contraband cell phones will be subject to the loss of up to 90 days of good time credits.

Interestingly, SB 26, which was introduced by Senator Padilla, also requires the state to ensure as part of its prison phone service contract that until January 1, 2018, the phone rates for intrastate and interstate calls must be equal to or less than the rates in effect as of September 1, 2011, with the only allowable additional charges being per-minute charges and "prepaid account setup fees."

Sources: *Los Angeles Times*, [www.govtech.com](http://www.govtech.com), [www.pacovilla.com](http://www.pacovilla.com)

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# BOP Fails to Prove Non-Exhaustion Following *Pavey* Hearing

by Mark Wilson

On June 7, 2011, an Illinois U.S. District Court held that federal prison officials had failed to satisfy their burden of proving a prisoner did not exhaust administrative remedies before bringing suit.

Chad Alan Hicks was confined at the Chicago Metropolitan Correctional Center (MCC), a federal Bureau of Prisons facility, in October 2005 and April through June of 2006. He was placed in MCC's Special Housing Unit (SHU) on October 8, 2005, where he remained until October 25, 2005. During that time his cell had restricted water access and was inundated with insects.

On October 25, 2005, Hicks was transferred to the Ogle County Jail to face criminal charges. Following sentencing he was returned to MCC in April 2006. Hicks was again segregated in the SHU on May 18, 2006, where he remained until his June 7, 2006 transfer to another prison.

Hicks filed a *Bivens* action in federal court on May 2, 2006. He alleged that in October 2005 his SHU cell conditions "deprived him of his 'basic human needs'" and that in May 2006, MCC guard Dennis Rolke placed him "in administrative detention ... 'in retaliation for Plaintiff's actions relating to this law suit.'"

The defendants moved for summary judgment, arguing that Hicks had failed to satisfy the exhaustion requirement of the Prison Litigation Reform Act (PLRA), which "applies to *Bivens* suits, such as Hicks's, that are brought directly under the United States Constitution. See, e.g., *Dale v. Lappin*, 376 F.3d 625, 655 (7th Cir. 2004)."

The district court denied the motion, concluding that if Hicks had properly filed Bureau of Prisons grievance forms, as he claimed, "... and had heard nothing back, he would have been unable to appeal and would have properly exhausted his administrative remedies."

To formally resolve the exhaustion issue the court held a hearing pursuant to *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008). In *Pavey*, the Seventh Circuit held "that it is the province of the judge – not a jury – to determine whether a plaintiff has complied with the PLRA's exhaustion requirement.... At the *Pavey* hearing, a judge is empowered to resolve factual disputes pertaining to exhaustion and to make credibility determinations about the witnesses."

The court found Hicks' testimony at the *Pavey* hearing to be credible, and concluded "that Defendants have not met their burden of proving that Hicks failed to exhaust all available administrative remedies before bringing suit."

The district court rejected the defendants' post-hearing argument "that if the Court accepted Hicks's testimony that he properly filed his grievance forms, 'every prisoner in the federal system could bypass Congress' requirement of exhaustion by doing nothing more than providing unsubstantiated testimony stating 'I timely filed all the necessary forms and the Bureau of Prisons lost all of them.'"

However, the court explained, "To

the contrary, if the record consisted solely of the bald assertion quoted above, the result very likely would have been different." Yet Hicks' testimony "was supported by a number of pieces of contemporaneous documentary evidence, all of which together support an inference that this case may present an instance in which grievances were lost or misplaced after they left the inmate's hands...." One of those pieces of evidence was a carbon copy of the grievance form that Hicks said he had handed to an MCC guard.

Thus, the defendants' summary judgment motion was denied. See: *Hicks v. Irvin*, U.S.D.C. (N.D. Ill.), Case No. 1:06-CV-00645; 2011 WL 2213721. ■

## North Carolina Warden Charged With Obstruction in Beating Coverup

Richard L. Neely, the former warden at Lanesboro Correctional Institution, was charged in April 2011 with obstruction of justice, a Class H felony, for withholding or ordering the destruction of evidence relevant to an investigation at the prison.

Neely became warden at Lanesboro in November 2009 after allegations involving use of excessive force against a prisoner forced the early retirement of the facility's previous warden.

The charges against Neely allege that he "unlawfully, willfully and feloniously did obstruct justice by ordering evidence ... CD of video surveillance from Lanesboro prison, to be withheld and/or destroyed that was directly relevant and related to an ongoing investigation of Lanesboro inmates."

The investigation involved a November 2009 incident in which several prisoners and guards were involved in a fight. A former sergeant at Lanesboro, Stephanie Miller, said Neely ordered her to destroy video footage of the brawl because he was concerned it showed guards using excessive force. Instead Miller contacted the State Bureau of Investigation.

"I was instructed not to put the video in the felony file and to destroy it," she said. "... It was basically a cover-up of the assault. [Neely] didn't want to be investigated." Miller said she faced harassment

by DOC officials after she turned Neely in, and she later resigned. [See: *PLN*, Oct. 2011, p.30].

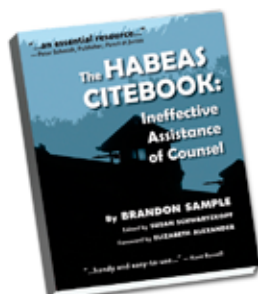
"In November 2009, a number of inmates seriously assaulted a number of correctional staff at Lanesboro Correctional Institution. Four inmates have been charged. No staff have been charged," a DOC spokesperson stated. "The Department is now looking into why Richard Neely allegedly did not initially release all of the footage to law enforcement."

Neely, a 30-year veteran DOC employee, continues to receive his \$71,846 annual salary while the investigation and charges against him are pending. He faces up to eight months in prison if convicted.

In May 2011, despite a public records request filed by media organizations, the DOC said it would not release the video footage that Neely is accused of withholding. "They are not only considered part of confidential inmate records, but also protected for security purposes," said DOC director of external affairs Pamela Walker. ■

Sources: [www.newsobserver.com](http://www.newsobserver.com), [www.charlotteobserver.com](http://www.charlotteobserver.com)

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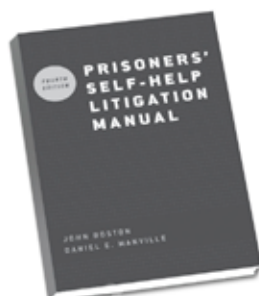


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# Illinois Prison Wages Cannot be Attached to Satisfy Incarceration Costs

by David Reutter

On June 16, 2011, the Illinois Supreme Court held that prison officials may not seize the wages a prisoner earns to satisfy the cost of incarceration. The Court's unanimous ruling also vacated a judgment of more than \$455,000 against an Illinois state prisoner for reimbursement of incarceration costs.

Kensley Hawkins has been imprisoned at the Stateville Correctional Center since July 1, 1983. During that time he worked in a prison industry program assembling furniture. The Illinois Department of Corrections (IDOC) filed suit against Hawkins on March 30, 2005, pursuant to a state statute that allows the IDOC to seek reimbursement for the cost of his incarceration.

Over the relevant time period, Hawkins had money from his wages deposited in his prison account. He had also established an account at an outside bank, which contained around \$11,000 at the time the IDOC's lawsuit was filed.

The state circuit court attached all but \$4,000 from the bank account, as the Code of Civil Procedure exempts that amount from collection. Ultimately, the circuit court entered a \$455,203.14 judgment against Hawkins for his incarceration costs, but precluded the IDOC from satisfying the judgment from Hawkins' bank account.

Both parties appealed. In affirming the judgment in favor of the IDOC, the appellate court held that prison officials could attach Hawkins' bank account to satisfy the judgment.

The Illinois Supreme Court granted review as to two issues: 1) May the IDOC satisfy a judgment with wages earned from a prison work program when a portion of those wages has already been applied to the cost of the prisoner's incarceration, and 2) Was the action properly authorized under law?

The questions were a matter of statutory interpretation, as the case arose out of several related sections of the state's Unified Code of Corrections. Specifically at issue were sections 3-7-6 and 3-12-5 of the Code.

The Supreme Court found that while 3-7-6 allows the IDOC to seek reimbursement of incarceration costs from a prisoner's assets, 3-12-5 creates a class of assets that are not subject to a reimburse-

ment action. The Court held that some assets may not be used to satisfy a judgment under 3-7-6.

The statute does not describe the nature of such non-attachable assets, but the Court noted that 3-12-5 requires a prisoner to contribute a "portion" of his prison wages for incarceration costs, and the IDOC must deposit all other wages into the prisoner's account. Hawkins had paid 3% of his wages – or \$750.60 – toward his incarceration costs, based on the percentage set by the IDOC.

The Supreme Court said to allow the IDOC to confiscate all of a prisoner's wages would not only render the language of 3-12-5 meaningless, but would contravene the legislative intent of ensuring that prisoners learn skills and save money for their release.

Permitting the IDOC to prevail would produce "a result that is absurd, unjust, and that our analysis indicates was not contemplated by the legislature. We therefore reject that interpretation. Instead, we hold that once a committed person's wages have been properly subjected to the offset provision of section 3-12-5 of the Code,

the remaining wages are not subject to collection under section 3-7-6."

"Work may be its own reward for some, but probably not for most inmates of the Department of Corrections," wrote Justice Lloyd A. Karmeier in a concurring opinion. "Once inmates realized that the extra work necessary to generate savings would benefit only the Department of Corrections, not them, they would quickly reevaluate the utility of prison employment."

In addition to vacating the order to attach Hawkins' bank account, the Court also vacated the \$455,203.14 judgment. As Hawkins' bank account contained funds that were generated from his prison wages, it could not be an asset from which the IDOC can seek reimbursement of incarceration costs.

While the IDOC had a reasonable belief that it could file suit against Hawkins, the Supreme Court noted that prison officials would no longer have such a reasonable belief following the ruling in this case in regard to other actions seeking reimbursement of incarceration costs. See: *Illinois v. Hawkins*, 952 N.E.2d 624 (Ill. 2011). ■

## North Carolina Jury Awards \$10 Million in Wrongful Death Suit Against Taser

by Matt Clarke

On July 19, 2011, a federal jury in North Carolina awarded \$10 million to the parents and estate of a teenager who died after being shocked with a Taser fired by a police officer. The defendant in the case was Taser International, Inc.

In March 2008, 17-year-old Darryl Wayne Turner was involved in a verbal altercation with store managers at a Food Lion supermarket in Charlotte, North Carolina where he worked. When Charlotte-Mecklenburg police officer Jerry Dawson, Jr. arrived at the scene there had been no violence or threats of violence, but Turner had knocked over a display and thrown an umbrella. Dawson issued a command and, as Turner turned and moved toward him, Dawson shot him in the chest with a Taser Model X26.

Dawson held the trigger of the Taser

down for 37 seconds, causing a high-voltage electrical current to be applied across Turner's chest. Turner collapsed on the floor. He was unresponsive when a backup officer arrived and ordered him to place his hands behind his back, so Dawson triggered another shock, this time for 5 seconds.

The officers noticed that Turner was not breathing and summoned medical assistance. Paramedics quickly determined that Turner's heart was in ventricular fibrillation; they tried to revive him, but were too late and Turner died. Dawson was suspended for five days and retrained on Taser use.

In 2009, the City of Charlotte settled all claims against the city and the police department in connection with Turner's death for \$625,000. Turner's parents then filed a wrongful death suit in state court



against Taser International, Inc. The suit was removed to federal court. Taser filed a motion for summary judgment, which was granted as to the issue of punitive damages because the plaintiffs had failed to prove willful or wanton conduct. Summary judgment was denied as to liability, and the court also denied Taser's request to exclude the plaintiffs' expert witness.

The expert Taser tried to have excluded was a highly-qualified physician and medical school professor who had authored numerous articles and textbooks dealing with the effects of electrical shocks on the heart. His conclusion was that the "X26 discharge can cause cardiac arrest by capturing the cardiac rhythm at very rapid rates, and precipitating ventricular tachycardia or ventricular fibrillation," especially if the Taser electrodes struck the chest area.

This contrasted with Taser's training material, which stated that Taser shocks had "no effect on heart rhythms." The training material did warn against repeated or sustained shocks, but only because they might temporarily inhibit breathing. Also, Taser had issued new training recommendations in October 2009, instructing officers not to aim directly for the chest when deploying Tasers.

After hearing the testimony at trial, watching a videotape of the incident and reviewing Taser's training materials, the jury found that Taser unreasonably failed to provide adequate warning or instruction, which created an unreasonably

dangerous condition that Taser knew, or should have known, would pose a substantial risk of harm and was the proximate cause of Turner's death. The jury also found that Dawson did not operate the Taser contrary to Taser's inadequate instructions and that he could not have known of the existence of the risk of harming Turner when he used the Taser.

The jury awarded \$10 million in compensatory damages to the plaintiffs, who were represented by Charlotte, North Carolina attorneys Ken Harris and Charles Everage, and California attorneys John F. Baker, John Burton and Peter Williamson.

"Hopefully, this verdict will sound the alarm to police officers around the world that firing these weapons into the chests of people should be avoided," said Burton. Taser announced it would appeal the verdict. See: *Turner v. Taser International*, U.S.D.C. (W.D. NC), Case No. 3:10-cv-00125-RJC-DCK.

The day after the \$10 million jury award, Charlotte police used a Taser on 21-year-old Lareko Williams, who was in a physical confrontation with a woman at a light rail station. Williams was pronounced dead an hour later, and the police department suspended the use of Tasers the next day.

Charlotte City Attorney Mac McCauley said the city and its police department continue to support the use of Tasers, though. "It is still a very effective, nonlethal force to control a situation," he said,

apparently without irony.

However, in August 2011, following an internal review of Taser use by the Charlotte-Mecklenburg police department, Police Chief Rodney Monroe said officers would not be allowed to carry Tasers until a second review by the Police Executive Research Forum had been conducted.

The following month the City of Charlotte voted to purchase 1,600 new Taser models, at a cost of \$1.83 million, which have safety features designed to reduce the risk of killing or seriously injuring people who are Tasered. The new Tasers, Model X2, have a 5-second limit on the amount of time someone can be shocked. "That five-second limit is critical," said Monroe. "No matter how long the officer may hold the trigger down, five seconds is as long as it will cycle itself."

Then again, an officer can inflict multiple 5-second shocks, one after the other, simply by pulling the trigger over and over. Most of the \$1.86 million to purchase the new Tasers will come from the city's general fund, while \$400,000 will be paid from an asset forfeiture account. ■

Additional sources: *Charlotte Observer*, [www.aboutlawsuits.com](http://www.aboutlawsuits.com)



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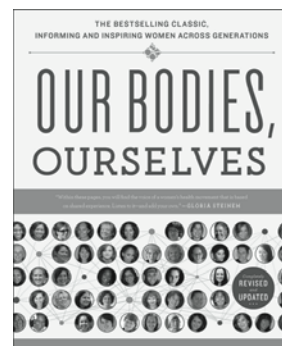
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# CMS Pays \$275,000 in New York Prisoner's Jail Death

Correctional Medical Services (CMS) has agreed to pay \$275,000 to settle a lawsuit related to a prisoner's death. The suit, which was filed in New York's Monroe County Supreme Court and then removed to federal court, alleged negligence, medical malpractice and deliberate indifference.

Orlando Samuels was booked into the Monroe County Jail (MCJ) on April 27, 2007 for a parole violation. He informed employees with MCJ's medical contractor, CMS, that he had high cholesterol, high blood pressure and a heart condition; he also told them he was prescribed and taking nitroglycerin, enalapril, Lipitor, aspirin and isosorbide to treat those conditions.

Other than his nitroglycerin, Samuels was not given any medication during his nine-day stay at MCJ. He made repeated verbal requests and submitted sick call slips seeking his medications, but did not see a doctor until May 4, 2007. At that time the doctor wrote prescriptions to treat Samuels' conditions.

Shortly after 7:00 a.m. the next day, Samuels informed a guard that he was experiencing chest pain and needed medical assistance. A CMS nurse responded at 7:12 a.m., and she and the guard took Samuels to the booking area. About eight minutes later, CMS employee Dr. Michael Latunji was advised of the situation. He prescribed aspirin but there was no record it was received by Samuels.

Around 7:30 a.m., Samuels collapsed due to a heart attack. Attempts to revive him failed, partly due to a defective battery in the jail's automated external defibrillator. He was pronounced dead at a local hospital.

Samuels' estate filed suit and CMS's medical malpractice insurer, Everest Indemnity Insurance Company, took over the defense and indemnified the county defendants. The parties reached a settlement agreement on May 31, 2011.

Samuels' estate accepted \$275,000 to settle the case due to the risks of the litigation. Specifically, CMS had experts who would testify that Samuels' history of cocaine and alcohol abuse precluded CMS's liability. The conscious pain and suffering he endured was minimal, and loss of parental guidance for his 14-year-old daughter was compromised due to his criminal history and likelihood of returning to prison on the parole violation. Finally, Samuels was unemployed

and receiving public assistance.

Of the settlement, the lawyer representing Samuels' estate, Mark J. Valerio, will receive \$88,472.05 in attorney fees and \$9,583.86 for disbursements. The Monroe County Department of Social Services will be reimbursed \$19,428.25 for public assistance that Samuels received between 2004 and 2007.

## Audit Finds California Prison Employees Routinely Work Less Than 40 Hours a Week

In an April 2011 audit, the California Office of the Inspector General (OIG) found that over a three-month period ending in August 2010, mental health and education employees at Mule Creek State Prison routinely worked less than the 40 hours a week reflected on the timesheets they submitted for pay. The noted discrepancies, totaling over 4,000 hours, amounted to \$272,900 during the three-month period – or nearly \$1.1 million on an annualized basis. And that was at just one state prison.

The OIG compared the number of work hours paid to psychiatrists, psychologists and licensed clinical social workers (LCSWs), as well as to teachers, vocational instructors and education supervisors, with the number of hours those employees spent inside Mule Creek's secure perimeter as recorded by the prison's electronic card-swiping security system (the only such system currently in operation in the state's 33 adult prisons). After taking into account both authorized time off and training hours, the OIG found that a full 15% of the total hours for which mental health employees were paid, and 8% of the hours for which education employees were paid, remained unaccounted for.

Among psychiatrists (with average annual salaries of \$245,000), those scheduled to work four ten-hour shifts a week averaged only 7.5 hours inside the security perimeter each day, or just 30 of the 40 hours they were expected – and paid – to work each week. Incredibly, the psychiatrists at Mule Creek worked a full ten-hour day a mere 4% of the time. In the words of one clinician, leaving early after completing patient work was “just part of the culture” – not surprising in light of the fact that the chief of mental health services himself worked only about 7.6 hours of his scheduled nine-hour shifts, on average.

A similar pattern emerged among

The parties moved to seal the details of the settlement agreement but the district court refused, citing “a well-established presumption favoring full and complete access to court proceedings and judicial documents.” See: *Samuels v. County of Monroe*, U.S.D.C. (W.D. NY), Case No. 6:09-cv-06223-MAT-MWP. ■

psychologists (with average annual salaries of \$103,000) and LCSWs (with average annual salaries of \$80,000). In regard to psychologists, those scheduled to work either nine- or ten-hour shifts averaged thirty-five hours or less per week. Among LCSWs, the collective average was only thirty-three hours per week regardless of the length of the shift.

The OIG found that both psychiatrists and psychologists scheduled to work standard eight-hour shifts actually worked their expected forty-hour work weeks. The inspectors noted that by working such shifts, clinicians could meet more frequently with patients; conversely, with ten-hour shifts they were left with three hours a day of non-patient (or administrative) time, a full 30% of their scheduled work load.

As summarized by the OIG, a change from a “4/10/40” schedule to a “5/8/40” schedule would result in a 25% increase in patient hours (from 28 to 35 per week) and a corresponding 58% decrease in non-patient hours (from 12 to 5 per week). While acknowledging that clinicians prefer the 4/10/40 schedules, the OIG found a change to 5/8/40 schedules “necessary to better align clinicians' work schedules with delivering optimal patient care,” as well as to “minimize ... the reasons for employees ... leav[ing] work before their shift ends.”

Among teachers and vocational instructors (with average annual salaries of \$77,000), the OIG found average work-weeks of just 37 and 36 hours, respectively – again, not surprising considering that their supervisors put in less than a full day's work, averaging between 6.6 and 7.0 hours per day, or the equivalent of just 33-35 hours per week.

“Many of the prison's mental health and educational employees were fully paid, but did not average working full days inside the prison,” the OIG

audit concluded.

Compounding matters, the OIG found that when prison employees take time off, the time off is often not reported on their timesheets (16% of the time) or erroneously recorded/tabulated by personnel office staff (22% of the time), with the result that employees are mistakenly overpaid for

hours not worked and, on balance, retain excessive leave credits. Those credits can then either be re-used or cashed in when the employees leave state service.

California Department of Corrections and Rehabilitation Undersecretary Scott Kernan said the overpayments due to shorted work hours were “unac-

ceptable,” though no employees were disciplined. ■

Sources: “*Mule Creek State Prison Must Improve Its Oversight of Some Employees’ Work Hours and Timekeeping*,” *California Office of the Inspector General* (April 2011); <http://sanfrancisco.cbslocal.com>

## Tennessee Court Again Orders CCA to Produce Records in PLN Public Records Case

On December 1, 2011, Chancellor Claudia C. Bonnyman of the Chancery Court of Davidson County, Tennessee issued a bench ruling directing Corrections Corporation of America (CCA), the nation’s largest private prison firm, to produce records in a long-standing public records lawsuit filed against the company.

The suit was brought by *PLN* associate editor Alex Friedmann. In 2007, CCA denied Friedmann’s request for records related to litigation filed against CCA and for reports or audits that found contract violations by the company, among other documents. The Chancery Court ruled in Friedmann’s favor in July 2008, finding that CCA was the “functional equivalent” of a state agency and ordering CCA to produce the requested records. [See: *PLN*, Oct. 2008, p.24].

On appeal, the Tennessee Court of Appeals affirmed the lower court’s finding that CCA was the functional equivalent of a government agency, noting, “With all due respect to CCA, this Court is at a loss as to how operating a prison could be considered anything less than a governmental function.”

The Court of Appeals remanded the case to the Chancery Court in September 2009 to determine whether some of the requested records did not fall within the definition of the public records act or constituted attorney work product, which would make them exempt from disclosure. CCA’s appeal to the Tennessee Supreme Court was rejected. See: *Friedmann v. CCA*, 310 S.W.3d 366 (Tenn.Ct.App. 2009), *appeal denied*.

Following remand, CCA produced a number of the requested records, including hundreds of pages from reports and audits in which CCA had been found in violation of or non-compliance with its contractual obligations to operate prisons and jails in Tennessee. However, CCA refused to produce copies of settlement agreements, verdicts or releases in cases

where the company had paid damages or other monetary amounts to resolve lawsuits or claims; CCA also refused to release spreadsheets, database printouts or similar documents listing such cases.

At a hearing on November 1, 2011, Chancellor Bonnyman heard testimony from CCA general counsel Steve Groom and arguments from attorneys on both sides related to the records the company had refused to produce pursuant to Friedmann’s original public records request.

Friedmann entered as an exhibit at the hearing a spreadsheet listing cases that CCA had settled from 2001 through 2003, including the settlement amounts, which CCA had submitted as part of a contract proposal in Florida. Groom stated that the release of such information had been “inadvertent,” as almost all of CCA’s settlements are confidential. However, he admitted that he had not contacted any of the opposing counsel in the cases where the settlement details were disclosed in the spreadsheet, even though CCA had apparently breached the confidentiality provisions of those settlements.

On December 1, Chancellor Bonnyman ruled against CCA, holding that the company, as the functional equivalent of a government agency, could not keep secret its settlement or verdict documents, nor its spreadsheets or database printouts listing resolved litigation against the firm. Such documents would be available under the public records act if requested from government agencies, which generally are not allowed to enter into confidential settlements.

“CCA is funded almost entirely by public, taxpayer money through government contracts,” said Friedmann. “The court’s ruling properly ensures that CCA is held accountable to the public to the same extent as government agencies, since CCA is performing a governmental function.”

Chancellor Bonnyman exempted from disclosure settlement documents that were sealed by order of a state or federal

court. Further, CCA will first submit the spreadsheets and database printouts to the Chancery Court under seal for an *in camera* review.

“CCA has fought tooth-and-nail against disclosing these records for more than four years,” Friedmann stated. “This would not have occurred with a government agency, and evidences a significant problem with prison privatization: private prison companies like CCA prefer to operate in secret, with little transparency, and are not accountable to the public.”

“If CCA has nothing to hide, then they should have no problem producing documents that government agencies would have to produce,” Friedmann added. “Instead, CCA has indicated it will again appeal the court’s ruling, thereby removing all doubt that it prefers corporate secrecy over public disclosure, even though the company performs a governmental function and is paid with taxpayer funds.”

The case is *Friedmann v. CCA*, Chancery Court of Davidson County (TN), Case No. 08-1105-I. *PLN* was ably represented by Memphis attorney Andrew Clarke, who is seeking attorney fees from CCA for the company’s willful refusal to release the requested records after the case was remanded from the Court of Appeals. ■

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# Russian Prison Officials Sentenced for Torture and Rape of Prisoners

by Matt Clarke

In March 2011, Lt. Colonel Vyacheslav Tippel, former head of the prison department for the St. Petersburg region in Russia, received a seven-year sentence for ordering the rape and torture of a prisoner. Six other prison officials with the Federal Service for the Execution of Punishment (FSIN) received sentences between four and six-and-a-half years for their involvement in that and an unrelated, similar incident.

In February 2009, a prisoner serving time for petty theft got drunk and failed to return from furlough. Located hundreds of miles away in Vladimir, he was returned to St. Petersburg and placed in the Gaaz prison hospital.

Tippel sent FSIN Colonel Rostislav

Balabolko, Lieutenant Colonel Alexander Beryozkin and Major Vladimir Ignatyev to the hospital to “commit physical and psychological violence as a punishment for escaping.” They handcuffed, beat and wrote obscenities on the prisoner’s chest.

Balabolko also threatened two other prisoners into raping the returned escapee. Then the three high-ranking prison officials beat him some more.

Separately, FSIN Major Yevgeny Petrov was sentenced to six years in prison for raping a prisoner he was trying to force to cooperate with authorities, and for ordering three other prisoners to sexually assault the victim. That incident, in which the victim was anally raped with what appeared to be a mop handle, was video-

recorded. Lieutenant Colonel Andrei Gavrilov and his deputy, Major Alexander Khachikyan, were also charged and convicted in connection with that case.

The prisoners who were coerced or threatened into sexually assaulting the two victims were all acquitted. One of the victims, the escapee, later reportedly committed suicide by cutting his throat.

Human rights organizations in Russia, including the Foundation for the Protection of Prisoners’ Rights and the For Human Rights movement, noted that rapes and beatings are commonly used in Russian prisons as a means of control. ■

Sources: *BBC News*, *St. Petersburg Times*

## Prisoner Bike Repair Program Benefits St. Louis Kids

A recent joint project of the United States Penitentiary in Marion, Illinois and St. Louis BicycleWORKS is helping to provide bikes to St. Louis-area children. Under the program, prisoners at USP Marion are refurbishing old bicycles and donating them to children who might not otherwise have a ride. The U.S. Probation Office had asked the prison to take part in the program, and according to Jeff Baney, a spokesman for USP Marion, prisoners responded enthusiastically.

“I just think they enjoy knowing, despite being in jail, they’re still able to do something to help out children who may not otherwise have an opportunity to own

a bike. It gives them a sense of accomplishment and instills some self-worth. These inmates are not being paid for their work, they’re doing it strictly voluntarily. They just enjoy really any type of community service they can do,” he stated.

Patrick Van Der Tuin, director of operations for St. Louis BicycleWORKS, said the nonprofit organization started in 1988 as an opportunity for youth in St. Louis to be productive and increase their probability of positive life outcomes. He added that such goals are accomplished by providing children with incentives to develop their academic, vocational and social skills through the organization’s Earn-A-Bike Program. As of January

2011 approximately 490 bicycles had been refurbished at USP Marion, not only for BicycleWORKS but also for a nearby Boys and Girls Club.

Prisoners are provided with truckloads of bikes and the training needed to properly refurbish them. One of the prisoners working in the project said, “It gives the inmates the opportunity to give back to the community. I feel like when we’re in here we’re paying back the government for what we did without really being able to give back to our communities, and this is a good program to do that....” ■

Sources: [www.thesouthern.com](http://www.thesouthern.com), [www.stltoday.com](http://www.stltoday.com)

## Aramark Loses Laundry Contract to Oregon Prisoners

Effective June 2011, prisoners at the Oregon State Penitentiary took over the job of cleaning microfiber mop heads for the Salem Hospital.

The hospital previously contracted with Aramark Uniform Services to clean its mops, but on March 10, 2011 the hospital gave 90-day notice that it was canceling the contract due to concerns about Aramark’s cleaning quality.

“The problems were really about infection prevention because instead of being returned clean, we were getting mop heads back that were stinky and crusty,” said Julie Howard, a spokesperson for the hospital. “So we weren’t able to use them.

We instead were using a supply of our own mops that we cleaned in-house.”

Rather than contract with another private company, the hospital turned to the Oregon State Penitentiary’s commercial laundry.

“We already contract with [the prison] to clean our bed linens and staff scrubs, and they are doing excellent work,” Howard noted. “We’ve been very happy with their attention to quality, the infection prevention that we require in a hospital.”

Business owners and labor unions often accuse prison industries of competing unfairly with the private sector because they are exempt from minimum-

wage laws and other requirements. Aramark, however, had little to say about losing the Salem Hospital laundry contract to prison labor. Perhaps the irony of a prison profiteer losing business to prison slave labor is not lost on the company.

“We stand behind the quality and service we provide,” said Sarah Jarvis, Aramark’s communications director. “Although disappointed, we remain committed to identifying new business opportunities that will help minimize any impact.” ■

Source: *Statesman Journal*



# California Muslim Prisoner Afforded Access to Kosher Diet Pending Implementation of “Religious Meat Alternate Program”

by Mike Brodheim

In February 2010, the California Department of Corrections and Rehabilitation (CDCR) entered into a stipulated settlement agreement with Muslim prisoner Askia Ashanti, providing him with access to CDCR’s Jewish Kosher Diet Program pending the prison system’s implementation of a “Religious Meat Alternate Program” (RMAP) consistent with Muslim dietary practices.

As part of the settlement agreement, the CDCR agreed to pay \$5,000 to Ashanti’s counsel for attorney fees incurred in representing Ashanti, who initially filed suit pro se. The CDCR made no admission of liability as part of the settlement agreement.

Ashanti had filed a lawsuit in 2007, alleging pursuant to 42 U.S.C. § 1983 that he had been denied a halal diet required by the tenets of his Islamic faith in violation of the First Amendment’s Free Exercise Clause, the Fourteenth Amendment’s Equal Protection Clause and the Religious Land Use

and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, et seq.

He also alleged that CDCR officials had violated his constitutional rights, as well as RLUIPA, by failing to provide an interfaith worship facility appropriate for Muslims.

One day after entering into the settlement agreement, the CDCR amended its rulebook and added the “Religious Meat Alternate Program” as Section 3054.3 to Title 15 of the California Code of Regulations.

Ashanti said his complaint was one of several lawsuits brought by Muslim prisoners to address issues related to their exercise of religious rights.

Yet nine months after the stipulated settlement, on November 5, 2010, Ashanti moved the district court for permission to withdraw from the voluntary dismissal of the case. Ashanti asserted that the CDCR had altered the terms of the understanding of the agreement only one month after

the settlement, by providing a halal meal only for dinner while breakfast and lunch consisted of a vegetarian “no-meat” diet rather than halal meals. This contrasted with the prison system’s Jewish Kosher Diet Program, which provided three kosher meals per day.

According to CDCR’s own regulations, Ashanti’s description was accurate. DOM Chapter 5, Article 51 (Food Service), Section 54080.14, revised July 13, 2010, states that “The RMAP is only offered at the dinner meal. Inmate participants in the RMAP shall receive the vegetarian option at breakfast and lunch.”

However, the court denied Ashanti’s request to withdraw from the stipulated settlement on June 8, 2011, finding the case had been dismissed with prejudice and the court therefore lacked jurisdiction to act on any further motions. See: *Ashanti v. Tilton*, U.S.D.C. (E.D. Cal.), Case No. 2:07-cv-00807-MCE-GGH. ■

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# Head of Missouri Jail Sentenced for Beating, Arranging Attacks on Prisoners

The former head jailer at Missouri's Washington County Jail (WCJ), about 60 miles from St. Louis, has been convicted of violating the civil rights of four prisoners and obstruction of justice. His daughter, a guard at the jail, also was convicted of obstructing justice.

The charges against the former jail boss, Vernon Wilson, 57, stemmed from four incidents that occurred in 2005. In separate incidents, Wilson slapped two prisoners hard enough to force their heads into a concrete wall. In the latter two incidents, Wilson gave prisoners cigarettes for attacking two other prisoners he considered troublemakers. Three of the victims were awaiting trial; one was the son of a sheriff's deputy.

WCJ prisoner Gary Gieselman was a victim of one of the latter assaults. Wilson put Gieselman into the "rough tank" after he had an argument with Wilson's daughter. Gieselman was attacked by other prisoners and suffered permanent facial damage, including a broken jaw, fractures around his eye and missing teeth.

According to Thomas E. Perez, Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, "Wilson used the power of his position to punish these inmates," and in doing so, "his actions brought shame to his fellow law enforcement officers, but even more than that, they served to undermine our faith and confidence in the criminal justice system."

Gieselman said the jury's verdict confirmed that his civil rights had been violated. Nevertheless, he expressed dismay at the culture of abuse that was allowed to persist at WCJ. "While Vernon Wilson will face justice, I am still concerned that the practice of beating prisoners was allowed to continue for so long at the Washington County Jail. I do not understand why so many employees and officials stood by silently for so long."

In addition to Wilson's convictions for four civil rights violations, he also was convicted of lying to the FBI about the attacks. He was sentenced on July 13, 2011 to ten years in federal prison – the maximum. He had served in law enforcement positions for three decades.

Wilson's daughter, Valeria Wilson Jackson, 26, pleaded guilty to obstruction

charges after she lied to the FBI about the assaults. She was sentenced in March 2011 to five years on probation and six months of house arrest. She had testified against her father at trial. Both Wilson and his daughter were ordered to pay over \$13,000 to Gieselman for his medical bills.

Gieselman has also filed a civil rights

suit against Wilson, Jackson and Washington County; that lawsuit remains pending. See: *Gieselman v. Jackson*, U.S.D.C. (E.D. MO), Case No. 4:10-cv-01619-JAR. ■

Sources: [www.bnd.com](http://www.bnd.com), [www.cypresstimes.com](http://www.cypresstimes.com), [www.stltoday.com](http://www.stltoday.com), [www.therepublic.com](http://www.therepublic.com)

## Oregon Discontinues Failed Prisoner Deportation Program

Oregon's expedited deportation program, touted as saving \$2.1 million by transferring about 200 illegal immigrant prisoners to federal custody for early deportation, came up \$1.9 million short, causing state officials to kill the program.

According to the Oregon Department of Corrections (ODOC), 1,289 prisoners, or about 9.2% of the state's prison population, are illegal immigrants. With an average daily incarceration cost of \$84 per prisoner, the ODOC spends about \$39.5 million annually to confine those non-citizen offenders – most of whom are serving time for drug-related crimes.

In an effort to cut incarceration costs, in 2009 Oregon adopted a deportation program similar to a federal program known as Rapid REPAT. [See: *PLN*, July 2010, p.37]. The Oregon program called for the governor to commute the sentences of non-violent, non-citizen offenders who were within six months of release so they could be transferred to the custody of Immigration and Customs Enforcement (ICE) for expedited deportation. Proponents estimated that some 200 offenders would initially be deported under Oregon's version of the program.

"It was put together under the guise that this potentially would save the budget \$2 million," said Christine Miles, press secretary for Governor John Kitzhaber, who took office in January 2011. "There were a lot of limitations on this program, and once they finally got it off the ground and running, it just didn't pencil out."

Indeed, Oregon saved a mere \$172,097 by commuting the sentences of just 44 prisoners – 42 of whom were from Mexico – according to financial data provided by

ODOC officials. The last of the group of 44 prisoners was released to ICE custody in July 2010.

Oregon's deportation program was enacted on July 1, 2009 as part of HB 3508, but did not launch until January 2010 due to stalled negotiations between state and federal officials. Once a memorandum of understanding was finally reached, the eligibility criteria dramatically limited the pool of potential candidates, according to the ODOC.

"Initially, we had a big pool to look at and start weeding through," noted Guy Hall, administrator of the ODOC's Office of Population Management. "But once you got through that initial bubble, so to speak, the people waiting in line as they marched through their incarceration towards their last six months really slowed down."

Screening potentially eligible prisoners required extensive time and effort by ODOC staff, Hall noted. "I think people were assuming that the entire six months would be saved [in terms of incarceration costs], but there were some people that were a month to the door, a week or so to the door," he said. "So we didn't glean the entire six months savings for lots of folks in the initial screening."

In exchange for commutation and early release, eligible prisoners – who frequently did not speak English – were required to waive their right to challenge their deportation, and sign agreements that specified they would face up to 20 years in federal prison if caught again in the United States illegally. Legal complications related to those conditions chilled prisoners' interest in the program.

On September 24, 2010, the Ninth Circuit Court of Appeals held that cer-

tain illegal immigrants facing “stipulated removal” from the United States have a due process right to counsel and, when necessary, to qualified translators to properly explain legal issues related to their deportation. See: *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010).

“I think ICE had slowed down in marching through this process because this case was going through the courts,” said Hall, “and then there was an outcome that they felt left them with a very slender pool of folks they could actually deport without that counsel process.”

ICE has spearheaded longstanding, successful expedited deportation pro-

grams in other states, such as Arizona, Georgia and New York. Those states have deported thousands of undocumented offenders before completion of their prison sentences, resulting in substantial savings. Georgia’s program has saved \$200 million, New York has realized \$150 million in savings and Arizona saved over \$33 million, according to immigration officials.

When Oregon achieved just 8 percent of its projected \$2.1 million in savings, the governor and his policy advisors “took a hard look” at the deportation program and pulled the plug, Miles stated.

“This program wasn’t giving us

the cost effectiveness that we originally thought,” she said. “We also want people to know that if you come to Oregon and you do a crime, no matter where you are from, you need to do the time.”

Pursuant to statute, the commutations granted to the 44 Oregon prisoners so they could be transferred to ICE custody and deported were not included in an annual report to the legislature regarding the number of pardons and clemencies granted by the governor. It’s as if those commutations – like the projected cost savings to the state – never existed. ■

Source: *Statesman Journal*

## Prisoners Contribute to Flood Control Efforts in Louisiana

In May 2011, as the rising Mississippi River threatened to flood vast stretches of riverfront territory, Louisiana prisoners from a number of parishes, including East Carroll, Madison, Tensas, Pointe Coupee and Concordia, filed sandbags in an effort to save lives, buildings and property.

Their efforts did not go unnoticed. “They’re working their hearts out,” said Concordia Parish Sheriff Randy Maxwell. “In all honesty, without them we couldn’t do all this.”

Echoing those sentiments, East Carroll Parish Sheriff Mark Shumate stated, “Without them it would be impossible to conduct this kind of flood fight.”

The prisoners, all deemed non-violent offenders, filled tens of thousands of sandbags. Those from East Carroll Parish worked 12-hour shifts. Sheriff Shumate credited one of the prisoners

with designing and building a machine that automatically fills sandbags – an invention which, he suggested, merited a patent.

Employing language that could be construed as either condescending or insightful, Sheriff Maxwell and Sheriff Shumate both remarked that the flood-fighting work gave the prisoners purpose.

“They enjoy it,” said Maxwell. “It makes them feel like they are contributing to something bigger than themselves.”

Similarly, Shumate said, “It gives them a chance to give something back, a chance at some redemption.” He added, “They appreciate that chance, and it shows.”

According to news report, Sheriff Shumate intended to expand the 12-hour work shifts to 24-hour work shifts (one hopes he considered that prisoners, no

matter how apparently enthusiastic about filling sandbags, still need to sleep).

State prisoners at Angola also helped in flood-control efforts, mainly to protect the prison grounds from flooding.

“It’s prison for those on the outside, but it’s home for those who stuck here this all we got, I got a life sentence I’m never leaving I’m gonna be here for the duration, why not try and make it better,” said Angola prisoner Darren Jarvis.

Two thousand prisoners at Angola were evacuated after a levee was breached, but thousands more remained. The prison is bordered on three sides by the Mississippi River, and the May 2011 flood was the worst to hit the area in over 70 years. ■

Sources: [www.thenewsstar.com](http://www.thenewsstar.com), [www.wbrz.com](http://www.wbrz.com), *CNN*



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## News in Brief:

**California:** On October 6, 2011, a San Quentin warehouse supervisor was fired following his arrest on suspicion of conspiracy, requesting or accepting bribes, and smuggling marijuana and cell phones to prisoners. Robert Alioto, 48, was freed on bond; he pleaded guilty on December 5, 2011 and awaits sentencing.

**Congo:** Government officials reported that 114 prisoners escaped from a prison in Tshikapa on Sept. 25, 2011. One prisoner was killed and another was wounded; the prisoners had complained about insufficient food and water before staging the mass escape. Earlier that same month, over 960 prisoners escaped from a facility in the city of Lubumbashi.

**Florida:** On Sept. 28, 2011, a three-count indictment was unsealed that charged Anthony Mangione, 50, the director of Immigration and Customs Enforcement for South Florida, with receipt, possession and transportation of child pornography. Mangione was arrested by FBI agents and ordered to undergo a psychological evaluation. "The government has concerns that given the magnitude of the charges, that he might melt down," said his defense attorney, David Howard. In October, a federal judge approved Mangione's release on a \$75,000 signature bond.

**Florida:** The Florida Dept. of Cor-

rections has stopped selling all tobacco products in prison canteens, and as of Sept. 30, 2011, all cigarettes and lighters were considered contraband. Prisoners who smoke were allowed to order nicotine patches for \$34.99. FDOC prisoners spent \$19 million on tobacco-related products in 2010. Prison officials cited health-related cost savings as a reason for banning tobacco, but such bans also create a lucrative black market that often results in smuggling by prison staff.

**France:** The anti-suicide paper pajamas given to suicidal prisoners at the Sante prison in Paris have failed to live up to their name. An unidentified 23-year-old prisoner used the pajamas to kill himself in September 2011 after finding a way to make the garment support his weight. Six months earlier, another prisoner had committed suicide using the anti-suicide pajamas. Over 70 French prisoners kill themselves each year; 96 percent of those deaths result from hanging.

**Georgia:** DeKalb County jailer Adriana Addison, 20, was herself jailed after being arrested on charges of stealing prisoners' identities and using them to file fraudulent tax returns and obtain food stamp cards. "We found that there was a scam here in which she was using our computer systems to get information on inmates - their names, date of birth, and

Social Security numbers," said DeKalb County Sgt. Adrien Bell. Addison's boyfriend, Robbie Sims, a convicted felon, and two other people also were charged in connection with the scheme. Addison was released on \$6,000 bond; her mother and stepfather work at the jail, too.

**Illinois:** Robert Buchanan, 45, a Cook County jail guard, was arrested in Sept. 2011 on charges of sexually assaulting his step-daughter when she was ten years old. The sexual assaults occurred in 1997; Buchanan was questioned at the time but not charged, and DNA evidence taken from the victim went untested for a decade at the Harvey Police Department. In 2007 the state attorney's office, Illinois State Police and Cook County Sheriff's Office raided the police department and recovered over 200 untested rape kits. Fourteen defendants, including Buchanan, have been charged since the kits were tested.

**Lebanon:** On September 23, 2011, a two-hour riot at the Roumieh prison in Beirut resulted in 17 injuries and ten Internal Security Forces members being freed after they were taken hostage by prisoners. Four security employees and 13 prisoners were wounded during the disturbance. "The hostages were freed in a unique operation carried out by an [Internal Security Forces] special Panthers unit and a Rapid Intervention squad," stated

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Colonel Amer Zaylaa, Lebanon's prison commander. The prisoners involved in the riot were members of Fatah al-Islam, a militant Sunni group.

**Maryland:** According to the Maryland Dept. of Public Safety and Correctional Services, in September 2011, apples grown by prisoners at the Roxbury Correctional Institution were being sold to the Maryland Food Bank. Prisoners were harvesting 2,000 bushels of apples; some will be served at the prison complex while some are provided to the food bank at \$.20 per pound, or around one-tenth their retail value.

**New Jersey:** On July 8, 2011, Camden County jail prisoner Bernard Jenkins, 26, was sentenced to 12 years in prison for biting a guard. The incident occurred in June 2008, when Jenkins created a disturbance and bit a responding guard in the face, removing a one-inch piece of skin that left a permanent scar.

**New Jersey:** Bucks County District Attorney David Heckler announced on October 7, 2011, that Sheriff's deputy Gary Browndorf, 55, had been arrested on charges of perjury, simple assault, false swearing, official oppression and unsworn falsification to authorities. Browndorf is accused of punching an arrestee who was handcuffed behind his back, then filing false criminal charges against the arrestee and his girlfriend, resulting in their impris-

onment. Heckler described Browndorf's actions as "a coward's crime."

**North Carolina:** According to a U.S. Department of Justice press release, former Columbus County Sheriff's Office sergeant Danny Ray Duncan, 63, pleaded guilty on October 6, 2011 to a civil rights charge in connection with an assault on a jail prisoner. Duncan admitted that he placed the prisoner in a cell with other detainees, knowing that he would likely be assaulted. "When corrections officers knowingly place the people they are charged with protecting at risk of serious harm, they undermine the very fabric of our legal system," said Assistant Attorney General Thomas E. Perez.

**North Dakota:** A sex offender who was being transported by TransCor, a private prisoner transport service and a subsidiary of CCA, escaped near Tower City in early October 2011. After being caught, Joseph Megna, 29, said the transport officer was giving him nothing but bread and cheese to eat. "I was starving and that's why I escaped and fled out into the cornfield," he said. "I wasn't trying to hurt anybody." Megna's brief escape resulted in a major response from law enforcement, including a SWAT team, thermal imaging devices and a North Dakota Highway Patrol airplane. Barnes County Sheriff Randy McClafflin said he "fully intend[s] to seek reimbursement" from TransCor for the

cost of the search.

**Ohio:** On October 12, 2011, Richland County Sheriff's Lt. William Franklin, Jr., 49, was charged with conspiracy to commit mail fraud. He is accused of falsifying paperwork to reduce a prisoner's sentence in exchange for jewelry, \$2,000 in cash and a car worth around \$2,500. Franklin submitted documents that falsely indicated the prisoner should get 66 days credit for time served in the county jail.

**Ohio:** John Rust, 38, a former Pickaway Correctional Institution payroll clerk, pleaded guilty on Sept. 28, 2011 to attempted tampering with records. Rust had padded the pay checks of seven other prison employees in 2009 in an attempt to overpay them a total of \$6,011. The prison staff who received the improper pay hikes were not charged or disciplined, as they claimed they were unaware of any wrongdoing. Rust was sentenced to 30 days in jail, but his conviction may be expunged under a three-year intervention program.

**South Carolina:** On October 10, 2011, Orangeburg-Calhoun Regional Detention Center guard Kerry King, 50, was fired following his arrest on DUI and cocaine possession charges. "We are officers for the community and we are to carry ourselves to a higher standard than others," said Willie Bamberg, director of the detention center. King was granted a \$5,000

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## News in Brief (cont.)

personal recognizance bond.

**Tennessee:** A CCA guard at the Silverdale Detention Facility in Chattanooga has been charged with smuggling drugs into the jail. Jesse Wedell, 20, was arrested on Sept. 29, 2011; Hamilton County Sheriff's Department officials said she had hidden around three-quarters of an ounce of marijuana in "her private area." Wedell was charged with two felonies and jailed on \$20,000 bond; she reportedly received \$25 to smuggle the drugs to a prisoner.

**Texas:** In late September 2011, former U.S. probation officer Armando Mora, 38,

was sentenced to 14 years in federal prison after he pleaded guilty to accepting bribes from and providing confidential information to a drug-trafficking gang. Mora would run background checks on drug couriers to see if they had any outstanding arrest warrants, before the couriers were hired for smuggling runs. He reportedly told the gang that two potential couriers were actually undercover agents.

**Texas:** An October 13, 2011 news article reported that the Ellis County Sheriff's Office was the target of a forgery and bad check scheme, likely orchestrated by a former prisoner who received a check from the sheriff's account for his remaining funds when he left the county jail.

At least 27 checks totaling over \$13,000 were forged using the jail's bank account information; five people were arrested and four others face outstanding warrants. The Ellis County Jail now plans to give released prisoners debit cards instead of checks.

**West Virginia:** Former state prison guard Joseph F. Roush, Jr., 35, was sentenced on Sept. 19, 2011 to 46 months in federal prison for possession of child pornography. Roush, who previously worked at the Lakin Correctional Center, a women's facility, had pleaded guilty in May 2011 after an FBI investigation discovered he had over 600 child porn images and videos. ■

## Criminal Justice Resources

### ***ACLU National Prison Project***

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### ***Amnesty International***

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***Family & Corrections Network***

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### ***Innocence Project***

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### ***Just Detention International***

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### ***Justice Denied***

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### ***National CURE***

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### ***November Coalition***

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### ***Partnership for Safety and Justice***

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### ***The Sentencing Project***

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)

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**The Criminal Law Handbook: Know Your Rights, Survive the System**, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

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**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

**Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It**, by Terry Kupers, Jossey-Bass, 245 pages. **Hardback only, prisoners please include any required authorization form. \$32.95.** Psychiatrist writes about the mental health crisis in U.S. prisons and jails. Covers all aspects of mental illness, prison rape, negative effects of long-term isolation in control units, and more. 1003

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# PRISON

## Legal News

VOL. 23 No. 2

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

February 2012

### Florida Provides Lesson in How Not to Privatize State Prisons

*by David M. Reutter*

When Florida lawmakers used a backdoor approach to try to privatize almost 30 state detention facilities in 2011, they likely did not anticipate the outcome. By the time the political dust had settled, the union representing prison employees had successfully sued to stop the privatization plan, the state's top two corrections officials had resigned, and an ethics complaint had been filed against the governor for accepting campaign donations from companies that stood to benefit from privatizing state prisons.

But first some background.

#### Private Prisons in the Sunshine State

Florida's Department of Corrections – the third largest in the nation – has been

in a constant mode of expansion since a federal court began overseeing the state's prison system due to a 1972 class-action lawsuit that challenged overcrowding and conditions of confinement. A prison population boom in the 1980s and a court-ordered limitation on the number of prisoners the system could hold created a dilemma.

At first prison officials erected tents to house prisoners at night, tore them down in the morning, and then put the prisoners on buses and shipped them around the state while court monitors inspected the prisons. This attempt to hide the true population count ended only after U.S. Marshals stopped a convoy of prison buses one morning. With the Secretary of the Florida Department of Corrections (FDOC) being found in contempt, lawmakers passed legislation to provide a prison population relief valve by awarding good time credits known as gaintime.

However, several high-profile crimes sensationalized by the mainstream media gave state politicians an excuse to renew their tough-on-crime agenda. Sentencing laws were strengthened and funding was made available to build more facilities, resulting in Florida's prison system exploding from just under 20,000 prisoners in 1980 to its current population of more than 101,000.

Operating prisons is expensive, though, and private prison firms stepped in with attractive claims of reduced costs. In 1993, Florida lawmakers decided to embark on an experiment in prison privatization. The authorizing legislation, Chapter 957, Florida Statutes, made a substantive change in existing law by

putting prison management – traditionally a function of the state – in the hands of for-profit companies. In return for this paradigm shift, the law requires that private prisons provide at least a 7% savings compared to similar state facilities (though there is little evidence that such savings have actually been achieved).

Florida currently has seven privately-operated prisons which are run by three private prison firms. Four are managed by Corrections Corporation of America (CCA), while the GEO Group operates two and MTC operates one. Approximately 10% of the state's prisoners are held in private prisons.

During his 2010 gubernatorial campaign, current Florida Governor Rick Scott promised to cut government waste, and the FDOC's \$2.2 billion budget became part of the conversation. Fearing that prison staff would lose their jobs under Scott's proposed budget cuts, the Police Benevolent Association (PBA), the union that represented state prison employees at the time and a staunch opponent of prison privatization, vigorously campaigned against Scott. Governor Scott's electoral victory signaled a loss of clout by the PBA in the court of public opinion.

#### Backdoor Budget Proviso

In 2011, the Florida legislature proceeded to slash spending across all state agencies. When it came to the FDOC's budget the PBA played its usual card, arguing that closing prisons and laying off guards would constitute a threat to public safety. But citing the need to cut the state's corrections expenditures, the Senate

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## **How Not to Privatize (cont.)**

Budget Committee slipped a last-minute proviso into the state budget, Senate Bill No. 2000.

The proviso required the FDOC to privatize 29 prisons, work camps, work release centers and annexes housing 16,000 prisoners in 18 South Florida counties known as FDOC Region IV – an unprecedented private prison expansion that would result in the termination of around 3,800 state employees. The privatization plan was to go into effect by January 1, 2012.

The PBA challenged the law shortly after it became effective on July 1, 2011 by filing suit in state court. Leon County Circuit Court Judge Jackie L. Fulford heard the parties' cross motions for summary judgment on September 29. The next day she entered an order that put the brakes on the prison privatization plan.

"Actions taken to date are declared illegal without authority in violation of law," Judge Fulford wrote in an order that prevented the privatization effort from moving forward.

At the outset Judge Fulford made clear that "the issue before [the court] is not whether the prisons in Florida may be privatized. The answer to that question is yes." Legislation already allows the FDOC to contract with private companies to operate and maintain prisons and supervise prisoners, the court noted.

However, "[u]nder existing substantive law, a specific legislative appropriation must be made for a proposed privatization contract after a decision to outsource is made and evaluated by FDOC for feasibility, cost effectiveness, and efficiency before FDOC proceeds with any outsourcing services," Judge Fulford found. "If it is the will of the Legislature to itself initiate privatization of Florida prisons, as opposed to FDOC, the Legislature must do so by general law rather than 'using the hidden recesses of the General Appropriations Act.'"

In other words, while state lawmakers could pass stand-alone legislation requiring the privatization of prisons in FDOC Region IV, they could not do so through a backdoor budget proviso. Better known as the single subject rule, Florida's Constitution requires that legislation be limited to one subject. The court held that the proviso in the appropriations bill requiring privatization of all Region IV facilities had no relation to the FDOC's budget

– the subject of the bill – and thus was unconstitutional.

Moreover, a "rush to meet the deadlines in the proviso" resulted in the skirting of statutory protections. "As such, the Legislature bypassed the very safeguards it built into the process that FDOC is required to follow when FDOC initiates privatization pursuant to substantive law," Judge Fulford concluded. See: *Baiardi v. Tucker*, Leon County Circuit Court (FL), Case No. 2011 CA 1838.

### **Political Fallout**

The court further found that the FDOC had not prepared any "cost comparison study, cost-benefit analysis, or business case analysis. It has not consulted the Auditor General. It did not include a business case analysis with the RFP [request for proposals]." Also, "it appears that the rush to meet the deadlines in the proviso has resulted in many shortcomings in the evaluation of whether privatization is in the best public interest as it relates to cost savings and effective service."

Indeed, it was not until two weeks after the PBA filed suit on July 13, 2011 that legislative staff, along with Governor Scott's office, contacted FDOC Secretary Edwin Buss to comply with the "spirit" of existing law related to the privatization of state prisons. It was then that Buss was asked to sign off on a four-page "business case" that had been written in his absence, which said performing due diligence was not applicable to seeking bids for privatizing prisons in Region IV.

Buss dutifully signed the document. "I wouldn't say I approved it, but yes, I read it and signed on it," he said.

"What they're asking you to do, I guess after the fact, is to do a business case for what has already passed? Is that essentially what this is?" PBA attorney Kelly Overstreet Johnson asked Buss during a September 2011 deposition.

"Yes. I mean, I guess the way you framed it, yeah" he replied. He added that the FDOC had prepared business justifications for other outsourcing that had a "much more in depth" analysis.

Buss said the prison privatization plan was "the largest I've ever heard of for private business." Considered an expert on correctional privatization for leading Indiana's efforts to privatize its prison health care system when he served as that state's DOC commissioner, Buss seemed surprised that he had not been consulted about the plan to privatize Region IV

## How Not to Privatize (cont.)

until after the appropriations bill with the proviso language was already signed into law.

Buss, who had been openly skeptical about the legislative effort to privatize the Region IV prisons, was forced to step down by the Scott administration on August 24, 2011. The governor's office cited "differences in philosophy and management styles," but it was widely recognized that Buss' failure to embrace the privatization plan was the reason for his abrupt departure, just six months after he took office.

"My gut would tell me that of all the issues that have come up, privatizing prisons was the deciding factor" in Buss' resignation, said state Senator Paula Dockery.

One of those other "issues" involved Buss being pressured by the governor's office to discontinue a contract with consultant Elizabeth Gondles to oversee the FDOC's privatization of prison health care services statewide. The bidding process for the \$400 million health care contract was canceled due to concerns that Gondles had written the RFP requirements to benefit her husband, James Gondles, executive director of the American Correctional Association (ACA). Under the terms of the RFP, all prison health care contractors had to "maintain full accreditation" by the ACA.

Following his forced resignation, Buss was replaced as FDOC Secretary by Ken Tucker, the assistant commissioner of the Florida Dept. of Law Enforcement. "I think Ed Buss was an honorable guy and I think he walked into a buzz saw and it's a shame," said Matt Puckett, executive director of the PBA.

The state fought hard to prevent Buss from being deposed in the PBA's lawsuit after he stepped down, with the Attorney General filing an unsuccessful appeal to the First District Court of Appeal. "It's a common principle that high-ranking people in government don't testify," Governor Scott argued.

The appellate court disagreed and the PBA was allowed to take Buss' deposition, in which he testified candidly about his lack of involvement in the proviso process and about the FDOC's RFP for the prison privatization plan.

In the latter regard, in her September 30, 2011 ruling in favor of the PBA, Judge Fulford took issue with the request for proposals that the FDOC put out for privatization of Region IV prisons. The RFP sought only one contract for all 29 facilities and no other options were considered. That may increase "convenience and speed," but there was no "demonstrated savings or benefit advantage" to that approach as required by law, the court wrote.

Professor Michael Hallett, chairman of the University of North Florida's Criminology Department, warned that awarding such an expansive prison privatization contract to a single company might "render[] the state subject to captivity by giving only one corporation so much control over a significant portion of the state budget."

State Senator Mike Fasano, who chairs a Senate Budget Subcommittee in

charge of prison spending, applauded the court's decision striking down the wholesale prison privatization plan. "This is a perfect example of why we should not be making major policy changes in provision language that did not go through substantive committees, debated, and taken testimony pro and con," he stated.

"It didn't go through the appropriate committee process. It wasn't heard in criminal justice committee in the Senate. It wasn't heard in my committee that oversees the Department of Corrections budget," Fasano noted. "You would think that if we were doing such a major policy change, it would have gone through those two committees. It wasn't a stand-alone bill and that's what, if I'm not mistaken, the court has said, that it should have been a stand-alone bill because it's a single subject issue."

House Leader Ron Saunders opined that the proviso was used to provide political cover. "There are political reasons they've been doing this, because they don't want to place some of their members in an awkward position," he said. "This way, people can shrug and say, 'I didn't have any choice and I had to vote yes'" in order to pass the appropriations bill.

Following its court victory, the PBA was feeling strong again. "It shows the Legislature and Governor that we will not be pushed around," wrote PBA president Jim Baiardi in a message to FDOC employees. "We struck a blow against the arrogance of the Legislature."

Governor Scott also declared a victory of sorts. While saying he supported the prison privatization plan, Scott also viewed the court's order as affirming the power of his office. "I should have the power to veto things that are major policy changes," he said. "I got elected as governor to make decisions on behalf of

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Then again, Scott didn't veto the prison privatization proviso in the appropriations bill when it crossed his desk, though he could have done so.

### Questionable Cost Savings

Senate Budget Committee Chairman J.D. Alexander responded to criticism about the failure to perform due diligence and follow proper legislative procedures regarding the prison privatization plan by saying his committee had received testimony that the plan would save around \$22 million annually. That estimate was based on the minimum 7% cost savings required by statute for private prison contracts, though such savings have not been proven.

“Donna Arduin suggested, not just Region IV, but said there was significant savings between privatized corrections on a per-day basis in say, Texas and some other places, over what Florida was spending,” said Senator Alexander.

Arduin is a nationally-recognized government cost-cutter. She has been a budget advisor to governors in Michigan, New York and California, was the budget chief for former Florida Governor Jeb Bush, and served as a budget advisor to Scott's campaign. In November 2010 she was named the head of Governor Scott's team to draft his first state budget proposal.

Arduin's consulting firm, Arduin, Laffer and Moore Econometrics, was retained by Florida's Senate Budget Committee to look at all areas of government,

including the state's prison system. The “unit cost comparison” she presented was a compilation of data from efforts by Texas and other states to control rising prison costs. Her firm found that women, juveniles and elderly prisoners are more expensive to house, educate and rehabilitate. Private prison contractors have been able to incarcerate male prisoners at competitive rates in most cases, she said, but “It hasn't been a total solution for any state.”

Interestingly, while working with Florida lawmakers in 2006, Arduin also served as a trustee of Correctional Properties Trust (CPT), a real estate investment trust that was established by Wackenhut Corrections – now GEO Group. CPT later became CentraCore Properties Trust, which was acquired by GEO Group in 2007. Further, Arduin's one-time boyfriend, David Ericks, is the owner of Ericks Consultants – a lobbying firm that has represented GEO Group for over a decade. [See: *PLN*, March 2011, p.1].

GEO was confident that it could make the winning bid for the Region IV prisons, and the company dedicated a web page to that effort. “The state of Florida is considering the privatization of 29 [prisons] in South Florida, and GEO is excited for the opportunity to grow,” the website states. “Our World Headquarters in Boca Raton, Florida is located in the heart of Region IV facilities and is less

than a two hour drive away from almost every facility in Region IV.”

Judge Fulford's order derailing the state's wholesale prison privatization plan deflated that cheery optimism, at least in the eyes of investors. Within three days after the court ruled in the PBA's favor in its lawsuit challenging the appropriations bill proviso, GEO's stock price fell 4.5% while CCA's stock dropped 3.5%.

Despite being almost two decades into its prison privatization experiment, Florida has been unable to show that private prisons have been a solution to the state's ever-expanding prison system. “Florida's experience with privatized prisons raises serious questions about whether the taxpayers are getting their money's worth,” concluded an April 2010 report by the Florida Center for Fiscal and Economic Policy (FCFEP), an independent research organization. [See: *PLN*, March 2011, p.36].

The FCFEP found there was no evidence that prison privatization had saved Florida taxpayers money, as required by law, because “the procedure to establish a 7% cost savings is flawed.” Additionally, there is virtually no difference in recidivism rates of prisoners released from

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## How Not to Privatize (cont.)

private or public prisons, so savings have been elusive in that respect as well.

According to a December 2003 research study by the FDOC, the Florida Correctional Privatization Commission and the Florida State University School of Criminology and Criminal Justice, “in only one of thirty-six comparisons was there evidence that private prisons were more effective than public prisons in terms of reducing recidivism.” A 2008 study involving Oklahoma prisoners reached a similar conclusion, finding that recidivism rates for prisoners released from private prisons were actually higher in some cases. [See: *PLN*, Dec. 2009, p.11].

Further, the legislature’s attempt to privatize Region IV facilities would have incurred substantial administrative costs that lawmakers ignored. FDOC Chief Deputy Secretary Daniel Ronay had e-mailed the governor’s budget office in May 2011 to warn that layoffs of state prison employees in Region IV due to privatization would “cripple the agency” with \$25 million in retirement, comp time and sick leave benefits that were not accounted for in the budget. “This amount was NOT taken into consideration by the legislature, even though they were made aware,” he wrote. The e-mail was uncovered by the PBA through a public records request filed with the FDOC.

Ronay resigned on October 5, 2011, two months after Buss was forced out. “I came to Florida committed to being a member of Governor Scott’s administration and assisting in leading the Florida Department of Corrections towards increased efficiency and success,” he wrote. “Circumstances are such that I am unable to continue in that role.” The FDOC

declined to say whether Ronay was pressured to quit.

### Politics as Usual

“We’re not going to file an appeal. It goes back to the Legislature. But let’s all remember what we’re doing here,” Governor Scott said during a press conference on October 31, 2011, the deadline to appeal the court’s decision in the PBA’s lawsuit.

Scott backed the plan to privatize prisons in Region IV but expressed concerns about the proviso process, noting that he would have had to veto a significant part of the state budget if he disagreed with certain proviso language. Asked about privatizing more FDOC facilities, he said, “It’s not going to happen if it doesn’t save money.”

State lawmakers, meanwhile, had other ideas. Just a few hours after Scott’s press conference, the Attorney General’s office, on behalf of the Florida legislature, appealed Judge Fulford’s order. Apparently, lawmakers believed that if they prevailed on appeal they could avoid the protracted political battle over prison privatization that would ensue if they followed the usual practice of introducing a new bill, debating the issue and pushing the legislation through the committee process.

“I don’t think we need to go pass a new bill or call a special session. I think we are going to win the case,” said Senate President Mike Haridopolos.

Following the filing of the appeal, the FDOC indicated it would proceed with the RFP for privatizing prisons in Region IV, but the PBA sought an emergency stay which was granted by Judge Fulford on November 4, 2011. “The Department of Corrections, its attorneys, agents and employees are directed to cease and desist all actions relating to the procurement process on the prison privatization RFP (request for proposals), and shall forthwith refrain from taking any further action inconsistent with this Court’s final judgment,” Judge Fulford wrote.

Due to the high stakes involved it’s unlikely that state lawmakers will actually pursue the appeal, and are instead using it for political saber-rattling. This is because the prison privatization proviso isn’t the only one the legislature has slipped into budget bills; in fact, the practice is fairly routine and has been used for decades. An adverse ruling by the Court of Appeal would make it difficult for lawmakers to use that backdoor method for legislation

that is unlikely to pass on its own – which extends far beyond the Region IV privatization plan.

“The question is when does the proviso language become substantive?” asked attorney Barry Richard, who specializes in the Florida Constitution. “To the extent that the legislature wants to retain broader authority to control expenditures through proviso language, it may feel it doesn’t want to take the risk of getting more restrictive language” in an appellate decision.

Senator Haridopolos acknowledged that possibility but said he intended to continue to use proviso language. “That has been the consistent policy of how we have moved toward prison privatization,” he remarked.

After Judge Fulford ruled in its favor, the PBA said it was primed for a legislative battle since lawmakers could introduce a bill to privatize Region IV that might succeed where the proviso attempt failed. “We are planning to use our political clout like never before. Our lobby team is working, right now, to line up opposition to ANY attempt to put public safety in the hands of profiteers,” wrote PBA Senior Vice President Danny Witt in a newsletter to FDOC employees.

The way the prison privatization plan was pushed “was incredibly sneaky” added PBA executive director Matt Puckett. “If we had a fair fight, we think we can beat this thing on the merits.”

However, in November 2011, despite the PBA’s long-standing efforts to oppose privatization, which poses a threat to state employees’ jobs, FDOC workers voted to oust the PBA as their union and instead seek representation with the Teamsters.

“These are tough times and they wanted a tough union to represent them,” said Teamsters general president Jim Hoffa.

“Of course we are disappointed in the result but nevertheless plan to continue to fight for the rights of correctional professionals,” stated PBA president Baiardi.

While the Teamsters said they would work with the PBA to oppose prison privatization efforts, Teamsters vice president Ken Wood acknowledged that if the Region IV facilities were privatized they would try to unionize private prison staff – which would appear to be a conflict of interest.

Prior to representing FDOC employees, on September 12, 2011 the Teamsters filed an ethics complaint against Governor





Scott. The complaint alleged that the prison privatization plan was tainted by almost \$1 million in political contributions from CCA and GEO Group that went to Scott, state lawmakers and the Republican Party.

According to the Teamsters, during the last election cycle GEO and its executives gave \$829,665 to political parties and candidates in Florida, while CCA donated \$138,494. Additionally, both CCA and GEO made contributions to Governor Scott's inaugural fund in the amounts of \$5,000 and \$25,000, respectively. GEO had also paid its team of Florida lobbyists between \$220,000 and \$360,000 to influence state officials, and the company reportedly said it would spend \$3 million to compete for the Region IV private prison contract.

"The governor's privatization scheme smacks of political payback, pure and simple," said Wood.

"It all comes down to politics and the big donors," noted Senator Fasano. "GEO and the other private companies that run prisons are very big donors to the party here in Florida and to the elected officials, both past and present."

Although the Florida Commission on Ethics initially found that the Teamsters' complaint was "legally sufficient" for an investigation into the state's plan to privatize Region IV prisons, the complaint was dismissed in October 2011. The Commission held that pay-to-play politics are not equivalent to a "quid-pro-quo, criminal-bribery-like understanding allegation"

necessary to allege an ethics violation, and that campaign contributions do not constitute improper influence.

### And the Fight Goes On ...

Governor Scott released his proposed 2012 state budget on December 7, 2011. The budget requires the Department of Management Services to issue an RFP "for the management and operation of six state operated work release centers and three reentry centers (Baker, Gadsden, and Everglades) scheduled to come online in October 2012," but there was no mention of privatizing Region IV facilities.

Again, however, Florida lawmakers had other ideas. On January 13, 2012 the Senate Rules Committee introduced two bills – SB 2038 and SB 2036. The former requires the privatization of all FDOC facilities in Region IV as originally specified in the budget bill proviso, with "actual cost savings to the state of at least 7 percent" and specified performance measures for the privatized prisons.

The companion bill, SB 2036, provides among other things that cost-benefit and business case analyses submitted by state agencies in support of their legislative budget requests will not apply "to the outsourcing or privatization of agency functions expressly required by the General Appropriation Act or any other law until the first legislative budget request submitted by the agency after the contract for the outsourcing and privatization has been executed." That is, no cost-benefit or

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## How Not to Privatize (cont.)

business case evaluations of such privatization contracts are required until after the contracts have been signed.

The bill further specifies that existing statutory requirements applicable to prison privatization contracts in 944.105, Florida Statutes shall “not apply to a contract for the outsourcing or privatization of the operation and maintenance of correctional facilities expressly directed to be outsourced or privatized by the General Appropriation Act or any other law.” Such existing requirements include “substantial savings,” “the same quality of services” from private prisons as that provided by the FDOC, certification of and use of force by private prison guards, and making escapes from privately-operated facilities a crime, among other provisions.

Taken together the two bills comprise a massive giveaway to the private prison industry. They concurrently mandate the privatization of 29 state correctional facilities, require a cost-benefit analysis and business case evaluation only *after* such prison privatization contracts are awarded, and simultaneously void the FDOC’s existing statutory requirements for those contracts.

Basically, the bills, which could have been drafted by CCA or GEO Group to the extent that they benefit private prison firms at the expense of Florida taxpayers, set the stage for another showdown between state lawmakers and privatization opponents. They also constitute a second bite at the private prison apple – even if the bills fail to pass, the legislature can still pursue its pending appeal of the PBA’s successful lawsuit.

Considering there is scant evidence that private prisons in Florida have saved the state money, and that prisoners released from privately-operated facilities have the same or higher recidivism rates as those released from public prisons, the repeated efforts by the state legislature to privatize FDOC Region IV can best be explained as political payback for campaign contributions from private prison firms.

While companies like CCA and GEO Group will profit from expanded prison privatization contracts, and politicians will benefit from those companies’ continued lobbying efforts and financial largess, should the legislature prevail in its private prison plan the loser will be Florida’s taxpayers, as public funds will be diverted from the FDOC into the coffers

of for-profit prison firms with no discernable benefit to the state.

As the battle to expand prison privatization in Florida continues, one expert has recommended that everyone slow down. “In what will be the largest correctional privatization contract in U.S. history, a more deliberate process would be prudent,” said Professor Hallett. “Assuming you accept the logic of market forces controlling costs, then why would you bias the process in favor of an already monopolized industry, which itself lowers cost efficiency and accountability?”

Dean Baker, co-director of the Center for Economic and Policy Research, suggested an answer. “Privatization just

doesn’t work,” he stated. “It’s a way for politicians to throw business to their friends.” And in Florida, those friends apparently include private prison companies like GEO Group and CCA. ■

Sources: *St. Petersburg Times*, *Miami Herald*, *Investor’s Business Daily*, *New York Times*, *Businessweek*, *Nashville Post*, *Palm Beach Post*, *Orlando Sentinel*, *Associated Press*, [www.flanews.com](http://www.flanews.com), *Sun Sentinel*, *Florida PBA Corrections Review*, [www.tallahassee.com](http://www.tallahassee.com), *Florida Tax Watch*, *Florida News Network*, *Tampa Tribune*, [www.dc.state.fl.us](http://www.dc.state.fl.us), [www.browardbulldog.org](http://www.browardbulldog.org), [www.stateline.org](http://www.stateline.org), [www.postonpolitics.com](http://www.postonpolitics.com), [www.dbapress.com](http://www.dbapress.com), [www.myfloridahouse.gov](http://www.myfloridahouse.gov)

## Israeli Study Shows Parole Decisions May be Affected by Whether Board Members are Hungry

A ten-month study of over 1,100 parole hearings in Israel indicates that the odds of a prisoner being found suitable for parole seem to be affected by the interval between the hearing and the time the board members last ate, with the odds decreasing dramatically as the length of that interval increases.

The research results of Ben Gurion University Professor Shai Denziger and his colleagues, including researchers from Columbia University in New York, was reported in the April 2011 issue of *Discover* magazine. Their study tracked the rulings of eight Israeli judges with an average of 22 years of judicial experience; each of the judges considered between 14 and 35 parole hearings a day, spending around 6 minutes on each decision.

The work day of the judges was divided into three sessions, with a food break between each of the sessions (and presumably a breakfast meal before the first session). The results of the study were striking. Within each session, a prisoner’s probability of being found suitable for parole always began at a relatively high 65% and then invariably dropped to about 10-20% by the end of the session. Interestingly, after every food break the probability of a prisoner being found suitable for parole would shoot up again to approximately 65%.

“The [study] shows the consequences of mental fatigue on really important decisions even among excellent decision-makers,” said Jonathan Levav, one of the

study’s co-authors. “It is really troubling and quite jarring – it looks like the law isn’t exactly the law.”

The researchers were able to rule out several alternative explanations for their findings. They found no evidence of discrimination, for example, as the judges treated prisoners equally regardless of their gender, ethnicity or the severity of their crime. Nor was there any evidence that any judge acted differently than any other judge, or that any judge had influence over the order in which cases were scheduled or heard.

Importantly, while the likelihood of being paroled was greater for the three prisoners seen at the beginning of each session than for the three prisoners seen at the end, and this pattern persisted regardless of length of sentence or prior incarcerations, the researchers found no evidence that the judges operated on the basis of an unconscious “quota” of favorable parole decisions.

The researchers suggested that, as with all repetitive decision-making tasks, the more decisions one makes and the more fatigued one becomes, the more likely one is to opt for a default choice – which, in the case of parole hearings, is to deny parole. Taking a break, particularly one that involves food, rejuvenates and resets the decision-maker’s mental faculties. ■

Sources: [www.kalwnews.org](http://www.kalwnews.org), [www.nature.com](http://www.nature.com), [www.abcnews.go.com](http://www.abcnews.go.com)

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# From the Editor

by Paul Wright

I would like to thank everyone who donated to our end-of-year fundraiser. It was very successful, and I am pleased to announce that we have added a second staff attorney to join Lance Weber, our chief counsel, as part of our legal team. Alissa Hull is a recent law school graduate who has chaired the National Lawyers Guild's Prison Law Project and helped edit the NLG's *Jailhouse Lawyers' Handbook*.

Prison Legal News is a project of the Human Rights Defense Center. We were able to start our litigation project in 2009 thanks to the generosity of an individual donor. The basis for creating an in-house attorney position was to be better able to confront and challenge the censorship of our publication and the books we distribute, and to handle litigation related to our public records requests.

As reported in this issue of *PLN*, we have won the largest legal victory against prison and jail censorship in American history, yet we still continue to be censored. As this issue of *PLN* goes to press we are currently litigating statewide bans of *PLN* by the New York and Florida state prison systems, as well as by numerous jails around the country. The workload increased to the point where we needed reinforcements.

We are very glad that Alissa has joined us at the Human Rights Defense Center and will be able to help us vigorously defend the rights of prisoners to receive and read *PLN* and other publications. It was due to everyone who donated to our fundraiser that we were able to hire her as our second staff attorney.

For the past 30 years or so, proponents of the private prison industry have claimed that private, for-profit prisons are cheaper to operate than government facilities. That may well be true, even though insufficient evidence has been presented to support the claim, but regardless, the taxpayers derive no benefit. As this issue's cover story demonstrates, prison privatization is largely determined by greed, lobbying, political pay-offs and corruption. The myth of the "free market" no more exists with respect to private prisons than it does with any other aspect of the American corporatist economy.

As Florida seems poised to privatize an unprecedented number of its prisons,

it is worth noting that there has been little public discourse and few legislative hearings on the topic. As holds true with most of the most egregious laws affecting prisoners, such as the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act, the privatization effort is being pushed through with budget riders, fast-tracked legislation and backroom deals. This amply illustrates the lack of democratic process in what is basically a huge giveaway of taxpayer money to huge corporations, which duly kick back campaign contributions to their political lackeys in the legislative and executive branches of government. We will report future developments in Florida as they occur.

Each year we spend a fair amount of money doing sample mailings to potential subscribers to encourage them to subscribe to *PLN*. This is expensive but is one of the few ways we have of letting prisoners know we exist and to build our subscriber base.

Other ways are through gift subscriptions and *PLN* readers encouraging other people to subscribe, as well as telling people – especially prisoners conscious about their civil rights – about *PLN*.

We currently have approximately 7,000 subscribers. Our goal is to have at least 10,000. Boosting our circulation will help keep our costs down, as our per-issue costs decrease as the number of copies we print and mail increases. Although we strive to reduce our expenses, and can note that in almost 22 years of publishing the cost of a one-year prisoner subscription to *PLN* has gone from \$10 to \$30 while we simultaneously increased the size of the magazine from 10 to 56 pages, we are faced with continuously rising printing and postage costs. If other people read your copy of *PLN*, encourage them to order their own subscription if they can afford to do so.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

## Alaska Medical Care Reimbursement Statute Extends to Former Prisoners; State Refuses to Pay Part of Medical Malpractice Judgment

by Mark Wilson

On June 24, 2011, the Alaska Supreme Court held that state law allows the Alaska Department of Corrections (ADOC) to seek reimbursement of medical costs from former prisoners.

Dewell Pearce was an ADOC prisoner from 1994 to 2008. He suffered from a number of medical conditions that required outside care between 2001 and 2008, at a cost of more than \$150,000.

In March 2008, Pearce prevailed on a medical malpractice claim against the state and was awarded \$369,277.88. Rather than pay the full judgment, however, the state "withheld \$140,847 as claimed reimbursement for Pearce's outside medical care unrelated to the injuries giving rise to the malpractice suit."

The state relied on AS 33.30.028(a), which provides that "the liability for payment of the costs of medical ... care provided or made available to a prisoner ... is ... the responsibility of the prisoner...."

In July 2008, after Pearce was released from custody, the state sought a declaration as to its reimbursement right under AS 33.30.028. During the course of that action "the State agreed ... that its claims should not include medical expenses incurred outside" the statute of limitations, and reduced its claim to \$137,000.

The superior court denied the state's claim in June 2009, concluding that the statute's reference to "prisoner" did not encompass former prisoners. Since Pearce had been released and was no longer a prisoner, "the court determined he had no liability to the State for his previous medical expenses."

The Alaska Supreme Court reversed. Applying principles of statutory construction, the Court interpreted "'prisoner' to include former prisoners for the application of AS 33.30.028." It also held that remand was necessary for the superior court to address Pearce's argument that the statute does not allow reimbursement



for outside medical care.

“Pearce’s reading of AS 33.30.028 is not implausible, and the statute’s relevant language may be ambiguous,” the Court wrote. However, “in the absence of full briefing on the issue,” the Supreme Court

left the matter “for the superior court to determine in the first instance.”

Finally, the Court also left “to the superior court any considerations that the State’s recovery, if allowed, may be subject to a claim for attorney’s fees and

costs incurred by Pearce in establishing what might be considered a common fund the State has essentially liened for its recovery.” See: *State of Alaska v. Hendricks-Pearce*, 254 P.3d 1088 (Alaska 2011). ■

## Prisoners Contribute to Flood Control Efforts in Louisiana

In May 2011, as the rising Mississippi River threatened to flood vast stretches of riverfront territory, Louisiana prisoners from a number of parishes, including East Carroll, Madison, Tensas, Pointe Coupee and Concordia, filled sandbags in an effort to save lives, buildings and property.

Their efforts did not go unnoticed. “They’re working their hearts out,” said Concordia Parish Sheriff Randy Maxwell. “In all honesty, without them we couldn’t do all this.”

Echoing those sentiments, East Carroll Parish Sheriff Mark Shumate stated, “Without them it would be impossible to conduct this kind of flood fight.”

The prisoners, all deemed non-violent offenders, filled tens of thousands of sandbags. Those from East Carroll Parish worked 12-hour shifts. Sheriff Shumate credited one of the prisoners with designing and building a machine that automatically fills sandbags – an invention which, he suggested, merited a patent.

Employing language that could be construed as either condescending or insightful, Sheriff Maxwell and Sheriff Shumate both remarked that the flood-fighting work gave the prisoners purpose.

“They enjoy it,” said Maxwell. “It makes them feel like they are contributing to something bigger than themselves.”

Similarly, Shumate said, “It gives them a chance to give something back, a chance at some redemption.” He added, “They appreciate that chance, and it shows.”

According to news report, Sheriff Shumate intended to expand the 12-hour work shifts to 24-hour work shifts (one hopes he considered that prisoners, no matter how apparently enthusiastic about filling sandbags, still need to sleep).

State prisoners at Angola also helped in flood-control efforts, mainly to protect the prison grounds from flooding.

“It’s prison for those on the outside, but it’s home for those who stuck here this all we got, I got a life sentence I’m never

leaving I’m gonna be here for the duration, why not try and make it better,” said Angola prisoner Darren Jarvis.

Two thousand prisoners at Angola were evacuated after a levee was breached, but thousands more remained. The prison is bordered on three sides by the Mississippi River, and the May 2011 flood was the worst to hit the area in over 70 years. ■

Sources: [www.thenewsstar.com](http://www.thenewsstar.com), [www.wbrz.com](http://www.wbrz.com), [CNN.com](http://CNN.com)

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# Business is Booming for Prison Profiteers

by James Kilgore

**P**private corrections company The GEO Group celebrated the holiday season by opening a new 1,500-bed prison in Milledgeville, Georgia on December 12, 2011. The \$80 million facility is expected to generate approximately \$28 million in annual revenues.

Though GEO (formerly Wackenhut Corrections) is hardly a household name, it is a major player in the private corrections sector, combining a self-righteous amorality in profiting from human misery with a ruthless sense of just how to make a buck in this business. The GEO Group is so notorious that it was the target of an Occupy Washington D.C. action in early December. In addition, the United Methodist Church sold off more than \$200,000 in stock in GEO Group over the holiday season, judging that holding those shares was “incompatible with Bible teaching.” [Editor’s Note: But playing the stock market apparently is compatible with Biblical teaching.]

While such actions may irritate a few within the company’s ranks, the GEO Group is thick-skinned. Over the years journalists have exposed a long history of violence, abuse and corruption in the company’s facilities. Such scandals would have driven most firms out of business, but GEO has always managed to find the way back to prosperity. While the U.S. economy has plummeted in the past eighteen months, GEO has been positioning itself for the future. In addition to opening the Georgia facility, during this period the company has:

- bought competitor Cornell Corporation and its prisons in 15 states, an acquisition expected to add about \$400 million a year to GEO’s revenues.
- acquired BI Incorporated for \$415 million. BI is the largest producer and provider of electronic monitoring units in the U.S., with 60,000 “customers” for their ankle bracelets. [See: *PLN*, April 2011, p.40].
- begun the intake of new detainees at the 650-bed Adelanto ICE Processing Center East in Southern California. Adelanto West is scheduled to bring a further 650 beds online in August 2012.
- expanded their first facility, the Aurora Detention Center in Colorado (founded in 1987), from 400 to 525 beds.
- moved ahead with plans to develop

a 600-bed Civil Detention Center in Karnes County, Texas, expected to generate \$15 million in annual revenues.

For the first nine months of 2011, GEO reported gross revenues of \$1.2 billion – an 11% rise over 2010. Shareholders are gloating with the company’s success. A hundred dollars invested in GEO in 2005 would have been worth \$322 by 2010. At the top of the profiteers stands long-time CEO George Zoley. The owner of 70% of GEO’s stock, Zoley consistently pulls down annual compensation in excess of \$3 million, landing him squarely in the ranks of the one-percenters. His Chief Operations Officer, Wayne Calabrese, is not far behind at around two million a year.

GEO’s rising profitability is a result of the company’s capacity to change with the times. While the War on Drugs and facility construction were the cash cows of the private prison industry from 1980 to 2001, 9/11 and the sinking economy have shifted the terrain. Immigration and alternatives to incarceration are the new windows of opportunity in the freedom deprivation sector. GEO, as usual, is right on the money. In Zoley’s prosaic jargon, the company is developing a “full continuum of care with leading competitive positions in every key market segment in corrections, detention and treatment rehabilitation services.”

Along with the new centers at Adelanto and expanding Aurora, the acquisition of BI has enhanced GEO’s potential to capitalize on anti-immigrant crackdowns. The takeover included BI’s five-year, \$372 million contract with ICE for monitoring 27,000 immigrants under federal supervision but not held in detention centers.

Grabbing BI has also put GEO in a position to take advantage of early release programs being implemented in California and other states. BI operates a network of daily reporting centers which offer drug treatment, anger management workshops, counseling and a host of other services to individuals on parole and probation. These centers stand ready to help state agencies address the increasing need for supervision of people released or diverted from prison or awaiting imprisonment. In the long run, the large scale privatization of probation and

parole functions is an obvious aim.

Further moves in line with the changing times are the firm’s forays into the psychiatric field through its GEO Care subsidiary. With mainstream mental hospitals suffering massive cutbacks, GEO Care has found a niche market in facilities for the involuntarily institutionalized – in other words, psychiatric prisons.

GEO Care runs three such facilities in Florida alone. Their prize plum is the 720-bed Florida Civil Commitment Center (courts impose civil commitment on those judged a threat to public safety though not convicted of any crime. People with histories of sex offenses are the most frequent targets). In addition to its Florida operations, GEO Care has a presence in Texas as well, having gained a contract in 2009 to run a 100-bed facility for people awaiting trial.

Predictably, GEO could not have achieved such financial successes without the usual assortment of dirty tricks and influence peddling. The firm’s team of 63 lobbyists has been active in 16 states over the past decade. In the first quarter of 2011 alone, GEO spent more than \$100,000 on lobbying in Florida as the legislature was considering a plan to privatize 29 state prisons. Unfortunately for Zoley and company, the initiative stalled this time around but is likely to resurface in upcoming legislative sessions. [See the cover story in this issue of *PLN*].

GEO Group complements its lobbying activities with political campaign contributions, which totaled just over \$2.4 million between 2003 and 2010.

Perhaps even more worrisome than GEO Group’s political maneuverings, however, are the company’s efforts to export the U.S. model of mass incarceration and immigration detention. In the late 1990s, GEO (then Wackenhut Corrections) had a financial stake in Australia’s notorious Woomera Immigration Detention Center. UN Envoy Justice Bhagwati visited the facility and said he felt he was “in front of a great human tragedy.” Barbara Rogalia, who worked there as a nurse, echoed those sentiments, saying, “It reminded me of a Nazi concentration camp I visited in Czechoslovakia, now a museum. The only thing that was missing from the gate, at the top near the razor wire, was a sign saying ‘*Arbeit macht frei*’

(‘Work sets [you] free’).”

Following massive demonstrations by community activists, a string of uprisings by those detained and a series of escapes, the Woomera detention center closed in 2003. A corporate restructuring process ensued and the company’s corrections wing re-emerged as GEO Australia, which continues to operate four prisons.

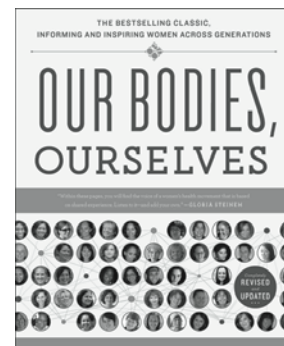
GEO Group’s ventures in the U.K. have had a slightly smoother landing. In 2011 GEO UK won a contract for prison escort services worth \$150 million a year. In addition, they took over management of the 217-bed Immigration Removal Center in Glasgow, Scotland.

GEO Group’s last overseas venture is a 3,000-plus-bed prison in the Limpopo Province of South Africa. Not long ago it appeared that South Africa was preparing to embark on a large-scale prison privatization project, with GEO in the lead. However, a change in cabinet personnel landed Nosiviwe Mapisa-Nqakula as Minister of Corrections. She has declared her intention to keep all facilities in state hands. Unlike in the U.S., at least someone in a national position of power in South Africa is prepared to say no to the private prison industry.

At the moment there doesn’t seem to be a Mapisa-Nqakula emerging in the Obama administration. Instead, it looks like the GEO Group is set to make an increasing variety of projects “shovel ready.” If the halting of private profiteering from for-profit incarceration is to become a reality, we will need a lot more Occupiers and political leaders with the courage to listen and act. ■

*James Kilgore is a Research Scholar at the Center for African Studies at the University of Illinois. He is the author of three novels, *We Are All Zimbabweans Now*, *Freedom Never Rests* and *Prudence Couldn’t Swim*, all written during his six-and-a-half years of incarceration as a political prisoner in the US. This article was originally published by *Counterpunch* ([www.counterpunch.org](http://www.counterpunch.org)), and is reprinted with permission of the author.*

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# **PLN Settles Censorship Suit Against South Carolina Jail; County Agrees to Pay \$599,900 and Change Policies**

On January 10, 2012, Prison Legal News settled a First Amendment censorship suit against the Sheriff's Office for Berkeley County, South Carolina.

The settlement includes changes at the Berkeley County Detention Center (BCDC) related to the receipt of publications and religious materials by jail prisoners, as well as the payment of \$100,000 in damages and \$499,900 in attorney fees and costs. The total monetary payment represents the largest amount ever paid in a First Amendment jail or prison censorship case in the United States.

PLN filed suit in October 2010 after the BCDC rejected *PLN's* monthly publication and books sent to prisoners at the facility. At the time, jail sergeant K. Habersham stated in an email to *PLN* editor Paul Wright that "inmates are only allowed to receive soft-back bibles in the mail directly from the publisher" and "are not allowed to have magazines, newspapers, or any other type of books." [See: *PLN*, Nov. 2010, p.38].

Berkeley County officials later claimed they did not have a Bible-only policy, and argued they had rejected *PLN's* monthly publication because it contained staples – even though the jail concurrently sold writing pads to prisoners that contained staples.

The U.S. Department of Justice intervened in the case against Berkeley County due to concerns related to restrictions on publications and religious materials provided to prisoners. The case proceeded with extensive pleadings, discovery, depositions and expert reports concerning the jail's mail and security policies.

An expert for the Justice Department, John Clark, formerly a warden at the maximum-security U.S. Penitentiary in Marion, Illinois, found troubling security problems at the jail but wrote that stapled publications were not a security threat.

"Rather than complying with the First Amendment, the county engaged in a scorched-earth approach to this litigation," stated *PLN* editor Paul Wright. "The monetary settlement paid by the county reflects that approach. County taxpayers are ill-served when public officials violate the Constitution and then try to defend their unlawful conduct with post-hoc rationalizations rather than remedy the violations. Had the county

been willing to resolve this case promptly it would have concluded much sooner, at a lower cost to the county and to the Constitution."

In addition to agreeing to pay damages and attorney fees, the county agreed to extensive policy changes at the BCDC. Those changes include implementing policies related to incoming publications and religious materials; providing training to jail staff related to such policies; and instituting an appeal and oversight process for when publications or religious materials are rejected or censored. Publications may not be rejected solely because they contain staples, and jail staff may remove staples prior to delivering publications to prisoners. The jail may reject publications deemed a "genuine threat" to safety and security at the facility.

The settlement agreement, entered as a consent injunction, resolves all claims raised by *PLN* and the Department of Justice. The agreement was approved by the U.S. District Court.

"The rights to practice one's faith and to be informed about matters of public

interest are among our most cherished freedoms," stated Thomas E. Perez, Assistant Attorney General for the Civil Rights Division. "The Department of Justice is committed to vigorously enforcing the First Amendment and [Religious Land Use and Institutionalized Persons Act] to ensure that freedom of expression and religious liberty remain protected. Not only will this agreement uphold the Constitution, it will also promote the safety, security and good order of BCDC; assist in rehabilitating detainees; and ensure that the people of Berkeley County have confidence in the criminal justice system."

*PLN* was ably represented by Susan Dunn with the ACLU of South Carolina, David M. Shapiro and David Fathi with the ACLU National Prison Project, and Human Rights Defense Center chief counsel Lance Weber. Attorney Sandy Senn represented the defendants. See: *Prison Legal News v. DeWitt*, U.S.D.C. (D. SC), Case No. 2:10-cv-02594-MBS. ■

Additional source: *U.S. Dept. of Justice press release*

## **Colorado CCA Prison Uprising: New Details of Unheeded Warnings Emerge in Epic Lawsuit**

*by Alan Prendergast*

Seven years ago prisoners at a private prison in southeastern Colorado went on an all-night rampage, chasing the shorthanded staff from the premises, attacking suspected snitches, setting fires and causing millions of dollars in damages. Now documents filed in a long-running legal battle confirm what many prisoners have been saying all along – that prison officials received ample warning of impending trouble but failed to take action in time.

The 2004 riot at the Crowley County Correctional Facility, operated by the Corrections Corporation of America (CCA), has emerged as a kind of case study in the multiple ways things can go wrong in a for-profit prison. The night of the incident, the prison had only 47 employees on duty, including eight trainees, to supervise 1,122 prisoners. There had been growing tension at the facility for weeks over issues ranging from food and

rec privileges to the presence of numerous disgruntled prisoners recently shipped in from Washington and Wyoming to fill beds. [See: *PLN*, Jan. 2005, p.26].

The Colorado Department of Corrections' after-action report would later blast CCA officials for inadequate training and emergency response procedures – but the DOC's own monitoring of the prison up to the night of the riot had been cursory at best, marked by a distinct failure to follow up on report after report of prisoner complaints and indications that the place could "go off" soon. [See: *PLN*, Jan. 2005, p.31].

Yet some of the most telling details about the riot and its aftermath have emerged slowly, over the course of an epic lawsuit filed against CCA on behalf of close to 200 Crowley prisoners. The plaintiffs, who claim to be among the majority of prisoners who "sat out" the riot by quietly lying down in the yard or



in their units, contend that CCA could have prevented the riot by responding promptly to trouble signs – and that they were abused and injured by guards in the aftermath of the incident.

A recently-filed court document includes excerpts of depositions by several current and former Crowley officers, who acknowledge having numerous discussions with prisoners and among themselves about brewing trouble in the days and hours leading up to the riot on July 20, 2004. A body-slamming use of force on a Washington prisoner earlier that day prompted several prisoners to inform guards that the Washington group was going to seek payback that night. One told staffer Wanona Wyker that “he had been trying to tell staff that there was going to be a riot ... that someone needed to listen, that Washington inmates were saying they were going to tear the place up.”

Despite numerous warnings, Crowley’s commanders failed to lock down the facility or stagger the recreation time. Instead, the warden left at five and a skeleton crew remained when all 1,100 prisoners were released for recreation. A confrontation between a group of CCA officers and Washington prisoners quickly led to a staff evacuation; emboldened prisoners poured into the housing units and began to help themselves to free weights. Once they realized no one was going to stop them, they started breaking windows and doors, smashing electronic control centers, busting fixtures and flooding tiers, setting fires and rifling case managers’ records.

Many prisoners say they attempted to wait out the rampage in their cells but

were driven out by smoke – or, after the SORT teams arrived hours later, tear gas. In many cases, prisoners say they were treated more harshly by staff in the aftermath of the riot than anything they endured during the disturbance. An account filed by prisoner Justin Dougherty is typical of the plaintiffs’ claims of injury and abuse:

“He was on his way to the weight room when the riot started on the west side [and] he heard the announcement to lock down. He tried to cross to the other side of the yard, but was unable to return to his unit on the east side. Guards shot at him as he tried to get to the east yard, a Molotov cocktail exploded near his feet, and inmates assaulted him.... Shot 3-4 times with rubber bullets and bird shot ... BBs were embedded in back, face, and lips. Assaulted by other inmates: hit with piece of debris in the back, punched on side of head, chased by 5-6 inmates with weapons after escaping the chaos in the yard. Bruises on neck, back, forearms.

“Smoke and gas inhalation in Unit 1-a for approximately 2 hrs. Coughing, skin and eyes burning. Saw inmates looking through files for reasons to physically assault other inmates. Saw inmates being chased, stabbed, and one thrown off the tier. Hid in a cell, under a bunk, until water filled with feces began flooding the cell. When SORT arrived, they made him lie face down in the fetid water to be pulled from cell and cuffed.

“Air full of gas. Hands purple and swollen with no feeling, wrists cut and bleeding from being cuffed in back for 8 hrs. Still has scars.... Denied water in yard

even though eyes burning from gas and smoke. Denied medical treatment. Denied water for nearly 24 hours. No food for 20-24 hours. Forced to wear soiled clothing for 3 days. Dehumanized and humiliated. Has lung problems caused by the smoke inhalation and tear gas during the riot.”

The lawsuit, brought by Boulder attorney Bill Trine and Washington-based Public Justice, has involved taking statements from dozens of CCA employees as well as hundreds of former Crowley prisoners. After more than six years of litigation, no trial date has yet been set and the case remains pending. Bill Trine is on the board of the Human Rights Defense Center, which publishes *Prison Legal News*. See: *Adams v. CCA*, District Court, County of Crowley (CO), Case No. 2005cv60. ■

*This article was first published by Westword (www.westword.com) on December 21, 2011, and is reprinted with permission.*

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# Doctors Propose Changes to Fix Flaws in Compassionate Release Programs

by Mike Brodheim

In “Balancing Punishment and Compassion for Seriously Ill Prisoners,” published in the July 19, 2011 issue of *Annals of Internal Medicine*, Doctors Brie A. Williams, Rebecca L. Sudore, Robert Greifinger and R. Sean Morrison propose changes to address “medical-related flaws” in compassionate release programs for prisoners.

The authors, affiliated with prestigious academic and medical institutions in New York and San Francisco, as well as with the U.S. Department of Veterans Affairs (for Drs. Williams, Sudore and Morrison), make the case that, as physicians, they are obligated to “lend [their] expertise and ethical suasion to ensure that compassion is fairly delivered.”

Compassionate release programs allow for the release of eligible, seriously ill prisoners before the end of their sentences, typically so they may die outside of prison. Such programs now exist in all but five states, as well as in the federal prison system. They seek to address the growing recognition that 1) the principal justifications for incarceration may be substantially undermined when a prisoner becomes “too ill or cognitively impaired to be aware of punishment, too sick to participate in rehabilitation or too functionally compromised to pose a risk to public safety,” and 2) the healthcare costs associated with incarcerating an aging, increasingly infirm and growing prisoner population are so prohibitively expensive that society may no longer be able to afford the current trend of overincarceration, at least not without taking into account the extent of the actual threat posed by elderly, disabled and terminally ill offenders.

The authors note that compassionate release typically consists of two distinct elements: eligibility (based on medical evidence) and approval (based on legal and correctional considerations). To the extent that doctors play a determinative role with respect to the first of those elements, they argue that “the development of standardized national guidelines by an independent advisory panel of palliative medicine, geriatrics, and correctional healthcare experts” is critical “to ensure that medical criteria for compassionate release are appropriately evidence-based.”

The authors also write that while compassionate release requires physicians to predict life expectancy as well as functional decline, neither may be easy to predict in practice. On the one hand, life expectancy is difficult to establish for conditions such as advanced liver, heart and lung disease, and dementia – increasingly common causes of death and disability among prisoners. On the other hand, for patients with more predictable prognoses such as cancer, functional trajectories are variable and unpredictable. Accordingly, the authors propose that national criteria for medical eligibility for compassionate release categorize prisoners into three groups: 1) those with a terminal illness with predictably poor diagnoses; 2) those with Alzheimer’s disease and related dementias; and 3) those with serious, progressive, nonreversible illnesses with profound functional or cognitive impairments.

Recognizing that prisoners are typically illiterate or otherwise unable to navigate the

procedural steps of the compassionate release application process by themselves, the authors urge the adoption of a “transparent process” that includes 1) the assignment of a “prisoner advocate” to assist and represent incapacitated prisoners; 2) a fast-track option for evaluation of rapidly-dying prisoners; and 3) a well-described and disseminated application procedure.

Standardization of the eligibility guidelines and minimization of procedural obstacles, the authors argue, will help reduce inequities in the compassionate release process for prisoners who are deserving of early release due to medical reasons. However, the political component of releasing terminally ill prisoners is beyond the scope of the medical profession. ■

Source: “*Balancing Punishment and Compassion for Seriously Ill Prisoners*,” by Brie A. Williams, M.D., et al., *Annals of Internal Medicine*, Vol. 155, No. 2 (July 19, 2011)

## New York City Jail Considered Serving Spoiled Meat

by David Reutter

After Rikers Island officials discovered 65,000 pounds of spoiled meat at the jail, at least one official suggested that it be served to prisoners. The meat, valued at \$130,816, was found rotting on July 11, 2011 when nauseating smells began emanating from two freezer trailers that had stopped working.

A Rikers captain walking by the trailers made the discovery upon noticing the putrid scent. A crew of kitchen staffers had failed to inspect the jail’s 33 refrigerators and freezers. “They didn’t check it for at least five days,” said a chef at the facility.

An inventory revealed the ruined food included cubed turkey thighs, Cajun turkey patties, veal patties, Jamaican beef patties, ground turkey, pizza pockets and cubed beef. The loss accounts for about 40% of the \$350,000 officials had hoped to save on the jail’s annual food budget.

In recent years, Rikers officials reduced the amount of bread served and cut ice cream from the menu to save money.

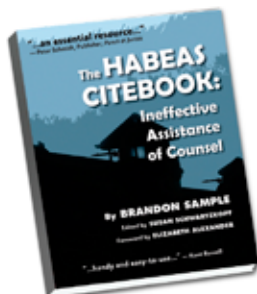
More recently they eliminated pepper packets and pudding.

When the spoiled meat was discovered, one Rikers official reportedly suggested it could be salvaged by washing it in cider vinegar and sodium bicarbonate before serving it to prisoners. “People would have gotten sick,” said the jail chef. A supervisor added, “You can’t get rid of the toxins.”

“Preliminary findings show that the freezers likely failed to turn back on following a loss of power after testing electrical generators,” said Rikers Island spokeswoman Sharman Stein. It is “absolutely incorrect that we considered serving the spoiled food.”

Stein said the incident was the first of its kind in 17 years. Norman Seabrook, president of the Correction Officers’ Benevolent Association, disputed that notion. “This is just the first time they are talking about it,” he stated. ■

Source: *New York Daily News*



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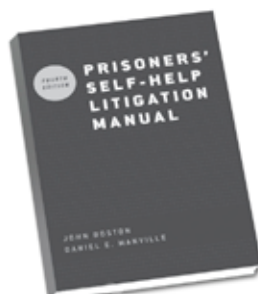


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# California Governor Cozies up to Prison Guards and Crime Victim Advocates

In April 2011, in apparent repayment of a political debt for helping him get elected, California Governor Jerry Brown approved a 200-page labor contract that gives the 31,000-strong California Correctional Peace Officers Association (CCPOA) a number of benefits that, according to the nonpartisan Legislative Analyst's Office, will create a "huge liability" for the state's taxpayers.

While Brown's relationship with the CCPOA is not surprising, his newfound coziness with Harriet Salarno, the head of Crime Victims United (CVU), a leading advocacy group for crime victims, is a bit harder to pin down. In February 2011, at Salarno's urging, Brown hosted a fundraiser for CVU in Sacramento.

Historically, Salarno and Brown have not always seen eye to eye. In 1986, Salarno, whose oldest daughter was murdered in 1979 during Brown's first tenure as governor of California, played an instrumental role in the recall of three of Brown's Supreme Court appointees, most notably then-Chief Justice Rose Bird. Under Bird's leadership the California Supreme Court had overturned virtually every death sentence it considered, which earned the disdain of crime victims' advocates. By 2006, Salarno actively opposed Brown in his successful campaign for State Attorney General.

Only five years later, though, Brown and Salarno have seemingly come to an understanding. "With age," Salarno said, "comes wisdom." Brown, she noted, "has been very cooperative and sent a message to me that his door would be open."

Brown's cooperation with Salarno stems at least in part from the fact that the politically influential CCPOA helped to create and still funds CVU – the nonprofit organization that Salarno heads. But the CCPOA, which spent \$1.8 million to help put Brown in the governor's office, has received much more than just "cooperation" in return for its political largess.

For example, under the terms of the CCPOA's new labor contract, prison guards will be able to save an unlimited number of vacation days (as opposed to the former limit of 80 days) and exchange accrued days off for cash upon their retirement. Since the average CCPOA member has already accumulated nearly 19 weeks of leave time,

that "perk" alone will cost California taxpayers over \$600 million.

The new contract also gives guards 18 more days off over the next two years; thus, the average prison guard will receive more than eight weeks of time off in the first year of the contract alone. Plus the state agreed to end three-day-a-week furloughs for prison workers, which had been imposed by former Governor Schwarzenegger due to California's extreme budget deficit (though prison staff will have to take one unpaid day off each month for a year).

Additionally, simply by passing an

annual physical exam, veteran prison workers will be eligible to receive an extra \$130 per month. With a 4% raise starting in 2013, moreover, the base pay for a veteran prison guard will climb to \$76,680 a year.

The state's generous contract with the CCPOA, after the union sunk \$1.8 million into Governor Brown's election campaign, smacks of political payback – if not a political payoff. Which is the essence of the American political system. ■

Sources: *www.pressdemocrat.com*, *Los Angeles Times*

## Alaskan Private Prison Promoter Arrested in Mexico, Extradited to U.S. on Child Sexual Abuse Charges

In the 1980s, Bill Weimar became a rich man when his company, Allvest Corporation, owned and operated a chain of private halfway houses in Alaska. He heavily promoted building a private prison in Alaska, too, in conjunction with Cornell Corrections, but fell under the scrutiny of the FBI. In 2006 it was discovered that Weimar, among others, had been the target of a wide-ranging corruption investigation.

He pleaded guilty to two federal felonies related to his failed attempt to get a Republican candidate for the Alaskan Senate, Jerry Ward, elected in exchange for Ward's support of the private prison project. Weimar served six months in federal prison and completed his post-release supervision in December 2010. [See: *PLN*, March 2009, p.20].

Weimar, 71, moved far from Alaska, to Sarasota, Florida, where he kept a 60-foot luxury cabin cruiser, the "Renewal II." In August 2010 he babysat a 6-year-old girl. Later, the girl's mother noticed she was playing sex games with her Ken and Barbie dolls. When she inquired about this, the girl said that Weimar had asked her to perform oral sex on him and she had done so. She also said he was "mean." The girl's mother contacted the Sarasota County Sheriff's Office.

A detective questioned Weimar about the incident. He admitted babysitting the

girl, but denied molesting her. He also said he was unaware of any reason why the girl or her mother would make up the allegations. When authorities came to arrest Weimar a few days later he was gone, but his boat remained docked at a local marina. Sexual battery on a six-year-old carries the possibility of a life sentence in Florida.

In January 2011, the Sheriff's Office issued a fugitive warrant for Weimar. The U.S. Coast Guard and Immigration and Customs Enforcement tracked him down in Havana, Cuba, where he was most likely beyond extradition. However, they learned that he intended to travel to Mexico. Sheriff's officials contacted the U.S. Embassy in Mexico City, which in turn requested the assistance of the Mexican Navy.

"Weimar was captured last night in Cancun, Mexico, and transported to Texas today, where he will await extradition to Florida," the Sheriff's Office said in a February 12, 2011 statement.

Sarasota County Sheriff Tom Knight expressed high praise for the "outstanding inter-agency cooperation that contributed to the successful resolution of what was ultimately an international manhunt."

However, notwithstanding such outstanding inter-agency cooperation, the sexual battery charges against Weimar were dropped in July 2011.



"It certainly doesn't have anything to do with the credibility of the child," said Assistant State Attorney Dawn Buff; rather, there was no evidence that corroborated the girl's accusations. "He's crafty enough with his words and certainly knew anything he said could be used against him," Buff remarked.

Weimar's attorney, Martin Burzynski, spun the dismissal of the charges another way. "Based on a single statement by a child, a man can be arrested on his vacation in Mexico, with helicopters, gunships, dogs, blacked-out Suburbans and machine guns," Burzynski stated. "Thrown into a jail in Mexico, transported to the border, handed over to the U.S. Marshals, brought to a jail in Texas, thrown into a holding cell for a week or two without being able to contact his lawyer or know what's going on, and then transported in a van across the country that took almost 2½ weeks going from county to county."

Of course, given Weimar's background, he should well know that that is exactly how the American criminal justice system operates. ■

Sources: [www.adn.com](http://www.adn.com), [www.bradenton.com](http://www.bradenton.com)

## GEO Group Ends Florida PAC

An audit by the Florida Department of State found that the GEO Group, Inc., the nation's second-largest private prison company, had been violating Florida law by making contributions to politicians from GEO's Political Action Committee (PAC) in excess of the \$500 limit.

In a letter to state election officials, GEO said it was operating as a federal committee and was not aware that by filing reports with state agencies it was bound by Florida contribution limits, which are lower than those allowed under federal law.

GEO Group disbanded its state-level PAC on May 18, 2011, but not before it had disbursed contributions to a number of Florida politicians. The PAC gave \$500 to state Rep. Eseban Bovo's successful bid to become a Miami-Dade Commissioner. It also gave \$2,500 to Republican congressman Ander Crenshaw's reelection campaign, but that donation was returned.

In the first quarter of 2011, the PAC gave money to U.S. Rep. Mario Diaz-Balart and the U.S. Senate campaign committee of current Florida state

Senate President Mike Haridopolos. Reports from GEO's PAC also show contributions to politicians around the country, including Texas, Oklahoma and Pennsylvania.

Such donations to lawmakers do not go unrewarded—see this issue's cover story for the political payback that companies like GEO expect, and receive, in exchange for their generosity. ■


Source: *Florida Independent*

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# Fight Brewing Between County Jails and Private Prisons in Kentucky

A bill introduced in the Kentucky legislature proposed removing approximately 3,500 Class D state prisoners currently held in county jails and transferring them to private prisons owned and operated by Corrections Corporation of America (CCA). Opponents claimed the bill made no fiscal sense. The state pays the counties \$31.34 per prisoner per day to house Class D state prisoners (plus \$9.00 per diem for jails that provide substance abuse treatment programs). CCA charges from \$37.99 to \$47.98 per prisoner per day.

Losing the Class D prisoners “would be devastating,” stated Grayson County Detention Center employee Darwin Dennison. “We count on the money generated by the Class D program to operate our jail and the female facility. If that money were to dry up, it could cost jobs. The jail annex houses nothing but Class D inmates.”

The counties would also lose the prisoners’ labor, which has been used in work release programs to perform maintenance and clean-up at parks and government buildings.

“The best thing about having a Class D program is that we are able to save the cities and county government a lot of money by providing inmates to work,” said Dennison. “This proposal could eliminate that program and cost our county thousands of dollars in the process. Our program saves the cities and county hundreds of thousands of dollars on labor costs every year. If this passes, city and county governments would either have to start paying for labor they have been getting from inmates or cut back on their services.”

Of course there are other issues. If the counties are so dependent on free prisoner labor and state funding, doesn’t that give them an incentive to incarcerate more people? Isn’t there a conflict of interest when a governmental entity has a monetary motive for incarcerating its citizens? And what about the prisoner workers – shouldn’t they be paid something for their labor? Nonetheless, the focus of the public debate remains on the budgetary consequences for the county jails.

“According to people I have spoken with,” said Dennison, “Corrections Commissioner LaDonna Thompson told the governor’s office that this proposal could bankrupt several county jails, but ap-

parently Governor Steve Beshear is not concerned with the consequences.”

Kentucky jailers are fighting back, though. After Governor Beshear signed into law a sweeping corrections and sentencing reform bill, House Bill 463, on March 3, 2011, it was anticipated that the bill would negatively impact county jails. The solution to that problem, according to jail officials, is for the state not to renew its contracts with CCA, which expire on June 30, 2012, and instead transfer the prisoners currently held at CCA’s two private prisons in Kentucky to county jails.

“Both the state and the counties could save money by eliminating the private prisons contracts,” remarked Patrick Crowley, a public relations consultant hired to push the idea of letting the private prison con-

tracts expire.

As for CCA, Mike Simpson, president of the Kentucky Jailers Association, said the company can always look elsewhere. “They have prisons all over the United States,” he noted. “There is no shortage of inmates in this country.”

However, removing state prisoners from the CCA facilities will be a hard sell, since the company’s two prisons in Kentucky, the Marion Adjustment Center and Otter Creek, employ 380 people; also, some of the prisoners currently housed at those facilities would not be eligible for transfers to county jails. ■

Sources: *Grayson County News Gazette*, [www.k105.com](http://www.k105.com), [www.courierpress.com](http://www.courierpress.com), [www.kentuckynewera.com](http://www.kentuckynewera.com)

## Some States Resist Implementing Adam Walsh Act Requirements

Under the federal Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (SORNA), states were required to implement standardized and stringent registration requirements for sex offenders by July 27, 2011 – following two extensions from the original July 2009 deadline – or risk losing 10% of their funding under the federal Byrne Justice Assistance Grant program. [See: *PLN*, July 2010, p.24].

As of the July 2011 deadline only 14 states had passed laws bringing them into substantial compliance with SORNA. Those states included Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, South Dakota and Wyoming (Guam and nine Native American tribes also were in compliance). Other states are resisting the SORNA standards, saying they are more expensive and less effective than existing registration requirements.

“They are reluctant to bear the cost of updating their own technology to register digital fingerprints, palm prints and DNA, and of paying for the additional time that law enforcement officers would spend processing sex offenders who appear before them in person,” noted Maggie Clark with Stateline, a nonpartisan news service of the Pew Center on the States, which reports on trends in state policy.

All states have some type of sex offender registration requirements. Texas and Arizona are leading the rebellious states that object to implementing SORNA.

The Adam Walsh Act “contradicts what our research over 30 years indicates,” according to Allison Taylor, executive director of the Texas Council on Sex Offender Treatment. “Public safety would not be enhanced” by compliance with the Act, she added. The council is an advisory body with a board appointed by the governor.

Officials in Texas also complain that the cost of implementing the new standards – estimated by the state to be \$38.8 million – is much greater than the cost of losing \$1.4 million in federal funding for opting not to comply with SORNA.

“In this budget climate, we don’t have the luxury of spending an additional \$40 million,” said state Senator Dan Patrick.

Lawmakers in Nebraska, which will lose \$163,000 in federal funding for failing to comply with SORNA, agreed. “For the money we’re losing, it’s just not worth it,” observed state Senator Brad Ashford. Nebraska is not in compliance because it does not list juvenile offenders on its sex offender registry.

New York, which receives \$16 million in Byrne Justice Assistance Grant fund-

ing, would lose \$1.6 million for failure to comply with SORNA – much less than the cost of enforcing the Adam Walsh Act

“New York believes that our present laws and risk assessment method provide our citizens with effective protection against sexual predators,” said Risa Sugarman, director of the state’s Office of Sex Offender Management. New York formally opted out of the Adam Walsh Act in August 2011, citing costs and conflicts with state laws and public policy positions, including the placement of certain juvenile offenders on sex offender registries.

Further, law enforcement officials have pointed out that because the vast majority of sex offenses are committed by family members or acquaintances of victims, not strangers, and the recidivism rate for sex offenders committing new sex-related crimes is extremely low, registering such offenders in a database does little to prevent new sex offenses.

Lt. Ruben Diaz, who heads the sex crimes unit for the Harris County Sheriff’s Office in Texas, admitted it is “very rare to find the perpetrator of a new sex crime among those already in the registry,” but acknowledged the registry is a “powerful

tool” that can be used to track sex offenders and ensure they comply with the conditions of their parole or probation.

Under the Adam Walsh Act, only the type of offense is used to determine the level of threat posed by a sex offender. Arizona, Texas and other states prefer to use a system that includes factors such as the sex offender’s age and relationship with the victim to determine their likelihood of reoffending. Officials in those states argue that implementing SORNA would put more sex offenders into the database and cause law enforcement to lose focus on offenders who pose the most dangerous risk.

“We’re concerned Adam Walsh would decrease the standards of monitoring,” said Arizona state Senator Kyrsten Sinema.

Federal officials have countered that SORNA is less expensive to enforce than most states estimate. U.S. Department of Justice (DOJ) senior analyst Scott Matson noted that one estimate was \$18 million for Ohio to implement the Adam Walsh Act, but the actual costs were around \$400,000. Linda Baldwin, head of the DOJ office that helps states implement SORNA, said that although some states

would have to track more sex offenders under the new standards, state officials often misunderstand the Act’s requirements and overstate its burdens.

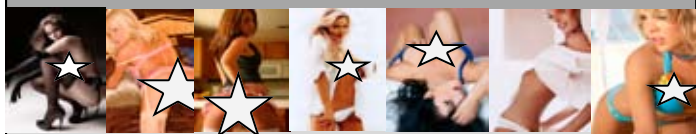
States that have declined to comply with SORNA have proposed compromises, such as permitting flexibility in the frequency of sex offender notifications, allowing states latitude in how they define juvenile offenders, and giving states the option to not apply SORNA requirements retroactively.

One must wonder why the federal government is so anxious to twist states’ arms to implement a law that doesn’t reduce the occurrence of sex offenses but does create a lot of new potential criminals – sex offenders who are not in compliance with SORNA’s registration requirements, and are thus subject to prosecution and incarceration.

As of January 2012 only one additional state, Tennessee, was in substantial compliance with the Adam Walsh Act, bringing the total to 15 states ... two years after the original deadline had passed. ■

Sources: *Wall Street Journal*, [www.ncsl.org](http://www.ncsl.org), [www.memphisdailynews.com](http://www.memphisdailynews.com), [www.omaha.com](http://www.omaha.com), [www.newsok.com](http://www.newsok.com)

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# Rikers Island Guards File Suit Alleging Cancer-Causing Toxin Exposure

by Mark Wilson

The Rikers Island jail in New York City was built atop a toxic landfill that is causing cancer, according to lawsuits filed by seven cancer-stricken Rikers employees.

"That island is toxic and it's killing people," said guard Vanessa Parks, 49, who was diagnosed with uterine cancer in 2009. "I've spent 20 years being exposed to what's in the ground and the air there. My life won't ever be the same."

Guard Jacqueline Bede, 51, who was diagnosed with colon cancer in 2009, agreed. "That place has killed so many of my brothers and sisters," she stated. "Every few months, someone got sick."

Rikers Island employees described a strong chemical odor that often permeates the facility, causing nausea. Plumes of methane gas thick enough to set off gas detectors on the island also rise from the ground.

Ingrid Mitchell, the widow of Rikers guard Anthony Mitchell who died of bladder cancer in 2008, claims the jail killed him. "His doctors told him his cancer was caused by inhaling carcinogens" during his 20-year career, said Mitchell. "Rikers did that to him."

Robert Barley, a cook at Rikers, blamed the jail for his thyroid cancer, while plumber John Paccione said the jail was responsible for his brain tumor, according to court filings.

Six cancer-stricken employees and Mitchell filed suit against the City of New York in Bronx Supreme Court, claiming that jail officials knew staff members were being exposed to dangerous toxins but did nothing to protect them. The plaintiffs noted that there are more victims who have not yet decided whether to sue.

The city denied the claims. "There is no support for these allegations," said Ken Becker, the city's attorney who is defending against the lawsuits.

Not surprisingly, the plaintiffs' lawyer, Seth Harris, disagreed. "Their investigation was a joke," said Harris, referring to a 2009 Health Department report that found "no evidence that suggests a cancer cluster exists" at Rikers.

However, researchers failed to determine how many jail employees had cancer, according to the report. Additionally, only cancer rates in neighborhoods near

Rikers Island were examined rather than on the island itself. Harris noted that two-thirds of the land at Rikers is made up of landfill, but the city has never disclosed its contents. "We need an honest accounting of what that waste is doing to people's bodies," he said.

Of course, nobody appears to be talking about cancer rates among prisoners

held at Rikers Island. The lawsuits filed on behalf of the Rikers employees were removed to federal court and consolidated; they remain pending. See: *Barley v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:11-cv-01300-RJH. ■

Sources: *New York Daily News*, [www.myfoxny.com](http://www.myfoxny.com)

## Oregon Discontinues Failed Prisoner Deportation Program

Oregon's expedited deportation program, touted as saving \$2.1 million by transferring about 200 illegal immigrant prisoners to federal custody for early deportation, came up \$1.9 million short, causing state officials to kill the program.

According to the Oregon Department of Corrections (ODOC), 1,289 prisoners, or about 9.2% of the state's prison population, are illegal immigrants. With an average daily incarceration cost of \$84 per prisoner, the ODOC spends about \$39.5 million annually to confine those non-citizen offenders – most of whom are serving time for drug-related crimes.

In an effort to cut incarceration costs, in 2009 Oregon adopted a deportation program similar to a federal program known as Rapid REPAT. [See: *PLN*, July 2010, p.37]. The Oregon program called for the governor to commute the sentences of non-violent, non-citizen offenders who were within six months of release so they could be transferred to the custody of Immigration and Customs Enforcement (ICE) for expedited deportation. Proponents estimated that some 200 offenders would initially be deported under Oregon's version of the program.

"It was put together under the guise that this potentially would save the budget \$2 million," said Christine Miles, press secretary for Governor John Kitzhaber, who took office in January 2011. "There were a lot of limitations on this program, and once they finally got it off the ground and running, it just didn't pencil out."

Indeed, Oregon saved a mere \$172,097 by commuting the sentences of just 44 prisoners – 42 of whom were from Mexico – according to financial data provided by

ODOC officials. The last of the group of 44 prisoners was released to ICE custody in July 2010.

Oregon's deportation program was enacted on July 1, 2009 as part of HB 3508, but did not launch until January 2010 due to stalled negotiations between state and federal officials. Once a memorandum of understanding was finally reached, the eligibility criteria dramatically limited the pool of potential candidates, according to the ODOC.

"Initially, we had a big pool to look at and start weeding through," noted Guy Hall, administrator of the ODOC's Office of Population Management. "But once you got through that initial bubble, so to speak, the people waiting in line as they marched through their incarceration towards their last six months really slowed down."

Screening potentially eligible prisoners required extensive time and effort by ODOC staff, Hall noted. "I think people were assuming that the entire six months would be saved [in terms of incarceration costs], but there were some people that were a month to the door, a week or so to the door," he said. "So we didn't glean the entire six months savings for lots of folks in the initial screening."

In exchange for commutation and early release, eligible prisoners – who frequently did not speak English – were required to waive their right to challenge their deportation, and sign agreements that specified they would face up to 20 years in federal prison if caught again in the United States illegally. Legal complications related to those conditions chilled prisoners' interest in the program.

On September 24, 2010, the Ninth



Circuit Court of Appeals held that certain illegal immigrants facing “stipulated removal” from the United States have a due process right to counsel and, when necessary, to qualified translators to properly explain legal issues related to their deportation. See: *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010).

“I think ICE had slowed down in marching through this process because this case was going through the courts,” said Hall, “and then there was an outcome that they felt left them with a very slender pool of folks they could actually deport without that counsel process.”

ICE has spearheaded longstanding, successful expedited deportation programs in other states, such as Arizona, Georgia and New York. Those states have deported thousands of undocumented offenders before completion of their prison sentences, resulting in substantial savings. Georgia’s program has saved \$200 million, New York has realized \$150 million in sav-

ings and Arizona saved over \$33 million, according to immigration officials.

When Oregon achieved just 8 percent of its projected \$2.1 million in savings, the governor and his policy advisors “took a hard look” at the deportation program and pulled the plug, Miles stated.

“This program wasn’t giving us the cost effectiveness that we originally thought,” she said. “We also want people to know that if you come to Oregon and you do a crime, no matter where you are from, you need to do the time.”

Pursuant to statute, the commutations granted to the 44 Oregon prisoners so they could be transferred to ICE custody and deported were not included in an annual report to the legislature regarding the number of pardons and clemencies granted by the governor. It’s as if those commutations – like the projected cost savings to the state – never existed. ■

Source: *Statesman Journal*

## Private Equity Firms Profit Handsomely from Prison Phone Services

The October 2011 sale of Global Tel\*Link Corp. (GTL), the nation’s largest prison and jail phone company, demonstrates what a goldmine prison phone services are for the provider side of the market. The sale, reportedly valued at \$1 billion, was highly unusual because it was a leveraged deal at a time when the nearly frozen financial sector is running from most leveraged deals.

GTL and its subsidiaries provide phone services for the prison systems of over half the states plus various county jails. In February 2009, the private equity firm Veritas Capital and Goldman Sachs purchased GTL from Gores Equity LLC for \$345 million. The deal to sell GTL to Alabama-based American Securities Capital, another private equity firm, will about triple their investment.

The high value of GTL derives from the fact that it operates a pure monopoly once it obtains a prison phone contract. The company then price-gouges its captive customers, who have few other means of calling their family members and friends.

GTL charges up to \$3.95 plus \$.89 per minute for long distance calls, or \$17.30 for a 15-minute conversation. The company’s call rates vary from state to state; GTL also charges service fees, such as for credit card payments by family members,

which pad its profit margin. [See: *PLN*, April 2011, p.1].

While companies like GTL profit handsomely from their prison phone service monopolies, prisoners and the recipients of their phone calls are the ones who have to pay.

Another prison phone service provider, Securus Technologies, Inc., was acquired on May 31, 2011 by Castle Harlan, Inc., a New York-based private equity corporation. That sale was valued at an estimated \$450 million. ■

Sources: *New York Post*, [www.thedeal.com](http://www.thedeal.com), [www.prnewswire.com](http://www.prnewswire.com)



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# Head of Missouri Jail Sentenced for Beating, Arranging Attacks on Prisoners

The former head jailer at Missouri's Washington County Jail (WCJ), about 60 miles from St. Louis, has been convicted of violating the civil rights of four prisoners and obstruction of justice. His daughter, a guard at the jail, also was convicted of obstructing justice.

The charges against the former jail boss, Vernon Wilson, 57, stemmed from four incidents that occurred in 2005. In separate incidents, Wilson slapped two prisoners hard enough to force their heads into a concrete wall. In the latter two incidents, Wilson gave prisoners cigarettes for attacking two other prisoners he considered troublemakers. Three of the victims were awaiting trial; one was the son of a sheriff's deputy.

WCJ prisoner Gary Gieselman was a victim of one of the latter assaults. Wilson put Gieselman into the "rough tank" after he had an argument with Wilson's daughter. Gieselman was attacked by other prisoners and suffered permanent facial damage, including a broken jaw, fractures around his eye and missing teeth.

According to Thomas E. Perez, Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, "Wilson used the power of his position to punish these inmates," and in doing so, "his actions brought shame to his fellow law enforcement officers, but even more than that, they served to undermine our faith and confidence in the criminal justice system."

Gieselman said the jury's verdict confirmed that his civil rights had been violated. Nevertheless, he expressed dismay at the culture of abuse that was allowed to persist at WCJ. "While Vernon Wilson will face justice, I am still concerned that the practice of beating prisoners was allowed to continue for so long at the Washington County Jail. I do not understand why so many employees and officials stood by silently for so long."

In addition to Wilson's convictions for four civil rights violations, he also was convicted of lying to the FBI about the attacks. He was sentenced on July 13, 2011 to ten years in federal prison – the maximum. He had served in law enforcement positions for three decades.

Wilson's daughter, Valeria Wilson Jackson, 26, pleaded guilty to obstruction charges after she lied to the FBI about the

assaults. She was sentenced in March 2011 to five years on probation and six months of house arrest. She had testified against her father at trial. Both Wilson and his daughter were ordered to pay over \$13,000 to Gieselman for his medical bills.

Gieselman has also filed a civil rights

suit against Wilson, Jackson and Washington County; that lawsuit remains pending. See: *Gieselman v. Jackson*, U.S.D.C. (E.D. MO), Case No. 4:10-cv-01619-JAR. ■

Sources: [www.bnd.com](http://www.bnd.com), [www.cypresstimes.com](http://www.cypresstimes.com), [www.stltoday.com](http://www.stltoday.com), [www.therepublic.com](http://www.therepublic.com)

## Mother Questions Her Son's "Natural" Death in Colorado CCA Prison

by Alan Prendergast

On October 28, 2010, a 26-year-old prisoner named Terrell Griswold was found slumped over and unresponsive in his cell at the Bent County Correctional Facility, a private prison in southeastern Colorado. The official cause of death was listed as cardiac hypertrophy, or an enlarged heart. But Lagalia Afola says the circumstances of her son's death are more complicated than that.

When it comes to the mysteries of prison health care, they usually are.

Griswold was serving a three-year sentence for burglary. Although she lives in Kansas City, Afola spoke with him often by phone. Terrell didn't complain a lot, didn't volunteer much about his health, she stated. She knew he was taking blood pressure medication but considered him in very good shape, and she was stunned when officials told her that he'd died of a heart condition that couldn't have been foreseen.

"Initially, they just told me that he died of an enlarged heart," Afola said. But over the past year she has tracked down medical records held by the private prison operator, Corrections Corporation of America (CCA), and the Colorado Department of Corrections; she's pored over the official autopsy report and pointed out inaccuracies to the medical examiner; and she's consulted with a private pathology group, which has reviewed the same records and issued a conflicting opinion regarding how Griswold died and the kind of medical care he received in the weeks leading up to his death.

It turns out that, in addition to an enlarged heart, Griswold also was suffering from obstructive uropathy – a nodule in his prostate was blocking his urinary tract. He had a history of urinary tract infections and had been complaining of problems with urination dating back to 2007.

"Kidney problems can precipitate heart problems," noted Afola, who has worked as a medical assistant. "I know they [CCA] are responsible for my son's death. All they needed to do was get a catheter in him."

Medical records indicate that a week before his death, Griswold had complained of dizziness, abdominal pain, soaring blood pressure and other symptoms that he believed were related to prostate problems. A prison physician was notified by phone but didn't actually examine the patient; two days later, he wrote a prescription for antibiotics to treat a possible urinary tract infection.

Afola believes her son tried to get medical help more often than the prison's records indicate. "Inmates have told me that he was going to medical almost every day for two weeks before he died, and they would not see him," she said.

His cellmate told authorities that Griswold had been complaining of stomach pain and was frequently attempting to urinate. Hours before his death he again went to medical, saying he'd been nauseous and vomiting. But the nurse who examined him concluded he was simply experiencing a bad reaction to the antibiotics prescribed for his infection. "He didn't show any outward signs of distress," reads one notation.

In response to information provided by Afola, Dr. Leon Kelly, the El Paso County pathologist who conducted the original autopsy, took the unusual step of running additional lab work and amending his report six months later. Although Kelly is still convinced that an enlarged heart was the cause of death, Shawn Parcells, the outside expert whose firm Afola consulted, contends that "complications of obstructive uropathy"

would be a more accurate finding.

Given the clinical history, he writes, "Terrell should have been taken to an urologist to have a complete and full workup.... I believe there is negligence in this case, which would be defined as the medical team providing care below the standard of care."

But Parcells is a forensic pathologist assistant, not an MD, and medical opinions can vary widely about the causation of death when several contributing factors are involved.

CCA officials did not respond to a request for comment about Griswold's death; the company has been the target of frequent criticism from private prison opponents and is the defendant in a long-running lawsuit over a 2004 riot at its prison in Crowley, Colorado.

Afola said she has no legal standing to pursue a lawsuit over the alleged medical negligence that resulted in the death of her son. "My hands are pretty much tied for

doing anything legally," she stated. "But I want to expose these people. I'm just hoping I can make their actions public. I know that my son was not cared for. I know he should not be dead."

It's taken her more than a year, she said, to extract sick call slips that her son filled out, documents that CCA was reluctant to provide and that somehow disappeared and then reappeared in DOC files. She's written somewhere between fifty and 75 certified letters to corrections officials seeking additional information and investigation, and has been gently urged to curb the practice.

Yes, Terrell Griswold was a convicted felon. But he was also her son. "These are still people," she said. "It's ridiculous, the kind of care they receive." ■

*This article was originally published by Westword (www.westword.com) on January 6, 2012 and is reprinted with permission.*

## CDCR Pays \$12,000 to Settle California Prisoner's Pro Se Caging Suit

As part of a settlement agreement, the California Department of Corrections and Rehabilitation (CDCR) agreed to pay \$12,000 to prisoner Bobby James Williams to settle a lawsuit Williams filed in 2005. Williams claimed that the CDCR had violated his state and federal constitutional rights when he was placed in a stand-up holding cage for seven days. The settlement agreement represented a compromise of various disputed claims and was not an admission of liability by prison officials.

In a federal lawsuit filed pursuant to 42 U.S.C. § 1983 that sought declaratory and injunctive relief, as well as compensatory and punitive damages, Williams alleged that in January 2005, while housed at Salinas Valley State Prison, he was ordered out of his cell to discuss the possibility of having a cellmate – something Williams had refused to do because he believed staff had previously endangered his safety.

Once out of his cell, guards placed him in a stand-up holding cage where he remained overnight. The next day he was placed in another stand-up holding cage, where he remained for seven days without running water. Williams had to eat and sleep in the holding cage, his complaint stated, with only a plastic bag for his bodily wastes. Among other claims his lawsuit alleged cruel and unusual punishment in violation of the Eighth Amendment.

Williams represented himself pro se during the litigation of the case and the negotiation of the settlement. See: *Williams v. Hickman*, U.S.D.C. (E.D. Cal.), Case No. 1:05-cv-01649-GMS. ■

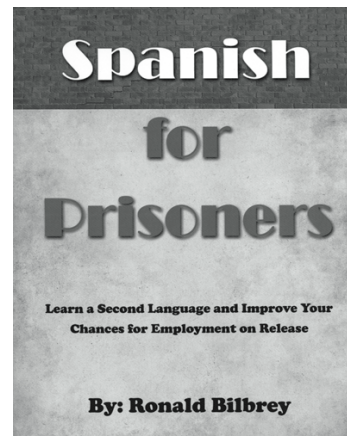
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## Settlement in New York City Jail Mental Health Services Case Still Alive

On June 28, 2011, the New York Court of Appeals held that a motion to extend the obligations of New York City officials to provide mental health services to jail prisoners was timely because it was filed before the settlement agreement in the case expired.

A group of mentally ill prisoners in New York City jails brought suit in 1999, alleging that “the City had failed to satisfy its duty under the State Constitution and Mental Hygiene Law to provide adequate ‘discharge planning’ services for mentally ill persons completing their terms of incarceration.”

The Supreme Court for New York County certified the case as a class action and granted preliminary injunctive relief. [See: *PLN*, Jan. 2002, p.14]. The parties then entered into a settlement agreement, which was approved by the court on April 4, 2003.

Two compliance monitors were appointed on May 6, 2003 to oversee the City’s efforts, and the settlement was implemented on June 3, 2003.

“The monitors ... did not begin their work monitoring the City’s activities ‘in earnest’ until June 25, 2003 and, even as of the filing of the September 2003 report, they were unable to provide an opinion regarding the City’s compliance with the agreement,” according to the Court of Appeals.

The settlement included a termination clause providing for expiration “at the end of five years after monitoring by the Compliance Monitors” began. The parties subsequently consented to extensions that tolled the termination date by 356 days. Thus, the expiration date was to be calculated using five years plus 356 days.

The settlement agreement also allowed the plaintiffs to “ask the Supreme Court to extend the settlement for an additional two-year period” if they “could demonstrate before the agreement expired that the City had failed to adequately discharge its responsibilities for two years.”

On May 22, 2009, the plaintiffs moved to enforce the settlement. The defendants moved to dismiss, arguing that the motion was untimely and the court lacked jurisdiction because the settlement agreement had expired in April 2009.

The Supreme Court denied the defendants’ motion, “concluding that the

five-year term began on the implementation date and that the expiration date occurred on May 25 or 26, 2009, thereby rendering plaintiffs’ motion timely.”

The Appellate Division reversed, however, “holding that the five-year term commenced when the monitors engaged in their first affirmative act on either May 19th or 28th in 2003, which produced a termination date of either May 10th or 19th in 2009, both of which were prior to the filing date of plaintiffs’ motion.”

Applying “traditional principles of

contract interpretation,” the Court of Appeals reversed the Appellate Division, finding that the monitoring of the City’s compliance obligations did not begin until June 3, 2003. Hence, “the agreement did not terminate until at least five years and 356 days later on May 25 or 26, 2009. Since plaintiffs filed their motion ... on May 22, 2009, [the] Supreme Court did not lack jurisdiction over the case and it properly denied the City’s ... motion to dismiss.” See: *Brad H. v. The City of New York*, 17 N.Y.3d 180, 951 N.E.2d 743 (N.Y. 2011). ■

## Texas Prisoner on Idaho Presidential Primary Ballot in 2008

by Mark Wilson

During the 2008 Democratic primary election, Idaho voters had three choices for president: Hillary Clinton, Barack Obama and Keith Russell Judd.

At the time, Judd was serving time at the Beaumont Federal Correctional Institution in Texas on a 1999 conviction for making threats on the University of New Mexico campus. He received 734 votes, or 1.7 percent of the Idaho primary vote.

Judd had worked to get his name on the ballot for president in numerous states, and qualified as a write-in candidate in several. Idaho was the only state that put his name on the ballot for the Democratic primary, though that won’t happen again in 2012.

“We weren’t real happy he was on our ballot,” said Idaho Secretary of State Ben Ysursa. “There were some changes made.” Those changes were intended to eliminate a state law that allowed Judd to have his name placed on the ballot by simply sending in a notarized form and paying a \$1,000 fee. Lawmakers responded by reinstating a previous law that required candidates to collect signatures in the state to make the ballot.

The change wasn’t actually needed, however, because Idaho’s Democratic presidential primary does not actually determine the winning candidate. Rather, for many years, Idaho’s Democrats have selected their presidential delegates at caucuses. The Republican Party’s central committee recently voted to do the same. As such, Idaho really should just do away with its presidential primary election, said Ysursa.

Judd wasn’t the only driving force behind Idaho’s law change. In 2009, a Ralph Nader supporter filed a federal discrimination suit challenging Idaho’s election laws. Arizona citizen Donald Daien alleged that Idaho law violated the Constitution by requiring petition gatherers to be Idaho residents and setting the number of qualifying signatures to put an independent candidate for president or vice president on the Idaho ballot at 1 percent of those who voted in the previous presidential election.

Daien prevailed on both counts, and on March 30, 2011 the court awarded him \$54,349.80 in attorney fees and costs. An additional \$14,831.05 in fees and costs was awarded on November 21, 2011. See: *Daien v. Ysursa*, U.S.D.C. (D. Idaho), Case No. 1:09-cv-00022-REB.

In response to the lawsuit, Idaho law was amended to reduce the number of qualifying signatures to 1,000. Which is still a high hurdle for Judd or other prisoners who want to have their names placed on the presidential primary ballot. ■

Source: *The Spokesman-Review*

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# Audit Recommends Cost-Saving Measures for Minnesota Sex Offender Program

A March 2011 report by Minnesota's Office of the Legislative Auditor (OLA) found that while civilly committing sex offenders increases public safety, the prohibitive costs associated with administering the Minnesota Sex Offender Program (MSOP) could be reduced by, among other means, developing alternatives to commitment at high-security facilities and improving the adequacy of treatment to allow MSOP residents to complete the program and be released.

Minnesota is one of 20 states with civil commitment programs for sex offenders; in 2010 it had the highest number of civilly committed sex offenders per capita despite having a lower incarceration rate than most states. It is projected that the number of civilly committed offenders will double between 2010 and 2020. With the annual costs of civil commitment reaching \$120,000 per MSOP offender – about three times the cost of incarcerating state prisoners – the OLA addressed concerns about whether those costs could be reduced, why the number of sex offenders being committed is so high, and why only one sex offender has been conditionally released from the MSOP since it was created in 1994.

With respect to the number of civil commitments, the OLA noted that Minnesota's laws facilitate the commitment of sex offenders (relative to the laws of other states). For example, unlike most states, Minnesota does not afford a jury trial to sex offenders referred for civil commitment. It also establishes correspondingly lower evidentiary burdens – the standard for commitment is “clear and convincing evidence” rather than proof “beyond a reasonable doubt.” Further, hearsay evidence is admissible and, absent physical harm or violence, emotional harm to the victim may still be considered. As of mid-2010, Minnesota had 627 civilly committed sex offenders – the third highest in the nation after California and Florida.

In regard to costs, the OLA noted that overall staffing per MSOP resident at the state's two civil commitment facilities, Moose Lake and St. Peter, is about three times higher than at Minnesota prisons. “One lower-cost alternative,” the report suggested, “would be to establish group homes or halfway houses for certain civilly committed sex offenders who could be managed in such a setting” – for example,

low functioning adult offenders whose risk level has been sufficiently reduced by MSOP treatment.

The OLA cited the civil commitment program in Texas, with an annual cost of only about \$27,000 per offender, as a model worth emulating. Texas places committed sex offenders in halfway houses intended specifically for that population, providing them with outpatient treatment as well as close supervision and monitoring. Violating the terms of civil commitment (including restrictions on travel outside the halfway house) may result in a lengthy prison sentence.

With respect to treatment, the OLA observed that several factors, including significant staff vacancies, changes in leadership and an unnecessarily strict release standard, may explain why only one MSOP resident has been discharged from the program. The report suggests that Minnesota could follow the lead of other states in allowing for the release of offenders who no longer meet the commitment criteria, regardless of whether the

treatment program has been completed. Such a step may be necessary, according to the OLA, because among the civil rights retained by civilly committed sex offenders is the right to treatment; thus, without an adequate treatment program, a legal challenge might prove successful.

In response to the OLA report, Minnesota Department of Human Services Commissioner Lucinda Jesson observed that “many of the findings and recommendations are consistent with current objectives and goals to continue to provide sex offender treatment in a safe and secure facility.”

While just one civilly committed offender has successfully completed the MSOP treatment program (though he was later re-incarcerated for violation of his community supervision), since 1994 at least twenty-four MSOP residents have been released from the state's civil commitment facilities – upon their deaths. ■

Sources: *OLA Evaluation Report, Civil Commitment of Sex Offenders (March 2011)*; <http://knowledgebase.findlaw.com>

## Washington DOC Employee Faces Ethics Complaint for Running Non-Profits on State Time Using State Resources

by Matt Clarke

In 2005, Washington Department of Corrections Secretary Harold Clarke reprimanded DOC employee Belinda D. Stewart for selling Avon products to her co-workers at the Purdy women's prison after she was ordered not to conduct private business with DOC staff.

Instead of learning a lesson about co-mingling her work duties and private business, Stewart merely switched the type of business she did on state time to nonprofit organizations, according to an ethics complaint filed by state Senator Mark Carrell.

The March 18, 2011 complaint accuses Stewart, now the DOC's Communications and Outreach Director, of using state computers, vehicles and employees to run at least five non-profit organizations from her DOC office. Those nonprofits, including the National Association of Women in Criminal Justice

(NAWCJ) and the National Association of Blacks in Criminal Justice (NABCIJ), used the address of the DOC's headquarters in Tumwater as their mailing address. Stewart is also the registered agent for the nonprofit Washington Corrections Association (WCA).

The ethics complaint states that Stewart misused “at least 593 hours of state DOC employee time” over a two-year period, which reflected “the work of only one employee,” a graphics technician. The complaint alleges that other DOC employees also worked for Stewart's nonprofits from their state offices, and that money was raised from Stewart's subordinates for the nonprofit organizations.

“It's a blatant misuse of state resources to support outside businesses and solicit funds in direct violation of DOC's own policies at the time,” Carrell said in his ethics complaint. Two other



complaints have been filed against Stewart with the Executive Ethics Board, which has the power to fine state workers. However, the Board asked the DOC to first conduct an internal investigation.

"We're in the final days of completing it," said then-DOC Secretary Eldon Vail, in what he referred to as a preliminary conclusion. "From a non-thorough look, I haven't seen a smoking gun at this point. I have seen someone trying to work to support staff in the agency," he remarked, noting that the two-year-old NAWCJ likely had "dozens" of DOC employees as members.

The NAWCJ initially received permission from the family of slain Lakewood police officer Tina Griswold to use her name to raise money for scholarships the organization wanted to award to criminal justice students. Later the family withdrew its permission and started its own scholarship fund, citing concerns over NAWCJ's mission, finances and Stewart's failure to answer their questions.

A few weeks after the first ethics complaint was filed, Vail signed a document outlining the appropriate participation of employees involved with NAWCJ. The DOC and Stewart also entered into a

"memorandum of understanding" that would permit the infrequent use of state employees and equipment for NAWCJ purposes, and allow DOC staff members to take administrative leave to attend NAWCJ training conferences. A similar agreement applied to NABCJ and WCA. Vail justified the agreements by saying they provided DOC staff with access to important training; the DOC's ethics rules on the use of state resources were rewritten around the same time.

Senator Carrell said he believes the agreements and policy rewrites were "a concerted effort by Ms. Stewart to 'grandfather in' her private business activities to try to make them appropriate within DOC policies, many years after much of the unethical behavior took place." He emphasized that her nonprofit-related activities while on state time were too frequent to be allowed even under the new DOC policies.

On September 9, 2011, the Executive Ethics Board, in a 3-0 decision, made a preliminary finding that there was "reasonable cause" to believe Stewart had violated state ethics laws by using "state resources including her time, her staff's time, state computers, state vehicles and

the state electronic mail system far in excess of the de minimis (negligible) use rule to further the agenda of" NABCJ, NAWCJ and WCA. The Board's report was forwarded to Stewart for a response, after which time a hearing will be scheduled.

Following the Board's decision, Senator Carrell asked current DOC Secretary Bernie Warner to fire Stewart. "I would hope that he would be using this as a reason to clean house," Carrell stated. "This didn't happen in a vacuum. It was condoned by people up the food chain." At the very least, he noted, Stewart had "exercised exceptionally poor judgment in mixing her state and personal business affairs..."

Instead, Warner said he would "reassign" Stewart and prohibit the nonprofit organizations from using state resources until the ethics investigation was complete. Additionally, the DOC will review its policies and the memorandums of understanding with Stewart's nonprofits, and develop a new ethics training program for DOC employees. ■

Sources: [www.thenewstribune.com](http://www.thenewstribune.com), [www.kirotv.com](http://www.kirotv.com), [www.theolympian.com](http://www.theolympian.com)

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Charles de Secondat, Baron de Montesquieu said, "There is no crueller tyranny than that which is perpetrated under the shield of law and in the name of justice."

# BOP Settles Prisoner Rape Suit for \$625,000

by *Brandon Sample*

The federal Bureau of Prisons (BOP) has agreed to pay \$625,000 to settle a lawsuit filed by a prisoner who was raped by a guard at the Metropolitan Detention Center (MDC) in Brooklyn, New York.

In the early hours of November 25, 2001, Karleen Toni Remice was forced to perform various sex acts on Randy Denjen, a BOP lieutenant at MDC Brooklyn.

For example, Denjen forced Remice to kiss him, touch his penis and perform oral sex on him. Denjen then raped her.

While Remice was being sexually assaulted, another guard noticed what was happening. That guard, a female officer who herself was having a sexual relationship with a male prisoner at the MDC, allegedly informed a guard in the control room that she “may have” seen Denjen having sex, but the control room guard reportedly told her “you saw nothing, you heard nothing.”

Remice filed suit in 2003, claiming violations of her Eighth Amendment rights and asserting various claims under the Federal Tort Claims Act. Remice alleged that she was not the only female prisoner Denjen had sexually assaulted, and that the warden, captain and other officials at the facility knew what Denjen was doing but looked the other way. Remice pointed to numerous past complaints of sexual misconduct by Denjen to support her claims against MDC supervisors.

Almost eight years after the suit was filed, the parties agreed to settle the case for \$625,000.


Denjen pleaded guilty to sexually abusing Remice on October 17, 2002, admitting during his plea hearing that he forced her to engage in sexual acts by placing her in fear that if she did not agree to the sex acts she would face retaliation in the form of false incident reports that would cause her to be placed in “disciplinary segregation.” [See: *PLN*, April 2004, p.21; May 2002, p.30].

Denjen was sentenced to 151 months in federal prison, which was upheld on appeal. See: *United States v. Denjen*, 101 Fed. Appx. 362 (2<sup>nd</sup> Cir. 2004). He is scheduled to be released in March 2013.

The female guard who saw Denjen assaulting Remice was never prosecuted for her own sexual misconduct. Instead,

she was allowed to resign and now works for the Transportation Security Administration.

Remice was represented by Brooklyn

attorneys Brett H. Klein and Samuel Gregory of Leventhal & Klein, LLP. See: *Remice v. Zenk*, U.S.D.C. (E.D. NY), Case No 1:03-cv-00286-BMC-RML. 

## Videotaped Assault at Idaho CCA Prison Sparks FBI Investigation

by *Mark Wilson*

Guards at a private prison in Idaho looked on, but did not intervene, as a prisoner was beaten into a coma. Video footage of the January 2010 incident has sparked an FBI investigation into civil rights violations at the facility.

Corrections Corporation of America (CCA), the nation’s largest private prison company, operates the Idaho Correctional Center (ICC), which has long been condemned for high levels of violence.

In 34 years of suing more than 100 prisons and jails, American Civil Liberties Union attorney Stephen Pevar said ICC was the most violent prison he had ever seen.

Critics claim that ICC guards use prisoner-on-prisoner violence to force prisoners to snitch on their cellmates to avoid being transferred to extremely violent units. Prisoners have called ICC a “gladiator school” due to its reputation for violence.

Hanni Elabed, 24, knows all too well just how violent ICC is. He was serving a sentence of two to 12 years for robbery when he snitched on drug trafficking by ICC prisoners and guards, according to a subsequent lawsuit. He was placed in solitary confinement for his own protection when he complained that he was being threatened. Elabed was later returned to his original housing unit, however, where he was attacked six minutes later.

On November 30, 2010, the Associated Press (AP) released surveillance video of the vicious attack on Elabed. Prisoner James Haver is seen beating Elabed as at least three CCA guards watch from a guard station for several minutes. Elabed banged on a window pleading for help, but ICC staff did not intervene.

Haver beat Elabed so long and hard

that he had to sit down and rest before resuming the assault. Even once Elabed was knocked unconscious, Haver stomped him at least a dozen more times.

About two minutes after Haver stopped his attack, the door to the unit opened and guards entered to handcuff Haver and examine Elabed for signs of life. Elabed suffered cranial bleeding and remained in a coma for three days; he was eventually granted a medical parole. He still suffers from brain damage and short-term memory loss. CCA agreed to settle Elabed’s lawsuit in November 2010 under undisclosed terms. See: *Elabed v. CCA*, U.S.D.C. (D. Idaho), Case No. 1:10-cv-00218-EJL.

Within hours of the AP’s release of the Elabed video, Idaho’s top federal prosecutor acknowledged that the FBI was investigating whether CCA guards had violated the civil rights of prisoners at ICC. The inquiry focuses on prisoner assaults and the overall rate of violence at the facility, according to U.S. Attorney Wendy Olson. CCA spokesman Steve Owen said the company was cooperating with federal investigators.

The Elabed video was a key piece of evidence in a class-action lawsuit filed against CCA, which has since been settled, that alleged prisoners were denied medical treatment to cover up the rampant violence. [See: *PLN*, Nov. 2011, p.10].

The Private Corrections Institute (PCI), a non-profit watchdog organization that opposes prison privatization, issued a press release on December 1, 2010 condemning the violence at ICC and CCA’s response to the release of the Elabed video.

CCA had criticized the AP’s decision to publish the video, saying in a statement that the “release of the video poses an unnecessary security risk to our staff,

the inmates entrusted to our care, and ultimately to the public.”

“That is utter nonsense,” countered *PLN* associate editor Alex Friedmann, who also serves as PCI’s president. “I’ve watched the video, and the only ‘unnecessary risk’ it poses is to CCA’s liability in prisoner assault cases and to the notion that CCA employees are corrections professionals.”

“CCA’s public relations staff needs remedial training,” Friedmann added. “Rather than try to minimize the fallout from the release of a video that shows callous disregard to an inmate’s safety, CCA should take steps to ensure that the prisoners ‘entrusted to their care’ are safe, and that brutal assaults like the one shown in the video do not happen again while

supposedly ‘well-trained’ CCA guards stand idly by.”

The ICC is accredited by the American Correctional Association (ACA), a private organization that provides accreditation to public and private correctional facilities for a fee, and which receives funding from private prison companies, including CCA.

“The fact that a private prison with such high levels of violence – that is facing both a class-action lawsuit and an investigation by the FBI – has received ACA accreditation raises serious questions about the credibility of the ACA and the accreditation process itself,” said PCI director Ken Kopczynski.

In the wake of the ICC scandal, Idaho Department of Corrections Director

Brent Reinke released a statement claiming that Idaho’s eight state-run prisons were among the safest and most efficient in the nation. According to an October 9, 2011 AP article, in 2010 the ICC had more violent incidents than all Idaho state prisons combined. That was an improvement since 2008, when the violence rate at ICC was three times higher than at state facilities.

Excessive violence is nothing new to CCA and private prisons in general. *PLN* has repeatedly reported on similar incidents at CCA facilities and higher levels of violence at privately-operated prisons. [See, e.g.: *PLN*, Dec. 2011, p.18].

Sources: *PCI press release (Dec. 1, 2010)*, *USA Today*, *Associated Press*



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# Texas Towns Saddled with Empty, Expensive Privatized Prisons and Jails

by Matt Clarke

In July 2011, anyone with at least \$5 million to spare was invited to bid on a 373-bed, state-of-the-art, turn-key minimum-security prison on 30 acres of land in the cotton-farming town of Littlefield, Texas.

The tiny town, with a population of 6,500, agreed to build what was originally a private prison for juvenile offenders after developers convinced city officials there was a burgeoning market for prisoners that would allow Littlefield to rake in huge profits by renting cell space to overcrowded prison systems. The citizens of Littlefield were not allowed to vote on the issue.

The city's haste to buy into the scheme to profit from keeping people locked up has cost Littlefield residents dearly. Initially, they spent \$11 million to construct the Bill Clayton Detention Center. The city issued bonds to raise the money and still has more than \$9 million in outstanding debt. The prison hasn't generated revenue for the last two years, requiring the city to raise taxes and fees, fire municipal employees and suspend the purchase of equipment such as a police car just to make the \$65,000 monthly payments on the bond debt. That allowed Littlefield to avoid defaulting on the bonds; nonetheless the city's bond rating was severely downgraded, making it expensive for the town to borrow money. [See: *PLN*, March 2011, p.34].

The private prison project had a promising start. Littlefield initially contracted with Correctional Services Corp. to run the facility. After the Texas Youth Commission stopped using the prison to house juvenile offenders, Idaho and Wyoming provided prisoners for several years. But riots, escapes and the suicide of an Idaho prisoner who left a note complaining about conditions in solitary confinement prompted Idaho to withdraw its prisoners in 2009. [See: *PLN*, June 2009, p.1]. Soon thereafter GEO Group, the private prison firm operating the facility at the time, announced it would be leaving. When the company departed it took 100 jobs with it.

Prompted by an empty prison that generated no revenue but cost \$65,000 a month to maintain, the city decided to sell

the Bill Clayton Detention Center. It was listed on the website of Tulsa-based William & William Real Estate Auctioneers in July 2011 with a \$5 million reserve. Littlefield lost money on the \$6 million winning bid by an unnamed bidder, but that was fine with some local officials.

It's best "to get out from under this debt so we can get back to some sort of normalcy," said Littlefield City Manager Danny Davis, who noted the city had learned its lesson. "Anytime we are signing up for a long-term agreement that looks good right now, we'll know we need to look further down the road," he observed.

Unfortunately, Littlefield's hopes of finally ridding itself of its money-pit of a jail were dashed in September 2011 when the auction purchase fell through, leaving the city right back where it started with a vacant facility saddled with millions of dollars of debt.

"With the detention center, nothing has happened easy," said Davis. "It's been a struggle for us all along, so, in some ways, we were not that surprised that we've got a continued struggle."

Prison populations are stabilizing or declining throughout the nation as cash-strapped governments look for ways to save money. Private prison contracts are some of the first expenses that are cut. The Texas Department of Criminal Justice (TDCJ) has cancelled contracts for 2,000 private prison beds, including the North Texas Intermediate Sanctions Facility and the Fort Worth Community Corrections Facility, both managed by GEO Group. Thus, Littlefield is not alone in feeling the pain of a shrinking private prison market.

Jones County built a new \$34 million, 1,100-bed prison and \$8 million, 96-bed jail just north of Abilene, Texas. The TDCJ had promised to fill the prison but later reneged. The private prison developers made their money and left the Texas Midwest Public Facility Corporation to pay \$314,000 a month for the two facilities that house no prisoners and generate no income. County officials paid \$3.6 million in 2011 from their reserves, but after the reserves run out who knows what will happen?

"The market has changed nationwide in the last 18 months or two years. It is certainly a different picture than when we started this project," said Dale Spurgin, County Judge of Jones County.

There may be no solution to that problem except the one taken by Grayson County, Texas, which was planning to build a \$30 million, 750-bed jail that was double the capacity the county needed, until the public pressured local officials to stop.

"When you put the profit motive into a private jail, by design, in order to increase your revenues, your profits, you need more folks in there and they need to stay longer," said Bill Magers, mayor of Sherman and a leading opponent to the oversized and privatized jail.

Although Corrections Corporation of America, the world's largest private prison operator, maintains that demand for the company's prison beds is strong – especially for federal immigration detainees – other private prison firms have not been so fortunate. Community Education Centers (CEC), a New Jersey-based company, has been pulling out of jails it runs in Texas due to unprofitability, citing "the current [jail] population fluctuation." Falls County, Texas, which formerly contracted with CEC, has a for-profit jail that is losing money due to a shortage of prisoners that has created a glut of unneeded and thus unwanted private prison beds.

"If somebody is out there charging \$30 a day for an inmate, we need to charge \$28," stated Steve Sharp, County Judge of Falls County, who is trying to stop the money that is hemorrhaging from the county through its jail. "We really don't have a choice of not filling those beds."

Burnet County and Johnson County also have had problems after entering into private prison ventures, only to have contracts canceled or private prison companies pull out. CEC canceled its contract with Johnson County in March 2010, a year early, due to unprofitability.

"I would hope that counties and cities would do some population projections before they go forward with building these jails," said Marc Levin with the Texas

Public Policy Foundation. "Any business has to consider how a government's perspective might change. No one is entitled to assume that certain policies are going to remain in place."

However, the problems faced by cities and counties with vacant or under-utilized correctional facilities have worked to the advantage of large, overcrowded jail systems in Texas. The Harris County jail in Houston uses about 700 private prison beds, and towns like Littlefield have been contacting Harris County to offer bed space for rent.

"It really is a buyer's market right now, especially for a county our size," said Harris County Sheriff's Department Captain Robin Kinetsky, who oversees prisoner processing for the county's jail system. "They're really wanting to get our business. So we get good deals."

Of course, the "good deals" for large, overcrowded jail systems are awful for small towns struggling to stay afloat in a sea of private prison debt. Which is yet another reason why privatized prisons aren't such a good idea. ■

Sources: *NPR*, *Dallas Morning News*, *www.star-telegram.com*, *www.kcbd.com*

## Homeless New Mexico Sex Offender Arrested for Moving Out of Dumpster

Charles Mader, a registered sex offender, was homeless when he was released from jail, so he listed a dumpster at an intersection in Albuquerque, New Mexico as his residence. That was fine with authorities. However, after Mader moved to an abandoned house across the street from a nearby homeless shelter in May 2011, he was arrested.

When sheriff's deputies realized that Mader had not been in the dumpster for ten days they began searching for him, allegedly spurred by reports that he had been seen "checking out" young children. Five officers discovered him at a nearby homeless shelter, where he told them about his relocation from the dumpster. They then arrested him for failing to register his change of address.

Mader said he didn't understand the registration requirements. A detective said he had repeatedly explained the requirements to him. As this was Mader's third violation of the sex offender registration laws, he faced up to three years in prison. His previous violations were for failing to re-register

every ninety days and failing to remain at his registered address once before.

Mader was apparently convicted of moving out of the dumpster without registering his new homeless address, as he is currently housed in a New Mexico state prison. At least now law enforcement officials know where he lives. ■

Source: *www.dailymail.co.uk*

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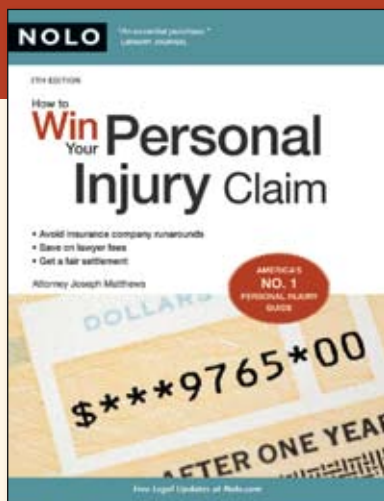
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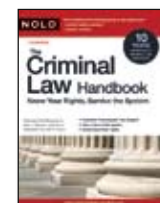
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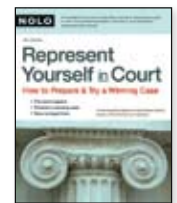
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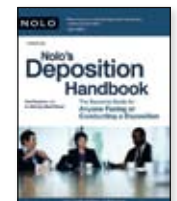
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# Massachusetts: Guards Suspended, Accused of Threatening to Kill Escaped Prisoner in Scheme to Generate Overtime

Two Massachusetts Department of Correction (DOC) officers were suspended in May 2011, one with pay, in connection with anonymous, threatening phone calls made to a hospital where a critically wounded prisoner was being held, apparently in an effort to create additional overtime opportunities for DOC guards.

On April 25, 2011, with ten months left to serve on a 2½ to 4 year sentence for gun charges, Tamik Kirkland, 24, placed a dummy in his bed and walked away from a minimum-security prison in Shirley, Massachusetts. Authorities believe he may have been motivated to escape because his mother had recently been shot.

Five days after escaping, Kirkland allegedly shot and killed Sheldon Innocent, 24, at a Springfield barbershop; a barber was also wounded in the shoot-out. Minutes later, Kirkland exchanged gunfire with state and city police, non-fatally shooting two officers. After being shot at least five times himself, Kirkland was taken to Baystate Medical Center in Springfield, where he was listed in critical condition and placed under 24-hour guard by both police and prison staff.

Several days later, a series of phone calls was made to Kirkland's hospital room. In one of those calls a male voice said, "I'm coming there and I'm going to kill you." The nurse who took the call immediately informed the officers guarding Kirkland of the threat. In the ensuing investigation, Springfield police traced the call to a cell phone connected to a prison employee.

Two DOC guards were subsequently suspended as law enforcement officials investigated whether they made the threatening phone calls and, if so, whether the calls were part of a scheme to ensure that DOC officials would order more overtime shifts to guard Kirkland. After the calls, Kirkland was moved to a prison medical facility.

"When a DOC investigation revealed that a number of calls made to Baystate Medical Center – some of which were threatening in nature – may have involved DOC staff, immediate action was taken," said DOC spokesperson Diane Wiffin.

However, Hampden District Attorney Mark Mastroianni asked the DOC to sus-

pend its internal investigation so his office could look into whether any crimes were committed. "I didn't want it investigated administratively," he said.

In July 2011, DOC sergeant Adam Demoranville, one of the two guards who had been suspended, pleaded not guilty to threatening to commit a crime and disorderly conduct. He is accused of making the threatening phone calls to Kirkland's hospital room. Demoranville was released on his own recognizance and ordered to have no contact with the Baystate Medical Center.

An investigation by the DOC found that Kirkland was able to escape because

a guard did not adequately conduct prisoner checks and a prison supervisor failed to follow proper procedures. Also, Kirkland had a contraband cellphone that he used to facilitate his escape; he reportedly obtained the phone from an employee of a DOC vendor.

"Inmate Kirkland's escape was due to staff procedural errors and staff misconduct, and was not the result of systemic failures," the DOC investigative report stated. "No changes in DOC policies or procedures are required." ■

Sources: *Boston Globe*, *The Republican*, *www.telegram.com*

## FBI Looks into Relationship between GEO Group and Former Florida House Speaker

by David Reutter

In March 2011, *PLN* reported on the political machinations that led to the construction of Florida's Blackwater River Correctional Institution (BRCI), which is operated by GEO Group, the nation's second-largest private prison firm. BRCI was opened at a time when there was excess bed space in Florida's prison system and it was not needed, and one of the lawmakers who championed the facility had connections with GEO. [See: *PLN*, March 2011, p.1].

The FBI has since launched an investigation into potentially illicit conduct in connection with the legislative process involving BRCI.

The federal investigation apparently centers around former Florida House of Representatives Speaker Ray Sansom, who resigned in February 2010 amid a state criminal and ethics investigation. The main thrust of the state investigation, which was dropped in March 2011, involved allegations that Sansom had falsified the 2007-08 state budget to insert \$6 million in appropriations for the construction of an aircraft hanger for Jay Odom, a prominent contributor to the Florida Republican Party.

GEO Group, incidentally, is also a major contributor to Florida Republicans. Through two political action committees, GEO gave \$85,000 to the Republican Party of Florida from 2006 through 2009,

plus tens of thousands of dollars in donations to state Republican Party PACs and individual Republican candidates.

Subpoenas issued by the FBI between March and June 2011 reveal the scope of the federal investigation. One subpoena requires the Florida Office of Legislative Services to provide to the grand jury all travel vouchers submitted by Sansom and his former assistants, Melanie Parker, Eric Edwards, Dory Balter and Samantha Sullivan. Another subpoena requires Sullivan, who served as Sansom's former district legislative aide, to produce all records pertaining to her role in that capacity and forms detailing expenditures made from legislative expense accounts that draw from excess campaign finances.

A third subpoena indicates the reach of the FBI inquiry goes beyond the use of Republican Party funds and is directed at Sansom's possible involvement with GEO Group in constructing and operating BRCI. That subpoena directed TEAM Santa Rosa, the economic development arm of Santa Rosa County, where BRCI is located, to provide all records that pertain to "Project Justice," the code name given to the prison. The subpoena demanded records related to the "planning, design, funding, appropriation, construction, and/or operation of any privately owned correctional facility located in Santa Rosa County," including

the county's acquisition of the land on which the prison was built.

Of particular interest to the FBI, according to TEAM Santa Rosa Executive Director Cindy Anderson, were documents related to communications between Sansom and GEO Group. Released documents indicate that as early as February 2008, state Senator Don Gaetz and Sansom, who at the time was the House budget chief, discussed the idea of a new prison as a means of economic development for Santa Rosa County.

The events surrounding a March 27, 2008 trip that Sansom made for "personal business" to Boca Raton, Florida, where GEO Group is headquartered, are curious. The previous month a team of GEO executives delivered a presentation to the Florida Senate Committee on Criminal and Civil Justice Appropriations, seeking more prisoners in exchange for a discounted contract per diem rate, plus the expansion of another prison the company operated for the state – the 1,884-bed Graceville Correctional Institution (GCI), located in Sansom's district.

The "business" that Sansom conducted in Boca Raton, which is 400 miles south of his district, is unknown. What is known, however, is that when he returned to the state capitol a week later he inserted a provision into the draft 2008-2009 House General Appropriations Bill to spend \$110 million to expand GCI by 2,000 beds.

The provision was removed, but four days later Sansom added another provision that provided for the same expansion of prison beds but removed specific refer-

ences to GCI. In the end, the \$110 million was appropriated to build the Blackwater River Correctional Institution, and GEO Group won the bid to operate the prison. This ultimately cost Florida taxpayers \$140 million at a time when state prison officials said BRCI was unnecessary due to a slowdown in prison population growth.

After the legislative session was over, Allen Bell, a facilitator who worked on the BRCI project, sent an email to TEAM Santa Rosa which said, "Project Justice and everything and everybody involved with Project Justice needs to remain confidential."

Also of interest is the fact that when drafting the Appropriations Bill provisions, Sansom was working with Donna Arduin, who until 2007 had served on the board of Correctional Properties Trust, a real estate investment trust founded by GEO Group when the company was known as Wackenhut Corrections.

Sansom has denied any wrongdoing, claiming his trip to Boca Raton was "totally unrelated" to anything concerning GEO Group, and stating he had nothing

to do with GEO getting the contract to operate BRCI. Hopefully the federal grand jury and the FBI can sort out the inter-relationships between BRCI, GEO Group, former House Speaker Sansom and TEAM Santa Rosa. The investigation remains pending. ■

Sources: [www.dbapress.com](http://www.dbapress.com), *Miami Herald*, [www.gainesville.com](http://www.gainesville.com), [www.nwfdailynews.com](http://www.nwfdailynews.com), [www.inthesetimes.com](http://www.inthesetimes.com)

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# Prison Phone Rates Under Scrutiny

## by Louisiana Regulatory Agency

The Louisiana Public Service Commission (PSC) is examining the rates for phone calls made by prisoners. To help it in that determination, the PSC has hired outside counsel to analyze rates, review regulations and compare them with other states to decide if they are “just, fair and reasonable.”

*PLN* previously reported that states receive an average of 41.9% of the gross revenue from prisoner calls in kickbacks from phone service providers. The only thing that controls the high rates for prison phone calls is “pure, unabated greed by both the phone companies” and state prison systems. [See: *PLN*, April 2011, p.1].

In Louisiana the kickback is 55% of gross prison phone revenue. “A lot of people think this is grossly unfair,” said PSC Commissioner Foster Campbell, a former state senator. “This affects a lot of families in Louisiana.”

Prisoners at the East Baton Rouge Parish Prison pay \$1.31 for the first five minutes of a local call and \$.50 for each five-minute period thereafter, or \$2.31 for a 15-minute call. According to Pam Laborde, spokeswoman for the Louisiana Department of Public Safety and Corrections, the cost for collect intrastate calls averages \$5.55.

Laborde touted that as a good deal when compared to the prison phone rates in Texas and Mississippi. She noted that for 15-minute calls in Mississippi, the charge is \$2.85 for a local call and \$14.55 for long distance. A call of the same length in Texas costs \$3.90 if local and \$6.45 for long distance.

Louisiana’s contract with Global Tel\*Link generated \$3.3 million for the state in prison phone kickbacks in FY 2010. Over the last three years the state has reaped \$10.2 million in kickbacks.

Local sheriffs are also profiting from phone calls made by prisoners. For example, the East Baton Rouge Parish Sheriff’s Office has a contract with American Phone Service that pays the sheriff 48% of gross revenue, amounting to \$620,000 in the last fiscal year.

Former state senator Cleo Fields had attempted to pass legislation to end the state’s profiteering from prison phone services. “Obviously, the Louisiana Sheriff’s Association opposed the bill vigorously,”

he said. “They felt it would be an infringement on their revenues. My argument is they shouldn’t use those types of revenues to balance their budget.”

Louisiana’s Corrections Secretary, Jimmy LeBlanc, admitted that prison phone revenue was integral to the department’s operation. “It would be a major impact if we had to cut \$3.3 million from our budget,” he observed.

One phone company executive said prison and jail officials encourage higher rates. “There is some pressure from individual counties, states and parishes to get the commissions as high as possible, and who can blame them? They are trying to run a jail and revenues are down,”

said Curt Selman, CEO of Payphones of Arkansas, LLC.

Campbell implied that it’s immoral to fund prisons and jails through phone revenue that is largely paid by prisoners’ family members. “You should do the human thing and let the man talk to his wife and children. It shouldn’t cost him an arm and a leg,” he said.

Meanwhile, Fields saw a problem with private companies profiting from prisoners. “We’ve got to take the profit out of prisons, period,” he stated. “At this point, it’s profitable to incarcerate people. It should not be a way to make money.”

Source: *The Advocate*

## Federal Probation Officer Sexually Abused Clients, Sentenced to Ten Years

by Mark Wilson

U.S. probation officer Mark John Walker, 52, supervised federal prisoners on parole, probation and other forms of supervised release in Eugene, Oregon from May 1987 until July 2009. Now, however, it will be Walker who is on supervised release after he completes a 10-year federal prison sentence for sexually assaulting women under his supervision.

In the summer of 2009, supervisors confronted Walker about accusations that he had inappropriate contact with a woman he supervised. He was suspended for five days. When he returned to work he denied the allegation, but abruptly retired.

On July 22, 2009, the FBI commenced a criminal investigation into Walker’s behavior. Several months later, Walker admitted that he had kissed a probationer but claimed he did not promise her leniency for sex.

In a voicemail to investigators, Walker said it was clear that the FBI was seeking an indictment so he was going to “put it to bed a little earlier” by killing himself. Walker then unsuccessfully attempted suicide by asphyxiation, according to court records.

On July 16, 2010, Walker was indicted for inappropriate sexual contact with five women he had supervised, lying to the FBI, intimidating and threatening wit-

nesses, and falsifying a record to obstruct the FBI’s investigation. At least fifteen women accused Walker of inappropriate contact dating back to the 1990s, according to prosecutors.

Due to Walker’s long career as a federal probation officer, all of Oregon’s federal judges recused themselves from his case and Chief U.S. District Court Judge Ralph R. Beistline was brought in from Alaska.

Following the indictment, Walker was arrested and released on his own recognizance with a GPS ankle monitor. On July 22, 2010, however, he cut off the tracker and drove to a cemetery to commit suicide near his father’s grave. He was arrested before he could make his second suicide attempt.

On April 28, 2011, Walker pleaded guilty to one count of aggravated sexual abuse and four misdemeanor offenses related to willfully depriving the victims of their constitutional rights and bodily integrity.

Under the terms of the plea agreement, federal prosecutors dismissed several other charges including making false statements, falsifying records and witness tampering. Walker and the U.S. Attorney’s Office agreed to make a joint sentencing recommendation of ten years in prison followed by a five-year term of

supervised release. Walker must also register as a sex offender under the federal Sex Offender Registration and Notification Act (SORNA).

Several of Walker's victims had been sexually abused before he took advantage of them, or were otherwise vulnerable due to suffering from mental illness or drug addiction. "It makes it particularly insidious," said Laura Fine, an attorney for one of the women.

Walker kissed the women and touched their breasts, buttocks and inner thighs without their consent in order to gratify his own sexual desires. He pulled down one victim's pants, held her down on a bed and forced her to have sex during an official home visit while wearing his badge and carrying his government-issued firearm, according to federal prosecutors. The victim, who was unable to escape, was "scared to resist because of his power," said Assistant U.S. Attorney Pamela Holsinger. "She knew he could make her

life miserable."

Walker told one woman that he wasn't abusive like the other men in her life, even as he forced her to relive "the rape and molestation of her past," said Holsinger.

The victims did not report the abuse to authorities because they were afraid no one would believe them, and Walker had the ability to put them in prison or have them punished in other ways. "They were pretty much powerless to say no," Holsinger stated.

On July 18, 2011, Judge Beistline adhered to the joint sentencing recommendation and imposed a ten-year prison term.

"Walker's betrayal of trust is staggering. Walker betrayed his fellow officers and abused his power by sexually abusing the vulnerable people he had sworn to help," said U.S. Attorney Dwight C. Holton. "These victims have been heard. I hope his lengthy prison sentence makes clear that we will hold accountable those

who breach the public trust."

Not to be outdone, Arthur Balizan, Special Agent in Charge of the FBI in Oregon, also weighed in. "We have a very high standard when it comes to the actions of federal officers," he stated. "This defendant's criminal actions did great harm to women who were already very vulnerable. That is intolerable."

In addition to the criminal charges, Walker faces six federal lawsuits filed by his victims, which remain pending. Several of the suits also name the United States as a defendant. See, e.g.: *Benn v. Walker*, U.S.D.C. (D. Ore.), Case No. 6:11-cv-06047-TC. 📄

Sources: *The Oregonian*, U.S. Department of Justice press release (April 28, 2011)

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# Agreement Between Florida DOC and DOT Steals 1,000 Freeworld Jobs

by David Reutter

With an economic malaise still affecting the nation, millions of people are looking for work. Florida is among the states that have seen job losses over the past four years, and ex-cons are especially hard-pressed to find employment upon release. Rather than offering more jobs to people in the community, however, last year the Florida legislature appropriated \$19,146,000 “to fund a contractual agreement” between the Department of Transportation (DOT) and Department of Corrections (FDOC) “for the use of inmate labor for maintenance” duties.

Prisoners who are assigned to work under the supervision of the DOT are referred to in the agreement as “supplemental support labor.” They may work in or around DOT facilities and “within DOT crews on a ratio no greater than two prisoners to one DOT employee,” except in unusual or emergency situations, when the ratio may be four-to-one. Some DOT crews may be supervised by FDOC guards.

The Master Agreement between the DOT and the FDOC, dated June 14, 2011, lists 94 job activities that prisoners may perform. Those jobs are ones that would be expected of an agency charged with maintaining roadways and their adjacent areas, and do not involve highly skilled work.

The DOT is to supply all tools, equipment and personal items necessary, appropriate or required to perform the work, and provide for storage of such items. The FDOC must supply clothing, safety vests, food and drinks for the prisoner laborers. To the extent possible, the FDOC is to provide the same prisoners day-to-day “in order to maximize the effectiveness of previous training.”

The benefit this agreement brings to taxpayers is questionable. While unemployed citizens and newly-released convicts struggle to find even minimum-wage jobs, the DOT pays the FDOC \$10.45 per man hour for prisoner slave labor. The prisoners receive no pay or opportunity for employment with the DOT upon their release.

A breakdown reveals that the agreement provides for more than 1.8 million man hours of prisoner labor. Based on a 40-hour work week, the same \$19 million

appropriation by the legislature to fund prisoner labor squads for the DOT could provide around 1,000 freeworld citizens with jobs for a year. The Master Agreement between the FDOC and the DOT is

available on PLN’s website. 

Source: *Master Agreement between State of Florida DOT and State of Florida DOC for Fiscal Year 2011-2012*

## New Mexico Continues to Let Understaffed Private Prisons Slide on Most Contract Violations

by Matt Clarke

In September 2010, the New Mexico Legislative Finance Committee calculated that over a four-year period, former Governor Bill Richardson (D) failed to collect \$18.6 million in penalties from private prison companies that breached their contracts with the state by allowing their for-profit facilities to remain understaffed by 10% or more for at least thirty consecutive days. [See: *PLN*, March 2011, p.42].

Not much changed throughout 2010 and the first three months of 2011 despite New Mexico having a new governor, Susana Martinez (R), who appointed a new corrections secretary, Lupe Martinez (no relation). Martinez later resigned after her live-in boyfriend shot a snake on corrections property and was accused of tampering with evidence.

Records reveal that the state’s four private prisons had high understaffing rates for most of the period between January 2010 and March 2011. The worst offender was the GEO Group-operated Lea County Correctional Facility in Hobbs, which was above the 10% understaffing threshold for the entire 14 months and had an employee vacancy rate of around 20% for 12 of the 14 months. For seven months, from September 2010 through March 2011, the average vacancy rate was 25.24%.

The Guadalupe County Correctional Facility in Santa Rosa, also operated by GEO, reported an employee vacancy rate as high as 16.93% in July 2010 but was under the 10% threshold during five of the last seven months in the time period examined. The Northeast New Mexico Correctional Facility in Clayton, another GEO prison, had a similar vacancy history. The facility

was over the 10% threshold for six months between January and August 2010 (with no information available for July 2010), but improved in later months.

The New Mexico Women’s Correctional Facility in Grants, operated by Corrections Corporation of America (CCA), exceeded the 10% threshold four times between January and July 2010, maxing out with an employee vacancy rate of 16.47% in July 2010. Information for August 2010 through March 2011 was not available.

The problem with understaffing is that it creates a dangerous situation both for prisoners and the remaining shorthanded staff. One reason to suspect that private prison companies may be intentionally understaffing is because fewer employees means less payroll, which increases the company’s profits.

New Mexico’s contracts with GEO and CCA include penalty provisions for habitual understaffing; however, an unused penalty is largely useless and the state has largely failed to enforce those contractual provisions.

“We’d like to follow up and perhaps do a performance group review on the private prison operators to see whether they are making excessive profits,” said state Rep. Luciano “Lucky” Varela, who is on the Legislative Finance Committee. Varela noted that he is not opposed to the companies making a reasonable return, but is suspicious of the continuously high employee vacancy rates at the private prisons.

Corrections Department spokesman Shannon McReynolds said there was a question regarding whether the private



prisons were in fact understaffed, because the companies may have used overtime to make up for the vacant staff positions. If so, the department “cannot in good faith consider that position to be vacant.”

However, the state doesn’t know whether CCA and GEO are using overtime to cover vacancies, and to find out would require a painstaking review of shift rosters at each privately-operated facility.

“That will take a decision from the administration,” said McReynolds. “We do not have specifics on overtime. Every once in awhile we hear a particular facility has spent a lot on overtime.”

In 2010, the Corrections Department was unable to definitively determine how often CCA and GEO Group had violated the employee vacancy contract provisions due to sporadic record-keeping at the private prisons. Thus, the state was unable to verify the Legislative Finance Committee’s estimate regarding the value of the uncollected penalties.

Governor Richardson’s administration declined to pursue the matter. While Governor Martinez is not holding GEO and CCA completely accountable, at least some fines have been imposed under the new administration. The state fined GEO Group \$1.1 million in November 2011 due to understaffing, plus the company agreed to spend an additional \$200,000 in 2012 on staff recruitment efforts.

Notably, New Mexico’s corrections secretary under Governor Richardson, Joe Williams, was employed by Wackenhut Corrections (now GEO Group) before he was appointed secretary. After leaving ofice he then returned to work for GEO.

“Because the private prisons [were] operating safely and securely, I have chosen to exercise my executive power, as have all secretaries before me, not to penalize the private prisons for staff vacancies caused by factors largely beyond their or anyone else’s control,” Williams stated. He had asked his former colleagues at GEO to send him data that he could use to justify his decision not to impose fines on the company.

This well illustrates the revolving door between public officials and the private sector, and why it is difficult to hold private prison companies accountable. “The people who go back and forth come out really well, but the taxpayers are the ones who aren’t well-served,” noted state Senator Cisco McSorley. ■

Sources: *Santa Fe New Mexican*, *Albuquerque Tribune*, [www.capitolreportnewmexico.com](http://www.capitolreportnewmexico.com)

## Washington Prisoner Killed During Prison Industries Escape Attempt

A Washington Department of Corrections (WDOC) prisoner was shot and killed at the Clallam Bay Corrections Facility during a June 29, 2011 escape attempt.

At approximately 10:00 a.m., state prisoner Dominick Maldonado, 25, used a pair of scissors to take a guard hostage in the prison’s garment industry program area, according to WDOC spokesman Chad Lewis. As he did so, his accomplice, prisoner Kevin Newland, 25, drove a forklift through the doors of the industry work area and into the perimeter fence in an attempt to break out. A guard shot and killed Newland outside the perimeter of the prison. Maldonado released his hostage shortly thereafter, said Lewis. The guard suffered only minor injuries.

Newland was serving 45 years for first-degree murder, while Maldonado is serving a 163-year sentence for a 2005 shooting incident at a Tacoma mall. Both had prepared for the escape by sewing

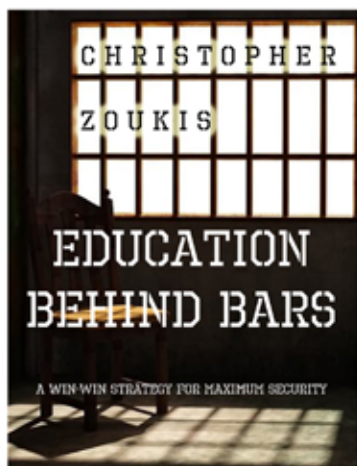
food, containers of water and medications into their clothes. Maldonado was subsequently transferred to the Stafford Creek Corrections Center and placed in an “intensive management” unit.

It was later revealed that Newland and Maldonado had records of institutional misconduct, including possession of a razor blade, and were classified as close security – just below maximum. The union representing Washington prison guards questioned why they were allowed to participate in the industry program. “Why were they working in that area given their violent histories?” asked Jim Smith, a union attorney.

Security changes have since been made by the WDOC. Newland’s death was the first time a Washington prisoner had been fatally shot since 2003, which also involved an attempted escape.

Sources: *Associated Press*, [www.komonews.com](http://www.komonews.com), <http://lnews.opb.org>

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# Oregon's Attorney General Accused of Botched, Abusive Prosecutions

by Mark Wilson

As previously reported in *PLN*, the Oregon Department of Justice (ODOJ) recently turned its prosecutorial power against a hotshot small-town district attorney. [See: *PLN*, Oct. 2011, p.39]. By the time it was over the DA had resigned, but the ODOJ skulked away with a fat lip and an ugly black eye.

Dean Gushwa was appointed district attorney for Umatilla County in Eastern Oregon in 2006, and re-elected in 2008.

"He was a very engaged, very methodical, very skilled DA," said Pendleton police chief Stuart Roberts. Apparently, however, Gushwa lived his personal life by a different set of rules.

In August 2010, a 47-year-old clerk in the district attorney's office, identified in court documents as "DW," accused Gushwa of physically, sexually and emotionally abusing her between December 2008 and April 2010.

DW initially reported that Gushwa – her boss and occasional boyfriend – had handcuffed her and brutally forced himself on her. However, she did not report the incident for eight months.

DW told police she was afraid of Gushwa and had only continued to see him "because I was lonely." She also admitted to being infuriated to learn that he was also romantically involved with Jennifer Roe, another employee in the district attorney's office.

Gushwa denied DW's claim but took a leave of absence soon after the allegations became public.

On November 5, 2010, Oregon's aggressive and ambitious new Attorney General, John Kroger, sent his top criminal prosecutor, Sean Riddell, to pay Gushwa a highly unusual visit. Riddell, who was not Gushwa's assigned prosecutor, contacted him directly rather than going through his lawyer – an apparent violation of the ethical rules for Oregon attorneys.

Gushwa had previously offered to resign, but Riddell demanded not only his resignation but also that he plead guilty to at least one criminal charge. Gushwa, a pit-bull of a prosecutor himself, didn't appreciate Riddell's hard-nosed tactics and refused. According to Gushwa and his defense lawyer, Riddell responded by vowing "to use all my 300 attorneys to hit you like a freight train."

Five days later, on November 10, the ODOJ charged Gushwa with eight counts of official misconduct, all misdemeanor offenses. "The allegations were very serious," said Kroger. "I would characterize it as an extreme form of sexual harassment as well as intoxication in the workplace." Prosecutors claimed that Gushwa had "a well known drinking problem" and targeted women in his office "who were vulnerable."

Gushwa told a reporter he was innocent of any wrongdoing. "My conduct as far as having relations with employees was stupid," he said. "I've apologized for that." He insisted, however, that all of his sexual relationships were consensual.

The ODOJ disagreed, yet did not charge Gushwa with any offenses related to forcible sex. "Those are very difficult cases to win when there's a prior consensual relationship," Kroger stated.

Gushwa's lawyer, William Perkinson, was surprised that Kroger had filed charges against his client. There was no evidence that Gushwa had threatened his female co-workers to have sex or to remain silent after the fact. There was also no evidence that he gave preferential treatment to any of his paramours.

When Gushwa didn't budge, the ODOJ turned up the heat by adding ten counts of contempt of court to the list of charges. The state accused Gushwa of violating a court order prohibiting contact with any employee of the DA's office because he had called, texted and met with Roe – to whom he was now engaged.

On November 15, 2010, Riddell had Gushwa arrested and booked into the county jail because ODOJ lawyers had heard that he intended to return to the DA's office, also in violation of the court order. "It was just a cheap little tactic, pure intimidation," said Gushwa. Eight days later Gushwa pleaded not guilty and was allowed to return to work on a limited basis.

Just before trial, the ODOJ shocked Gushwa and Perkinson by offering to settle the case. If Gushwa agreed to resign, the ODOJ would drop the sexual harassment-related offenses and proceed only with one count of official misconduct for using his position as district attorney to obtain a \$6.00 discount on a hotel bill even though he was not serving in an

official capacity at the time. In the end, Gushwa agreed. "I felt like they'd already destroyed my effectiveness as a DA, anyway," he said.

Gushwa was found guilty of the charge, received a three-year term of probation and resigned on May 11, 2011. Kroger denied that the ODOJ had dropped the sexual harassment misconduct charges because the case was weak. He insisted the decision was more about saving time and money, and sparing the victims a potentially traumatic trial.

Gushwa's prosecution was part of Kroger's pattern of launching high-profile corruption cases against public officials, complete with hardball tactics and numerous press releases, only to have the case fizzle, noted Umatilla County Commissioner Dennis Doherty.

"They came in guns a-blazing," said Doherty, a former county prosecutor. "And then, jeez, the only thing they could get him on was getting a cut-rate motel room. Did they ever really have any evidence? The whole thing is pretty pitiful."

DW filed a notice of intent to sue Gushwa for physical, sexual and emotional abuse, and to name the county and the state as defendants because they "have failed to protect [her] from this conduct and have condoned retaliation for the reporting of this conduct."

In June 2011, however, the Oregon Bureau of Labor & Industries (BOLI) dismissed DW's sexual harassment and discrimination complaints against Gushwa for lack of evidence. A state investigator determined that DW had welcomed the relationship with Gushwa until she learned that he was concurrently involved with another DA office employee. BOLI also dismissed her claims against the state and county for failing to protect her from Gushwa.

In the end, Oregon taxpayers were the biggest losers. The ODOJ spent \$148,978 prosecuting Gushwa and \$221,957 running the district attorney's office while he was on leave. Taxpayers also paid Gushwa's salary for the nine months he was on leave, for a total bill of about \$437,000.

Beyond the Gushwa prosecution, Kroger's leadership failings were never more apparent than when his office

mishandled one of the county's most notorious, high-profile murder cases so badly that a killer serving a life sentence walked free.

On April 6, 2001, Kathleen Blankenship shot her husband to death. Gushwa originally prosecuted the case and Blankenship was found guilty of murder in 2003. She was sentenced to life imprisonment but won a new trial in 2009.

Her attorney obtained two medical opinions that Blankenship was suffering from extreme emotional disturbance when she killed her husband. If the jury agreed, the charge could be reduced from murder to manslaughter.

Gushwa needed to counter Blankenship's medical evidence, and convinced a New York psychologist to evaluate her. Before that could happen, however, Gushwa was sidelined by the misconduct prosecution and the ODOJ took over the case.

ODOJ lawyers failed to obtain a psychological evaluation of Blankenship to rebut her medical experts. In January 2010, Assistant Attorney General Rachel Bridges moved for a second continuance of the re-trial scheduled for the following month.

The court refused to grant a second delay. The ODOJ responded by allowing Blankenship to plead guilty to manslaughter, and she was released from prison on April 7, 2010.

Circuit Court Judge Garry Reynolds, who presided over the case, was furious. "I am completely dismayed by the way this case has gone forward," he said from the bench. "I do not feel that the state of Oregon's interests were protected.... That it was resolved in the manner that it was resolved is not a service to this county."

Umatilla County Senior Circuit Court Judge Richard Courson also was peeved. "It is evident that the 'plea deal' was an excuse to try and conclude a 'botched prosecution,'" he wrote in a letter to the *East Oregonian*.

Kroger admitted the ODOJ had made a "mistake" in failing to obtain its own psychological evaluation of Blankenship. "I'm unhappy with our handling of that case," he remarked.

The victim's sister and parents were stunned. "They dropped the ball," said Mary Kligel. Although she had no sympathy for Gushwa, Kligel said she believed Blankenship would still be in prison for

murder had Gushwa not been taken off the case due to the official misconduct prosecution pushed by Kroger. "Deep in our hearts, we know that it would have been different if Dean [Gushwa] would have handled it."

Kroger's hardball tactics and aggressiveness have drawn sharp criticism from other Oregon officials and members of the state's legal community.

Attorney David Angeli said Kroger and Riddell fostered a "shoot first, ask questions later mentality," and created skepticism and distrust of the ODOJ. "They won't tell you what they're investigating; they won't tell you what their evidence is," he said. "It's in everybody's best interest – the government, the suspects and the public – that there is a mutual feeling of trust and open communication. It's not in anybody's interest to spend hundreds of thousands of the public's dollars on an investigation that could have been avoided had there been a level of trust and dialogue."

In Riddell's world, however, everyone is a liar and not to be trusted, apparently. So it should come as little surprise that Riddell found himself in the hot seat for dishonest and unethical conduct.

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Riddell was busy in 2010. In addition to going after Gushwa, it appears that he and Kroger likely made the worst misstep of their careers when in August 2010 they launched a criminal investigation that involved Cylvia Hayes, the girlfriend of current Oregon Governor John Kitzhaber. Hayes was serving on an energy advisory panel, the Oregon Renewable Energy Working Group, and co-owned a company that had received a \$60,000 contract from the state's Energy Department.

During that investigation Riddell employed the same strong-arm tactics he used against Gushwa. Among the worst accusations, Riddell allegedly lied to witnesses in an attempt to coerce and intimidate them. Further, he publicly disclosed documents from the case in violation of a protective order requested by the ODOJ.

Four Energy Department employees were suspended during Riddell's investigation. The ODOJ closed its criminal investigation in December 2010, opting not to file charges against anyone. The investigation cost Oregon taxpayers an estimated \$600,000. When added to the Gushwa fiasco this totaled more than \$1 million, with nothing but a lot of resentment to show for it.

After the criminal investigation ended, the ODOJ disclosed thousands of pages of documents from the case to attorneys for the four suspended Energy Department workers, without court authorization. The disclosure violated Oregon law because the documents had been obtained pursuant to a criminal subpoena. They also contained personal information such as phone numbers, addresses and email addresses.

Realizing its error, the ODOJ requested the return of the released documents. Most of the defense lawyers refused, however, because the documents included a gold mine of information, such as interview transcripts of Riddell browbeating suspects.

The ODOJ then engaged in an extended, bizarre attempt to obtain retroactive court permission to release the documents while simultaneously seeking a protective order barring public dissemination of those documents.

The Energy Department employees objected, arguing that depriving them of the ability to read and use the docu-

ments in their defense would violate their constitutional rights. But in April 2011, Marion County Circuit Court Judge Joseph Guimond sided with the ODOJ and issued a protective order that barred public disclosure of the documents.

On June 7, 2011, a report issued as part of an independent review found that none of the suspended employees had done anything to warrant termination or disciplinary action. The ODOJ responded by publicly releasing documents from the case a second time, which ironically included 45 pages of records that were covered by the April 2011 protective order the ODOJ had requested.

The next day the ODOJ wrote to Judge Guimond, claiming the documents had been carefully reviewed before being publicly released. "Regrettably, a number of ... emails were overlooked in this review process," wrote Senior Assistant Attorney General Roger DeHoog. "We do not seek to minimize our error. As we have already apologized ... through counsel, we also apologize to the court."

The ODOJ's hollow *mea culpa* was not well received. "The attorney general seeks to selectively disclose documents that support its self-serving view that he wishes the public to adopt," wrote the Energy Department employees' attorney, Bill Gary, in a court filing. "While at the same time preventing ... [the employees] who were the subject of his ill-conceived and unlawful investigation from utilizing documents from the ... investigation to contradict the attorney general's position."

Gary and well-respected former Oregon Attorney General Dave Frohnmayer filed an ethics complaint against Riddell with the Oregon State Bar on May 13, 2011 due to his conduct in the Energy Department case.

"Mr. Riddell repeatedly and unequivocally lied to witnesses and coerced and intimidated them in order to deceive those witnesses into making statements that Mr. Riddell could then use to make unfounded charges against the targets of his investigation," they wrote. "As a direct result, innocent individuals have had their lives turned upside down and their careers and reputations irreparably damaged. Mr. Riddell's actions have wasted hundreds of thousands of tax dollars and have damaged the credibility and the integrity of the criminal justice system."

Initially, Attorney General Kroger remained loyal to his pit-bull prosecutor.

On June 1, 2011, the ODOJ announced that it had found Riddell had done nothing wrong. "We conducted a thorough internal review and have concluded that the allegations are baseless," the agency stated. "We stand by the integrity of the investigation."

The *Oregonian* newspaper submitted a public records request for investigative documents from the supposed internal review. The ODOJ responded that no such records existed. Rather, a Deputy Attorney General supposedly conducted the review and "reported orally" to Kroger, according to the ODOJ.

Seventeen days later Kroger released a statement announcing that Riddell was being demoted for what he termed a "clerical error."

"I acknowledge ... that we have made mistakes in a small number of high profile cases," Kroger admitted in his statement. "This week, I learned that in addition to these errors, Chief Counsel Riddell had deleted a large number of government emails under the mistaken belief that they had been backed up on computer tape. Although we were able to recover many of the deleted emails, an unknown number have been lost permanently."

Riddell was to resign from his management position and go on leave until August 2011, according to Kroger. When he returned to work he would be assigned to another ODOJ department.

"It's about time," said Eugene attorney Sharon Rudnick. "I would say that it is a good decision to remove Mr. Riddell. This man has wielded the prosecutorial authority of the state. He's misused his power. He's hurt a lot of people.... It's good that it's going to stop. It's too bad so many people's lives had to be damaged before the Attorney General removed him."

Kroger's half-hearted decision to throw Riddell under the bus is likely too little, too late, though. Riddell's demotion was accompanied by a hollow apology from Kroger that was unlikely to appease his critics.

"As Attorney General, the buck stops with me. I take full responsibility for errors made under my leadership," Kroger claimed. "I will not always be a perfect Attorney General. I cannot promise to never make mistakes. But, what I can promise is when there are errors in practice or judgment, they will be accompanied by accountability."

Unfortunately Kroger did not seem to



understand that repeatedly apologizing for bad behavior while continuing the same pattern of conduct is not accountability. Then again, perhaps he finally came to realize that he had worn out his welcome. On October 18, 2011, Kroger announced

that he would not run for a second term as Oregon's Attorney General, citing an undisclosed medical condition.

Many people in the state's legal community will be glad to see him go, including those who have been the targets

of his heavy-handed, misguided investigations. ■

Sources: *The East Oregonian*, *Associated Press*, *The Oregonian*, *Statesman Journal*, *ODOJ Press Release* (May 17, 2011)

## California Pays \$10,000 to Settle Sex Abuse Suit Brought by Transgender Prisoner

The California Department of Corrections and Rehabilitation (CDCR) has entered into a settlement agreement with former state prisoner Alexis Giraldo, paying her \$10,000 in exchange for a voluntary dismissal of a lawsuit she filed in San Francisco Superior Court in 2007.

In her suit, Giraldo, a male-to-female transgender prisoner, claimed that various prison officials had failed to take any action to protect her despite being repeatedly told about the horrific sexual abuse she suffered at the hands of her cellmates while housed at Folsom State Prison. Giraldo raised state-law claims for negligence, intentional infliction of emotional distress, and cruel and unusual punishment under California's constitution. She sought damages as well as injunctive and

declaratory relief with respect to the issue of transgender prisoner housing.

The trial court dismissed the negligence claim on a pretrial motion, holding that as a matter of law Giraldo had failed to allege a cognizable duty on the part of any of the defendants. The court also dismissed the cruel and unusual punishment claim, finding that case law did not authorize damages for such a claim. As to the emotional distress claim, a jury returned a verdict in favor of the defendants. Finally, because Giraldo was paroled three days before the trial began, her request for injunctive and declaratory relief was dismissed as moot.

The California Court of Appeal held that Giraldo's negligence claim should not have been dismissed, because

the vulnerability of prisoners to assault created a "special relationship" between prison officials and prisoners sufficient to impose an affirmative duty on the part of those officials to protect prisoners from foreseeable harm (including sexual abuse) by other prisoners. See: *Giraldo v. CDCR*, 168 Cal. App. 4th 231 (Cal.App. 1 Dist. 2008).

Giraldo and the CDCR agreed to settle the case following remand from the appellate court for reconsideration of her negligence claim. No admission of liability attached to the settlement agreement.

Giraldo was ably represented by attorney Julie Zhalkovsky of the Walston Legal Group in San Francisco. See: *Giraldo v. CDCR*, San Francisco Superior Court (CA), Case No. CGC-07-461473. ■

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# Texas Court of Criminal Appeals Credits Sentence with Time on Appeal Bond

The Texas Court of Criminal Appeals held that a man who erroneously remained free on an appeal bond for 21 years was entitled to full credit toward his sentence.

Claus Detref Thiles was sentenced to 16 years in prison in a Dallas County plea agreement in 1982. He appealed. The Court of Appeals reversed his conviction, and the state filed a petition for discretionary review. The Court of Appeals granted Thiles an appeal bond and he was released in 1985. The bond conditions did not require him to remain in the state or check in with the court.

After thirteen months the Court of Criminal Appeals reversed the judgment of the Court of Appeals, reinstated the conviction and returned the case to that court for review of the remaining errors Thiles had raised on appeal. Seventeen months later, the Court of Appeals upheld his conviction. However, no warrant for the appellate mandate was issued for another twenty years.

During these judicial proceedings, Thiles had moved to Missouri, remarried and became a productive member of society with no further criminal arrests, living openly under his own name with no attempt at concealing his identity or location. Two years after the appellate warrant was issued in 2007, Thiles was arrested in Missouri for DWI, though that charge was later dismissed. However, the police discovered the outstanding warrant and extradited him to Texas.

Thiles filed a state application for a writ of habeas corpus pursuant to Article 11.07, Texas Code of Criminal Procedure, arguing that he was entitled to credit toward his sentence for the time he remained on appeal bond because he had been erroneously “constructively released” from his sentence through no fault of his own. The state agreed that he was entitled to relief. The district court held an evidentiary hearing, during which Thiles and his wife testified that he was never informed that his conviction had been reinstated. The trial court recommended that relief be granted.

The Court of Criminal Appeals noted that there were two lines of relevant cases. One line deals with prisoners erroneously released from custody through no fault of their own, and the courts have uniformly

held that such an erroneously released prisoner is entitled to credit toward the expiration or discharge of a sentence. The other line of cases involves defendants released on appeal bond while a direct appeal is pending, who are inadvertently allowed to remain at large after the appellate court upholds the conviction. In that type of case, the courts have found that no credit should be granted toward the sentence.

The Court of Criminal Appeals applied the principle of reasonableness, noting that in the previous appeal bond cases the defendant always had personal

knowledge that the conviction had been upheld by the appellate court. Because Thiles had not known of the reinstatement of his conviction, and a series of bureaucratic blunders by the government and bonding agency resulted in no arrest warrant being issued for such a long period of time, he was entitled to relief.

Since the time credit exceeded his sentence, the Court of Criminal Appeals ordered that Thiles “be immediately discharged from the custody” of the Texas Department of Criminal Justice. See: *Ex parte Thiles*, 333 S.W.3d 148 (Tex.Crim. App. 2011). ■

## Ninth Circuit Applies *Turner* Test to Evaluate First Amendment Interest in Prisoners’ Receipt of Unsolicited Publications

by Mike Brodheim

On January 31, 2011, a divided Ninth Circuit panel reversed the grant of summary judgment to two California sheriffs who had adopted mail policies that prevented detainees in their county jails from receiving unsolicited publications – or at least those publications that the sheriffs did not want to distribute.

In doing so, the Ninth Circuit majority determined, first, that “a publisher has a First Amendment interest in distributing, and inmates have a First Amendment interest in receiving, unsolicited publications.” The Court of Appeals then applied the four-factor test of *Turner v. Safley*, 482 U.S. 78 (1987) to evaluate whether that “interest” gave rise to a protected First Amendment right in light of the countervailing interests of jail administrators. The Court concluded that it could not determine, as a matter of law, that the sheriffs were justified in banning the distribution of unsolicited publications to jail prisoners.

In dissent, Ninth Circuit Judge N. Randy Smith opined that because a jail (like a prison) is not a “public forum,” no First Amendment interests were implicated, and therefore the *Turner* test was inapplicable.

In 2002, former bail bondsman Ray Hrdlicka began publishing Crime, Justice

& America (CJA), a publication addressing criminal justice-related topics (such as the steps between arrest and conviction) relevant to jail detainees. CJA’s revenues derive not from subscriptions but rather from the ads it runs for bail bond agents and lawyers.

Currently distributed in jails in more than 60 counties in 13 states, including 32 county jails in California, CJA relies on one of two methods of delivery depending on whether or not a jail agrees to accept general distribution. If it does, CJA delivers weekly supplies of magazines that jail staff leave in common areas of the facility; otherwise, CJA mails individually addressed issues to about 10% of the jail population after obtaining a detainee roster.

The Butte County Sheriff’s Department refused to allow delivery of unsolicited copies of CJA under any circumstances. The Sacramento County Sheriff’s Department, on the other hand, initially agreed to deliver individually addressed copies of CJA but changed its policy after five months.

In February 2008, Hrdlicka and CJA filed two § 1983 suits for injunctive relief, one against Butte County Sheriff Perry Reniff and the other against Sacramento County Sheriff John McGinness, alleging that the refusal to distribute unsolicited

copies of CJA to prisoners at their jails violated the First Amendment. Applying *Turner*, the district court in each case granted summary judgment in favor of the sheriff.

In a consolidated appeal, the Ninth Circuit majority noted that in four previous cases (two involving *Prison Legal News*), it had held unconstitutional prison policies that placed restrictions on the distribution of gift and solicited publications. The majority rejected the dissent's position that the fact that CJA was unsolicited

rendered the *Turner* test inapplicable. On the merits, the appellate court found the sheriffs' expressed concerns about security and the strain on staff resources unpersuasive, and suggested that the ban on delivery of unsolicited copies of CJA "may be an exaggerated response."

Accordingly, the cases were remanded to their respective district courts for further proceedings. See: *Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011).

On September 1, 2011, the Ninth Circuit denied a motion for rehearing *en*

*banc*, with two Circuit judges entering concurring opinions reiterating that jail prisoners have a right to receive unsolicited publications. "Because inmates are typically in county jail for relatively short periods, and because the value of CJA to inmates is greatest when they first arrive in the jail, it is unrealistic to insist, as a condition for applying the *Turner* test, that inmates have already subscribed to CJA," the concurring judges noted. Eight judges wrote a lengthy dissent in the decision in which *en banc* review was denied. See: *Hrdlicka v. Reniff*, 656 F.3d 942 (9th Cir. 2011), *petition for cert filed*. ■

## Arizona Ranchers Use Prison Labor to Construct Erosion-Prevention Dams

**W**hitewater Draw near McNeal, Arizona is a unique desert wetland with a shallow lake that hosts thousands of Sandhill Cranes and other water fowl. Water comes to the 600-acre wildlife area from the mountains that ring Sulfur Springs Valley. However, the water tends to arrive in the form of infrequent monsoons that cause heavy erosion of the surrounding ranchland.

Four local ranchers, under grants from the Arizona Department of Environmental Quality, have been working for three years to install numerous rock dams on their ranches to help prevent soil erosion. The dams were built using prison labor.

The rock dams are typically 18 to 24 inches high and eventually get covered with sediment, losing their effectiveness. Rancher Jack Telles of the Double U Ranch in Gleeson used 66 tons of rock to build 53 dams at different sites in a long wash on his property with a little rock left over for future repairs. The dams collect sediment and create small pools of moisture that help grasses grow, reduce erosion of topsoil and improve the quality of grazing for livestock.

Rancher Ruth Evelyn Cowan of the NI Ranch in Tombstone said the project was simple and inexpensive, but difficult due to weather and equipment failures. However, using three teams of prisoners, her rock dams were eventually completed.

"They work harder than volunteers,"

she said of the prisoner workers from the Arizona State Prison Complex at Douglas.

Dennis Monroney of the 47 Ranch in McNeal said he was able to use an Arizona Department of Agriculture grant and prison labor to build 496 rock dams at active erosion sites on his property. He noted that the best time to build the dams is in June, when neither frost nor ice can affect them.

One has to wonder if the prisoners who are constructing the dams think that June, with its scorching heat, is the best time to be laboring in the Arizona desert. ■

Sources: *Wick News Service*, *Douglas Dispatch*

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# Study Reports on Undiagnosed HIV Infections in New York City Jails

by Matt Clarke

An article in the May 2011 issue of the *Journal of Acquired Immune Deficiency Syndrome* reported that the HIV infection rate among people being booked into New York City jails was much higher than the average in the general population, but lower than the 1998 rate. In the first study of undiagnosed HIV in jails, the article noted that 28.1% of those testing positive for HIV were previously undiagnosed.

The New York City Department of Correction operated 11 jails that processed 64,383 unique male and 8,073 unique female arrestees in 2006. Upon being booked into jail a blood test for syphilis is required, but a consent form must be signed to receive an HIV test. Because only one-third of detainees on average consent to HIV testing, the New York Department of Health and Mental Hygiene conducted HIV tests using the remnants from blood samples taken for syphilis testing to determine whether jail prisoners who were HIV-positive were not being diagnosed.

The study did not include all persons admitted into the jails, because 8.9% of the arrestees had no intake health data and 31.15% of those with intake health data had no remnant blood samples. The study targeted over 6,000 unique men and women admitted into New York City jails beginning on May 1, 2006. After ensuring that the blood sample remnants represented unique individuals, all identification data was removed from the samples and the sample database.

"Of the 6,411 specimens that were tested in the serosurvey, 389 (5.2%) tested HIV positive, 5,977 (94.1%) tested HIV negative, and 45 had indeterminate results (0.7%). Only 7 of 5,977 inmates who tested negative (0.11%) self-reported being HIV infected at intake," the study found.

Of the 398 HIV-positive prisoners, 232 (59.5%) were in the city's HIV/AIDS Reporting System (HARS), which tracks persons infected with HIV, at the time of their admission. Of those 232 listed in HARS, 169 (72.4%) self-reported being infected while 63 (27.6%) did not. Among the HIV-infected prisoners not in HARS, 53 (32.4%) self-reported as being HIV positive. The remaining 104 not listed in HARS (28.1% of all HIV-positive prisoners) did not self-report being HIV infected, and thus were considered to have

undiagnosed HIV infection at intake.

"HIV prevalence for all inmates in the serosurvey was 5.2%: 4.7% in men and 9.8% in women." When the prevalence was adjusted to reflect all new admissions, both with and without remnant blood samples, "based on proportional matching to HARS, the estimated true New York City inmate [HIV infection] prevalence would be 8.7% overall." This included an adjusted rate of 6.5% in males and 14% in females. Although that is about three times the general population rate for men and around 17 times the rate for women, it represents a reduction from the jail's HIV rates as determined in the past. In 1998, the HIV infection rate for male jail prisoners was 7.6% while the rate for female prisoners was 18.1%.

The study concluded that 104 (28.1%) of the 389 prisoners testing positive for HIV had not been previously diagnosed.

Only 13 (11.1%) of the prisoners with previously undiagnosed HIV reported the common risk factors of intravenous drug use or male homosexual sex. Forty-one (39%) reported other factors such as previous sexually-transmitted diseases, multiple sex partners and/or unprotected sex.

The study's main suggestion was to change the jail system's opt-in policy for HIV testing to one in which all new prisoners are tested for HIV without consent unless they refuse to allow such testing. That approach has been successful in other jail systems, which report HIV testing rates of up to 86% for new jail admissions. ■

Source: *Journal of Acquired Immune Deficiency Syndrome*, "Undiagnosed HIV Infection Among New York City Jail Entrants, 2006: Results of a Blinded Serosurvey" (May 2011)

## Former Oregon Prison Official Faces Ethics Probe

In March 2011, Michael Taaffe, 56, retired from his \$91,000-a-year job as an assistant administrator for the Health Services Division of the Oregon Department of Corrections (ODOC). Three days earlier he had been hired by Correctional Health Partners (CHP), a private medical services company.

While employed with the ODOC, Taaffe had helped CHP land a multi-million dollar contract with the state's prison system; the Oregon Government Ethics Commission is now investigating whether he violated the state's "revolving door" statute after retiring from his government position.

Taaffe began working in the ODOC prison industries in 1996. He was later employed as a pharmacist before being promoted to an executive position with the ODOC's Health Services Division in 2007.

Taaffe served on a three-member panel which, in March 2009, selected CHP over five other bidders to manage some of the ODOC's medical services for prisoners.

However, he did not make the final selection or administer the contract, according to a May 10, 2011 email that ODOC Director Max Williams sent

to Governor John Kitzhaber and the Director of the Oregon Department of Administrative Services, briefing them on the situation.

In June 2009, CHP became a "third-party administrator" of the ODOC's health care system, monitoring medical care for prisoners, scrutinizing medical claims to prevent overpayments caused by mistake, fraud or abuse, and providing data to help the ODOC track health care trends and contain costs. CHP was paid \$1.2 million during the first year of the contract and continues to receive monthly payments of approximately \$100,000.

"We're quite happy with their performance," said Williams, noting that CHP had helped reduce prison medical costs that were consuming around 15.4 percent, or \$216.6 million, of the ODOC's \$1.3 billion budget.

Williams admitted, however, that "some of the contractor's employees are embedded with DOC Health Services staff in our offices, and Mr. Taaffe is one of those."

Oregon law prohibits state employees from having a "direct beneficial financial interest" in a contract awarded by an

agency with the employee's participation. The ban, which lasts for two years after the employee leaves public service, may be triggered by "participating on a selection committee" as Taaffe did, according to the Ethics Commission.

"There was no effort to try to sneak something past the process," Williams said. He noted "that the contract is not directly with Mr. Taaffe but with a larger Corrections Health Management company." Additionally, "his duties are not the same as those he was performing for the department."

When Taaffe was nearing retirement he asked his supervisor about applying for the CHP job, according to Williams. He was told there was no problem and submitted his job application on February 28, 2011.

The Ethics Commission opened a preliminary inquiry into Taaffe in April 2011 after receiving a complaint from ODOC employee Vicki Gallegos. Gallegos alleged that "Mr. Taaffe left his official position and went to work for [CHP] immediately," and that after he was hired by CHP, the company set Taaffe up "as an on-site vendor representative in the same office he occupied when employed by [ODOC]."

"We have no concerns about his actions and feel [Taaffe] is a very ethical employee," countered Jeff Archambeau, a CHP official. Archambeau denied that Taaffe had done anything to benefit the company when he was a state employee

in exchange for the job. "Absolutely and unequivocally not," said Archambeau. Taaffe, who was hired by CHP three days before retiring from the ODOC, declined to comment.

On May 11, 2011, the ODOC released Williams' email to the media. "I am writing to give you all a heads up on a *Statesman Journal* media issue inquiry involving a former DOC employee that recently retired," wrote Williams. "Michael Taaffe worked most recently in our Health Services office in a budget/business role. He retired sometime last month and immediately went to work for our contracted third-party administrator for Health Care."

Williams and ODOC's legal counsel were not consulted or notified of the situation until after Taaffe was hired by CHP.

"I am sorry that I wasn't made aware of the situation until the retirement was complete and he had been hired by the contractor," Williams wrote. "What is unfortunate is that his immediate supervisor didn't not [sic] recognize any concerns (even internal politics) with this approach and told Mr. Taaffe he didn't think it would be a problem. The supervisor did not ask [ODOC] leadership ... for any opinion or advice on the issue and did not feel it was a problem since Mr. Taaffe was retiring from state service."

"Nevertheless, it may in fact be that Mr. Taaffe violated ethical laws of the state," Williams admitted.

The Ethics Commission released a

preliminary review in September 2011 which concluded, "there appears to be a substantial objective basis to believe that violations of Oregon Government Ethics law may have occurred and that Mr. Taaffe may have committed such violations."

Further, "[i]nformation for this preliminary review appears to indicate that Mr. Taaffe may have had a direct beneficial financial interest in a public contract in which he participated in the authorization of while acting in his former official capacity as a public official representing [ODOC]," the Ethics Commission stated. See: Oregon Government Ethics Commission, Preliminary Review, Case No. 11-136EDT.

The matter now progresses to a formal investigation of Taaffe's post-retirement employment with CHP. Taaffe had tried to downplay his involvement in the evaluation committee that granted the lucrative ODOC contract to CHP. The law is the law, though, and presumably prison officials have to follow state ethics laws just like all other public employees. ■

Sources: *The Oregonian*, *Statesman Journal*, *Ethics Commission preliminary review*

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# Colorado Prison Murder Prosecutions Include Coerced Witnesses, Withholding of Evidence

In January 2011, a Powers County, Colorado jury acquitted a prisoner who was charged in the stabbing death of another prisoner. Prior to trial, prison officials were accused of using coercion to persuade prisoners to testify for the prosecution, including putting one in segregation for a year when he refused to testify.

Colorado state prisoner Jeffrey Heird was stabbed to death at the Limon Correctional Facility (LCF) in March 2004. Prosecutors became convinced that it was a gang-related killing carried out by prisoners Alejandro Perez and David Bueno, and sought the death penalty. There was no physical evidence clearly linking the murder to Perez and Bueno, so prosecutors built their case on the testimony of prisoners who stood to benefit from their cooperation.

One of the prisoners whom prosecutors claimed was a witness, Ray Wagner, was placed in segregation after he said he had not witnessed the murder. Wagner testified at an October 2007 hearing that he did not see the murder because he was in a different pod at the time. Shortly thereafter, a lieutenant told him he had “pissed off the powers that be” by failing to provide the testimony they wanted, and that “shit rolls down hill....” He was then placed in segregation for a year.

The reason LCF officials gave for segregating Wagner was his alleged involvement in tobacco smuggling. He was transferred to a supermax facility while in the process of administratively appealing his placement in segregation. A hearing board at the supermax found no evidence against him.

Wagner is now suing LCF warden Steve Hartley and other prison officials for violations of his civil rights; his lawsuit remains pending. See: *Wagner v. Hartley*, U.S.D.C. (D. Col.), Case No. 1:10-cv-02501-WYD-KLM.

Prosecutors claimed that while they offered immunity to some prisoner witnesses, they did not pressure anyone to provide false testimony. However, District Attorney Carol Chamber’s handling of the case has been questionable.

Her office was twice disqualified in the Perez prosecution for misleading court filings, conflicts of interest and other potential ethics violations. She successfully appealed the disqualifications. She also

billed the Colorado Department of Corrections for the costs of her prosecution team, resulting in criticism that her office was profiting from the case.

A state court jury found Bueno guilty at trial but refused to impose the death penalty; instead, Bueno received a life sentence [see: PLN, Dec. 2008, p. 50]. Thereafter, in October 2010, District Judge Douglas Tallman vacated the conviction, noting that prosecutors had withheld potentially exculpatory evidence from Bueno’s defense counsel.

“Apparently, someone from the District Attorney’s office made the conscious decision this information was not to be included in discovery because it was not relevant.... The Trial Court cannot say with certainty the District Attorney acted in bad faith by withholding relevant and possibly exculpatory evidence... [But] it is apparent to the Trial Court that a conscious decision was made at some point early in this case to keep the information from the Defendant...,” Judge Tallman wrote.

Chambers is appealing the reversal of Bueno’s conviction; she claimed his

defense counsel had the evidence but “sat [on it] for strategic reasons,” and said she was not required “to spoon-feed to the defense every document.”

In the Perez prosecution, Chambers initially sought the death penalty but changed her mind after the disqualifications and the failure to obtain a death sentence in Bueno’s case. The Perez jury returned an acquittal on January 28, 2011. Chief Deputy district attorney Jason Siers blamed the prisoner witnesses, citing credibility issues and complaining that some prisoners had refused to testify even when held in contempt of court.

“The prison environment adds a certain dimension to this,” said Siers.

Jim Castle, Perez’s defense attorney, disagreed, stating that prosecutors were inappropriately trying to “spin” the verdict after they lost a case that never should have been prosecuted in the first place. “There wasn’t any physical evidence linking Perez to the crime,” Castle noted. ■

Sources: *Associated Press*, <http://blogs.westword.com>, *Denver Post*

## Texas Court of Criminal Appeals Rules Against Parole Board on Imposition of Sex Offender Restrictions on Non-Sex Offenders

by Matt Clarke

The Texas Court of Criminal Appeals held that the Texas Board of Pardons and Paroles was required to provide due process in the form of a hearing similar to a parole revocation hearing before imposing onerous sex offender restrictions (Special Condition X) on prisoners who had been or were about to be released on parole or mandatory supervision, and who were not previously convicted of a sex offense.

Johnathan Evans was convicted of reckless injury of his two two-month-old daughters, sentenced to prison and later paroled under Super-Intensive Supervision Parole (SISP), with a stipulation that he complete anger management and parenting classes before being allowed to see his children again. Seventeen months later, he had completed the classes and was taken off SISP. He then moved across the state to El Paso to be near his

daughters. He planned to take classes at El Paso Community College to become a nutritionist.

His new parole officer served him with a “Notice and Opportunity to Respond Pre-Imposition of Sex Offender Special Conditions” containing allegations that Evans had sexually abused his daughters. Evans filed a response contesting the allegations, but the Special Condition X was imposed nonetheless. Evans was not allowed to view the evidence against him, appear at the hearing or cross-examine witnesses.

Special Condition X required Evans to enroll in sex offender treatment; not contact his daughters; not attend any program that included participants under 17 years of age; not go within 500 feet of any place where children commonly gather; not have any kind of contact – including by correspondence, telephone or video –



with anyone under 17 years of age; receive parole board approval before enrolling in higher education classes, participating in volunteer activities, becoming involved in a relationship with anyone with children under 17 years of age, or owning, maintaining or operating computer, photographic or video equipment; and submit to a warrantless search of his person, vehicle, residence and property at any time. Unable to see his daughters, drive to work (due to child safety zones) or go to college, Evans' life rapidly deteriorated.

Five months after the imposition of Special Condition X, police searched Evans' residence and discovered a cell phone with a camera and a picture of a naked woman on it, pictures of naked women in his cell phone's online photo album and two pornographic DVDs. His parole was revoked for violations of Special Condition X. He was returned to prison where he filed a state petition for writ of habeas corpus pursuant to Article 11.07, Texas Code of Criminal Procedure, alleging denial of due process in the imposition of Special Condition X. Following a hearing in which the criminal trial judge and prosecutor testified that Evans' original crime had no sexual component, the trial court recommended that relief be granted.

The Court of Criminal Appeals noted that the U.S. Court of Appeals for the Fifth Circuit had already twice ordered the parole board to use minimal due process procedures when imposing Special Condition X on a person not convicted of a sex offense. [See: *PLN*, Feb. 2010, p.20; Sept. 2009, p.20]. This specifically required advanced written notice; disclo-

sure of evidence; a hearing at which the person is allowed to be present, present evidence, call witnesses and cross-examine witnesses; an impartial decision-maker; and a written statement by the factfinder stating the evidence relied upon and the reasons for imposing sex offender conditions. The Court noted that under Texas law, "a parole panel may impose 'Special Condition X' upon a parolee only if it determines that the parolee 'constitute[s] a threat to society by reason of his lack of sexual control.'"

The Court of Criminal Appeals spe-

cifically rejected the state's claim that the previous Fifth Circuit decisions did not apply to prisoners, parolees or persons already released under the post-1996 mandatory supervision laws. It also rejected the argument that the cost of giving hearings to the 6,900 non-sex offense parolees upon whom Special Condition X had already been imposed was too expensive. Accordingly, the Court ordered that Evans be reinstated on mandatory supervision without Special Condition X. See: *Ex parte Evans*, 338 S.W.3d 545 (Tex. Crim.App. 2011). ■

## California: Prison Visitor Settles Slip-and-Fall Suit for \$175,000

**R**ichard Allen Barton, Sr. has settled a lawsuit he filed against the State of California and officials at Avenal State Prison, agreeing to accept \$175,000 in exchange for dismissal of the suit.

On July 11, 2008, while visiting a prisoner at Avenal, Barton slipped on a wet bathroom floor that had recently been mopped. He subsequently filed a personal injury complaint in state court, alleging there were no warning signs indicating the bathroom floor in the visiting area was wet on the day in question, which created a "dangerous condition of public property."

He also alleged that state officials had been negligent for mopping the bathroom floor and leaving it wet, without proper warning signs, during visitation hours. Barton claimed he suffered loss of wages and earning capacity, as well as hospital and medical expenses, stemming from

the slip-and-fall incident. His complaint sought compensatory damages in an amount to be proven at trial.

Fourteen months after filing suit, Barton signed a General Release & Settlement Agreement in exchange for \$175,000, acknowledging that the injuries he sustained may be permanent and progressive, as well as recognizing that recovery was uncertain and indefinite, yet agreeing to waive all future claims which may arise from the incident.

Barton was represented by attorney Joseph Fornasero of the Sacramento law firm Van Tassell, Fornasero & Wagstaffe LLP.

*PLN* readers should note that the amount of the settlement was determined, to some extent, by the fact that Barton was a visitor and not a prisoner. See: *Barton v. California*, Superior Court of County of Kings (CA), Case No. 09C 0032. ■



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## News in Brief:

**Alabama:** Jonathan Windham, 24, was acquitted of manslaughter on October 4, 2011 in connection with the January 2009 death of Northwest Florida Reception Center prison guard Timothy Fowler. Fowler had an altercation with Windham over a card game, and Windham hit him in self-defense. Medical evidence indicated that Fowler died not from the blow but from a subdural hematoma. The judge acquitted Windham by directed verdict, before the case went to the jury.

**Alabama:** On October 17, 2011, St. Clair Correctional Facility prisoner Jabari Leon Bascomb, 22, was stabbed to death during a fight with another prisoner. "We do have a suspect," said Alabama DOC public information manager Brian Corbett. "At this time, it's still under investigation." Bascomb was a juvenile when he was charged with murdering a 65-year-old man in 2007; he was serving a 22-year sentence for that crime at the time he was killed.

**Arizona:** Former Arizona prison guard Robert Joseph Hamm, 32, pleaded guilty on October 12, 2011 to repeatedly having sex with a 14-year-old girl. When confronted, Hamm denied having a sexual relationship with the girl but said "[a]nything was possible while he is passed out from alcohol," according to court records. Hamm was sentenced on December 1, 2011 to one year in prison and 7½ years probation; he will also have to register as a sex offender.

**Arizona:** On Oct. 21, 2011, former Maricopa County jail guard Kevin Gerster, 35, was sentenced to one year in prison for assaulting two prisoners and improperly accessing law enforcement records to obtain the home address of an ex-prisoner. Video footage from the jail showed Gerster stepping on the neck of a restrained prisoner and punching another prisoner in the face. He also gave a friend the address of a former prisoner who was dating his friend's ex-wife; his friend then assaulted the couple with a box cutter.

**Brazil:** In Sept. 2011, a 14-year-old girl reported to police that she had been drugged and taken to a men's prison, where she was raped by prisoners for four days. The girl escaped with the help of a guard; police officials suspect she was taken to the Heleno Fragozo prison to be prostituted. The prison director and 19 other employees were fired. "The facts show a violation of human dignity, a disrespect of the basic rights of this child, a serious violation of

human rights," said Alan Mansur Silva, a regional federal prosecutor.

**California:** Brothers Gary and Chong Vue were convicted in late Sept. 2011 of first-degree murder in connection with the 2008 shooting death of California prison guard Steve Lo. Lo was reportedly killed because he was having an affair with the wife of Chu Vue, the older brother of Gary and Chong. Chu, a former Sacramento sheriff's deputy, had been convicted on Sept. 29, 2010 of arranging Lo's murder. [See: *PLN*, July 2011, p.41]. All three Vues received life sentences.

**California:** According to an autopsy, Michael Thomas Graham, 50, incarcerated at the Wasco State Prison, was beaten to death on October 10, 2011. Graham's cellmate, Joseph Hyungmin Son, 40, is suspected of killing him. Son, a part-time actor, had starred in an Austin Powers movie before he was convicted of torture in connection with a rape, and received a life sentence. Graham was serving two years for failing to register as a sex offender.

**California:** In October 2011, a Fresno Sheriff's Department bus transporting prisoners hit a tractor-trailer that had turned in front of it, resulting in significant damage. Fortunately both the guards and prisoners were wearing seat belts, though there were still injuries. "Everybody was complaining of pain to arms, legs, shoulders, nothing major," said California Highway Patrol officer Ryan Smith. "There were seat belts on there, just the impact was pretty severe." The prisoners were taken to a Kern County hospital for evaluation.

**China:** According to an Oct. 26, 2011 news report, prisoners at a jail in Behei province were purchasing luxury items from guards, including cell phones, pure-breed dogs and alcohol. An investigation of the jail following an escape revealed lax security measures and extensive contraband smuggling by staff that included chow chows, a Chinese dog breed. The warden was fired and two guards were arrested.

**Colorado:** On October 11, 2011, a sheriff's deputy fatally shot a Jefferson County jail prisoner who was trying to escape during a medical appointment at the Advanced Medical Imaging center in Golden. "Once inside the facility he attempted to escape by fleeing down a common area hallway," said Police Sgt. Ryan Custer. "The deputy fired one time striking the suspect. No other people were

injured during the escape attempt." The prisoner, Jesus Octavio Aguilar, 28, was unarmed and not in handcuffs at the time of his unsuccessful escape.

**Delaware:** In October 2011, the Delaware State Police arrested David S. Benson, 50, a state youth probation officer and former police officer. Benson was charged with a home invasion and assault that occurred on January 20, 2011 near Seaford. He was suspended with pay from his position as a senior probation and parole officer. Benson allegedly wore a mask when he broke into the house of a woman who had refused his advances; he had been her son's youth officer. DNA evidence linked Benson to the home invasion and assault. He had previously exhibited unusual conduct, such as repeatedly visiting the woman's home, even after her son was no longer on probation, and one time put on the woman's lingerie while at her house.

**Florida:** A former CCA guard at the Hernando County Jail was acquitted on October 12, 2011 of raping a female co-worker in 2008. Gregory Heiser, 45, was accused of raping the 42-year-old victim, who was not identified, when they were both employed at the CCA-run jail, which has been operated by the Sheriff's office since August 2010. Heiser said the sex was consensual, and claimed the woman cried rape after he rejected her invitation to go to the beach the next day. Heiser was also accused of having sex with an underage girl in an unrelated incident, but that case was dismissed.

**Florida:** Last month, *PLN* reported that the Florida Dept. of Corrections had imposed a ban on smoking. [See: *PLN*, Jan. 2012, p.50]. The ban was modified in October 2011 due to resistance from the Florida Police Benevolent Association, which until recently represented state prison guards. The union argued that a smoking ban must be negotiated under their contract with the state. The revised policy allows guards, employees and visitors to smoke in areas not in plain view of prisoners.

**Iowa:** A prisoner who held a leadership role in a United Methodist congregation at the Iowa Correctional Institute for Women, and who had been hired by the church group as an administrative assistant after her release, has been charged with stealing the identities of church volunteers. Shelley Bridges, 37, faces a felony charge related to identity theft involving 40 volunteers who participated in the prison congregation; she used their personal information, including

Social Security numbers, to obtain credit cards in their names. "We're hoping that people will remain committed to the mission of this congregation and the work that we do with these women," said the Rev. Lee Schott.

**Louisiana:** State prisoner Sylvester Miller, 38, was hit by a car on October 14, 2011 while working on a road crew in Alexandria, and died five days later. Kelly Tuttle, 38, drove off the road and her Jeep Liberty struck Miller, the prison work van and a sanitation truck. Tuttle, who suffered minor injuries, was charged in November with vehicular homicide, first-degree vehicle negligent injury and careless operation of a vehicle. A city sanitation worker also was injured in the incident.

**New York:** Cameron Douglas, 33, the son of Academy Award-winning ac-

tor Michael Douglas, pleaded guilty on October 20, 2011 to a federal narcotics possession charge. Cameron was serving a five-year sentence for meth-related offenses and cooperating with a federal drug investigation when he caught the new charge. He was reportedly found with heroin and cocaine in his prison cell. Cameron was sentenced on Dec. 21, 2011 to 4½ years on the new drug charge, with the judge citing his "history of reckless behavior" and violation of prison rules as justification for the sentence.

**Sweden:** Sweden's Parliamentary Ombudsman ruled in October 2011 that guards at the Västervik Norra prison should not have interrupted a prisoner who was having sex with his fiancée during an authorized visit. The fiancée had brought her infant daughter with

her, who was asleep in a stroller at the time. The guards scolded the prisoner for having sex while the child was present in the room. The prisoner's fiancée filed a complaint against the guards for "insulting and invasive" conduct. "To barge into the visiting room at such a sensitive moment constitutes a huge invasion into the inmate's and his visitor's personal privacy and requires great tact and consideration," stated Chief Parliamentary Ombudsman Cecilia Nordenfelt.

**Texas:** On October 12, 2011, the Texas Court of Appeals declared that Michael Morton was innocent of murdering his wife. Morton served almost 25 years of a life sentence for his wife's 1986 death. DNA from the crime scene was eventually linked to another suspect; Morton, now 57, had been convicted based on

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## News in Brief (cont.)

circumstantial evidence. The Innocence Project assisted in exonerating Morton and uncovered evidence that the original prosecutor in the case, Ken Anderson, now a district judge in Williamson County, had concealed exculpatory evidence.

**Unknown:** The hacker group “Anonymous” took credit in an October 2011 press release for computer attacks on various police organizations, including the International Association of Chiefs of Police (IACP), the Boston Police Patrolmen’s Association, the Baldwin County (Alabama) Sheriff’s Office and the Matrix

Group, a web development firm that serves government and corporate clients, including the IACP. Anonymous hacked the sites “in solidarity with the [Occupy Wallstreet] Movement and the International Day of Action Against Police Brutality,” and targeted the police “because they are the vicious boot boys of the 1% whose role in society is to protect the interests and assets of the rich ruling class.”

**Washington:** A female suspect being questioned at the Burlington Police Department on October 7, 2011 decided not to wait to be transferred to the county jail. She climbed into the drop ceiling in an attempt to escape, but ended up falling through the ceiling panels into the police

chief’s office. Following that incident, the city council approved \$4,000 in emergency funds to install hard ceilings in interview rooms at the police station.

**Washington:** A naked jail prisoner was shot and killed by a county corrections officer on Oct. 21, 2011, while trying to escape from a hospital where he had been taken after a suicide attempt. The prisoner, John Gary Lies, 40, armed with a knife, took a woman hostage in a parking lot after tearing off his hospital gown and fleeing from the Grays Harbor Community Hospital. Investigators are looking into whether the suicide attempt was part of Lies’ escape plan, to get him to the hospital. The shooting was deemed justified. ■

## Criminal Justice Resources

### *ACLU National Prison Project*

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners’ Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### *Amnesty International*

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### *Center for Health Justice*

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### *Critical Resistance*

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### *Family & Corrections Network*

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### *FAMM*

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### *The Fortune Society*

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### *Innocence Project*

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### *Just Detention International*

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### *Justice Denied*

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### *National CURE*

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### *November Coalition*

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### *Partnership for Safety and Justice*

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### *The Sentencing Project*

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)

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**The Criminal Law Handbook: Know Your Rights, Survive the System**, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038 ☐

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**Writing to Win: The Legal Writer**, by Steven D. Stark, Broadway Books/Random House, 283 pages. **\$19.95.** Explains the writing of effective complaints, responses, briefs, motions and other legal papers. 1035 ☐

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**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073 ☐

**Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It**, by Terry Kupers, Jossey-Bass, 245 pages. **Hardback only, prisoners please include any required authorization form. \$32.95.** Psychiatrist writes about the mental health crisis in U.S. prisons and jails. Covers all aspects of mental illness, prison rape, negative effects of long-term isolation in control units, and more. 1003 ☐

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**Crime and Punishment In America**, by Elliott Currie, 230 pages. **\$16.95.** Effective rebuttal to right-wing proponents of prison building. Fact-based argument shows that crime is driven by poverty. Debunks prison myths and discusses proven, effective means of crime prevention. 1019 ☐

**Prison Writing in 20th Century America**, by H. Bruce Franklin, Penguin Books, 368 pages. **\$17.00.** From Jack London, Malcolm X and Jack Henry Abbott to George Jackson and Edward Bunker, this anthology provides a selection of some of the best writing describing life behind bars in America, from those who have been there. 1022 ☐

**Soledad Brother: The Prison Letters of George Jackson**, by George Jackson, Lawrence Hill Books, 339 pages. **\$18.95.** Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 40 years ago. 1016 ☐

**Marijuana Law**, by Richard Boire, Ronin, 271 pages. **\$17.95.** Examines how to reduce the probability of arrest and prosecution for people accused of the use, sale or possession of marijuana. Info on legal defenses, search & seizures, surveillance, asset forfeiture and drug testing. 1008 ☐

**Prisoners' Self-Help Litigation Manual**, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 960 pages. **\$39.95.** The premiere, must-have "Bible" of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Highly recommended! 1077 ☐

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**The Prison and the Gallows: The Politics of Mass Incarceration in America**, by Marie Gottschalk, Cambridge University Press, 451 pages. **\$28.99.** Great political analysis of the confluence of events leading to 2.3 million people behind bars in the U.S. 1069 ☐

**Women Behind Bars, The Crisis of Women in the U.S. Prison System**, by Silja J.A. Talvi, Seal Press, 295 pages. **\$15.95.** Best book available that covers issues related to imprisoned women, based on interviews with hundreds of women behind bars. 1066 ☐

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# PRISON

## Legal News

VOL. 23 No. 3

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

March 2012

### How Victim Rights Shaped Spending, Laws and the Future of Punishment in Colorado

*by Alan Prendergast*

Newly elected as a Colorado state representative, Pete Lee hit the Capitol in January 2011 fired up with big ideas. The biggest of them all was the restorative justice bill he introduced shortly after the session began.

A concept borrowed from Native American traditions and other cultures, restorative justice offers an alternative to the conventional crime-and-punishment approach of the legal system. The emphasis is on “restoring” and healing a community damaged by crime – by, for example, letting victims have more say in the justice process and requiring transgressors to admit their guilt and agree to

reparations, such as fixing up vandalized property, instead of simply spending time behind bars.

A Colorado Springs Democrat and criminal defense attorney, Lee had worked with juveniles in a restorative justice program in El Paso County and had been impressed with the results. “We had very low recidivism rates, and the kids accepted responsibility for what they did,” he says. “So I became a zealot.”

Many prosecutors are skeptical of the touchy-feely aspects of restorative justice programs; they regard the approach as far more effective in dealing with juvenile delinquency and property crimes than violent offenses. But Lee, whose wife works as a restorative justice facilitator, believes that a focus on healing can be useful in a wide range of criminal cases, to victims and offenders alike.

“In 25 years of practice in the criminal courts, I can count on one hand the number of times I saw an offender shake hands with a victim and offer a sincere apology,” he says. “There’s that expression in snowboarding, ‘Go big or go home.’ I wanted to introduce restorative justice to the adult criminal code and put it into the schools and the Department of Corrections.”

Lee wasn’t proposing a change in sentencing laws or a costly new treatment regimen, just an advisement to victims and offenders that restorative justice might be an option – along with a pilot program in prisons for “victim-offender conferences” when appropriate. He expected his bill to have strong support from victim advocacy groups. But when House Bill 1032 came up for public comment, two of the most

powerful voices in Colorado criminal justice circles were raised to oppose it.

“Nancy Lewis came up to the hearing table with Tom Raynes,” Lee recalls. “I was very surprised that they were linked arm in arm.”

Raynes is the director of the Colorado District Attorneys’ Council, a group that provides services and lobbying for prosecutors across the state. Lewis is the executive director of the Colorado Organization for Victim Assistance, a nonprofit that works closely with district attorneys and various state agencies. COVA is relatively small in numbers – its official membership is less than a thousand people – but with an annual budget of more than \$800,000, a yearly conference that draws greater attendance than two national victim-advocacy gatherings and strong ties to the law enforcement community, it’s by far the most influential victim-rights group in Colorado.

While supportive of restorative justice in theory, Raynes and Lewis had several practical concerns about Lee’s bill. They wondered what standards would be required for the professional facilitators who were supposed to determine if a particular offender and victim could meet face-to-face without further trauma to the victim. Most of all, they wanted clear language that victims were in charge of any restorative justice effort and could decline to participate at any point.

“You can’t say to a victim, ‘You have to talk to your offender,’” Lewis said. “That’s just ludicrous.”

Lee was stunned. It had always been his intent that the program would be voluntary and initiated by victims, he says;

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*PLN* is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

## **Victim Rights in Colorado (cont.)**

the idea of dragging people into a healing process against their will made no sense at all. But he hadn't made that point clear to the organized victim lobby, a force he'd failed to consult before drafting his bill.

"I didn't think COVA would oppose my bill," he says now. "I thought they would embrace it. So I buttonholed them after the hearing and said, 'Okay, let's see what we can do to address your concerns.'"

Lee had learned a lesson that every freshman lawmaker learns sooner or later: If the victim lobby has problems with your bill, you've got problems. What began as a modest rights campaign decades ago on behalf of survivors of domestic violence, centered on the notion that victims of crime deserve to be heard, has grown into a formidable national movement shaping legislation, sentencing policy and public debate on crime and punishment. The movement is particularly strong in Colorado, which has some of the most far-reaching victim-rights legislation in the country – and an ample bureaucracy to administer it.

In 2011, more than \$30 million in public monies was spent in Colorado in the name of victim assistance and advocacy. Some of it comes from court surcharges imposed in criminal cases and is paid directly to crime victims and family members to cover everything from medical costs to burial fees. Some of it pays the salaries of full-time victim advocates in police departments and prosecutors' offices. A surprising amount, around a fifth of the total, consists of state and federal grants doled out to law enforcement agencies, nonprofits like COVA and other entities for conferences, training, salaries and research that may have no direct impact on victims at all.

The convoluted chain of financial relationships and shared agendas hasn't gone unnoticed among other criminal justice interest groups. Critics charge that the victim-rights movement has become too closely allied with government to serve its diverse constituency. "COVA has always been very clear that their mission is retribution and punishment," says Maureen Cain, policy coordinator for the Colorado Criminal Defense Bar. "But victims come in all perspectives. A lot of times they want to prosecute to the full extent of the law, but sometimes they're counseled into that position.

"COVA's position has always been

driven by the district attorneys," Cain continues. "Their board members are overwhelmingly district attorneys and law enforcement. You almost don't have to talk to COVA [about legislation], because they're just going to do what the DAs tell them to do."

Lewis says her group and prosecutors argue frequently about policy and legislation – but not in public. "Our philosophy is, in legislation and funding and programs, to try to have consensus with folks," she explains. "If we have a disagreement, we have it behind closed doors. It isn't like the press would ever know about it."

It's not exactly shocking that COVA would clash with the defense bar – or other "offender advocates," as those pushing sentencing reform are labeled by the victim-rights movement. But there have also been memorable disputes between COVA and other victim groups, over issues ranging from the death penalty to restorative justice.

"COVA is very good at giving victim assistance to victims," says Howard Morton, executive director of Families of Homicide Victims and Missing Persons, which began as a gathering of eleven grieving family members in 2001; in October 2011 it marked its tenth anniversary, with a membership now at 1,100. "But when COVA gets into the political arena, then we sometimes find ourselves on opposite sides of the fence."

Who speaks for crime victims in Colorado? The answer is complicated, as Representative Lee discovered when he went about clarifying HB 1032 to satisfy COVA and the district attorneys. (Passed in the spring of 2010, the revised bill leaves no doubt as to who's in charge of the restorative justice process: The phrases "victim-initiated," "requested by the victim" and "victim-centered" appear a total of thirteen times in the final version).

"I think COVA represents some victims," Lee says carefully. "I don't think it represents all victims."

Then he quickly adds, "Don't get me in trouble with COVA. I want to work with them."

• • •

It's customary for lawyers and judges to pay lip service to the rights of victims in criminal cases. But only in the last three decades have victims achieved substantive rights and influence in the way crimes are prosecuted. Before that, being a crime

## Victim Rights in Colorado (cont.)

victim was mainly about feeling powerless – losing your property, your peace of mind, your health, even a beloved child or parent or sibling or lover, without warning or any say in the matter at all. And that feeling of powerlessness often continued throughout the court process.

Joe Cannata remembers that feeling well. In 1987, his youngest daughter, Lynn, was stabbed to death in front of her two-year-old son. She was twenty and pregnant. The police suspected her boyfriend, but it was a couple of weeks before they could make the arrest.

“They had victim advocates in the DA’s office, but their role wasn’t well defined,” Cannata recalls. “They were just starting to give out victim compensation. They gave the man who killed her \$500 toward the burial, and he spent it on himself. After the trial, the judge actually apologized for having to give him such a harsh sentence. He didn’t allow us to speak at all.”

Lynn’s boyfriend was convicted of second-degree murder and sentenced to 24 years in prison. But that was hardly the end of it. The Colorado Court of Appeals tossed the sentence on technical grounds; the Colorado Supreme Court reinstated it. Under the sentencing scheme at the time, the man was eligible for parole after serving only a third of his time. Cannata learned how to negotiate the maze of pa-

role hearings – even though his daughter’s killer would often waive his hearing at the last minute, after Joe and his wife, Kaye, had driven hours to be there.

“The offender actually had control of the victim’s life,” Cannata says. “I didn’t think he should have even been eligible for parole after only eight years.”

The situation gradually began to change, starting with tough new laws dealing with domestic violence. Thanks largely to pressure from grassroots activists outraged by violence against women, Colorado became a pioneer in requiring arrest and treatment programs for batterers. Groups focusing on other crimes – Mothers Against Drunk Driving, campaigns targeting sexual assault and child abuse – also began to make their presence felt. COVA was incorporated as a board-run entity in 1982; Lewis became its first executive director in 1994.

In 1992, Colorado voters amended the state constitution to formally acknowledge that victims and surviving family members “have the right to be heard when relevant, informed and present at all critical stages of the criminal justice process.” The Victim Rights Act, which has been amended five times since its creation, requires law enforcement agencies to keep victims apprised at every step of an offender’s journey through the system, from arrest and preliminary hearings to parole matters or an upcoming release from prison or jail. The system has a review board for victims who have a complaint about their treatment and even a legal clinic, started by COVA, that can intervene in a criminal case on a victim’s behalf.

Cannata now runs a nonprofit called Voices for Victims that provides transportation to parole hearings and other post-conviction services for crime victims. Over the years, he and other victim-rights

crusaders have pushed for additional legislation to address sentencing inadequacies and related issues. Cannata is particularly proud of “Lynn’s Law,” passed in 2004, which requires violent felons in Colorado to serve at least 75 percent of their sentence before parole eligibility. Other changes to the parole process have eliminated offenders’ ability to waive a hearing without advance notice or to apply for halfway-house placement right after being denied parole.

The new legislation has created special revenue streams designed to benefit victims – and, in some cases, to make offenders pay in new ways for their crimes. Colorado has had a victim-compensation program in place since 1981, which provides up to \$20,000 to a crime victim for out-of-pocket medical expenses, property damage, burial costs or other losses not covered by insurance. The program is funded by surcharges imposed in court cases, ranging from \$33 for a misdemeanor traffic offense to \$163 for a felony, that are independent of any additional restitution the court might order. The program also receives millions in federal funds (including nearly \$900,000 buried in the 2009 American Recovery and Reinvestment Act). In all, federal and state victim-compensation funds awarded \$14.25 million to 7,758 Colorado crime victims in fiscal year 2010, an average of less than \$2,000 per claim.

Other federal funds flow into the state through Victims of Crime Act grant awards (\$6.65 million in 2011, for services ranging from bilingual counseling of victims in Eagle County to hiring prosecutors who specialize in domestic violence cases in La Junta) and Violence Against Women Act awards (\$1.9 million in 2011). Another pot of state money comes from a second surcharge on criminal defendants,

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which funds Victim Assistance and Law Enforcement (VALE) programs operated by public agencies and private groups. In 2011 the Colorado Department of Public Safety doled out \$1.2 million in VALE grants directly to various agencies; another \$13 million in VALE funds were dispensed by local boards in the state's 22 judicial districts, appointed by the chief judge in each district.

The VALE money is the lifeblood of many victim groups, which compete for funding awarded by the local boards. Some of the awards go directly to victim services, such as a rape crisis hotline or a safehouse for battered women. But there are plenty of other uses for the cash, too. By statute, district attorneys, who are barred from the local VALE boards but are expected to administer the awards, can charge up to 10 percent in administrative costs. Add to that the awards made directly to their offices, to police departments and related entities, and fully one-third of the \$13 million goes to government employees rather than victims.

VALE funds pay the salaries of many victim advocates in district attorneys' offices and police departments. They pay for digital cameras purchased by the Otero

County Sheriff's Office and anatomically correct dolls used by the Firestone Police Department in investigating allegations of child sexual assault. And they pay for cops and prosecutors across the state to attend training and conferences sponsored by COVA and other groups, on topics such as "Drug-Facilitated Sexual Assault," "Supporting Victims of Identity Theft" and "Officer Involved Shootings and PTSD." In 2010, VALE funds paid out \$289,186 for various organizations just to attend COVA conferences; the salaries of the nonprofit's top employees (including Lewis), as well as an intern program operated by COVA that trains students to work with victim advocates in public agencies, are also supported by VALE grants.

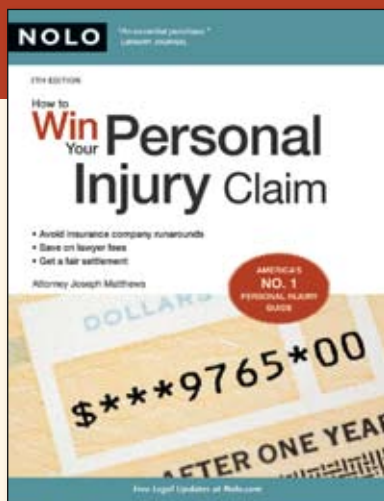
Although COVA does have an emergency fund to assist victims directly when other sources have been exhausted, most of its energy is devoted to training and conferences; those activities provide its main source of revenue, apart from government grants. "That's a very big part of the mission, to see that the person dealing with a crime victim has good training," Lewis explains. "In other states, agencies that provide that training on a statewide level are housed in the governor's office. Being a nonprofit,

we don't have to switch things around every time the governor switches."

Privately, grassroots groups have suggested that some of the state money expended on law enforcement training could be better spent on more immediate victim needs. But Cannata, whose fledgling group receives a trickle of VALE funds but also relies on donations and fundraisers in restaurants, doesn't have a problem with the arrangement. "I think the training is important to victims because it makes these people more victim-sensitive," he says. "It reminds them of the trauma the victim is going through."

Yet COVA's close interactions with police and prosecutors, as well as its organizational makeup, have led some to question whether it has sufficient independence from its government sponsors. Its current fifteen-member board of directors includes six people who work for district attorneys, three police department employees and four other employees of city or state agencies. Lewis also sits on the Crime Victim Services Advisory Board, which advises the Colorado Department of Public Safety on the distribution of various state and federal victim grants. That board, too, is dominated by govern-

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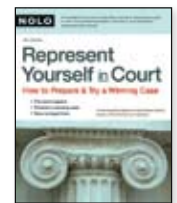
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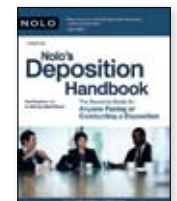
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## Victim Rights in Colorado (cont.)

ment interests; one member identified as a “community representative” works for the Denver district attorney.

Howard Morton calls Lewis “a good gal” but believes COVA’s priorities reflect the composition of its board. “Most of the board, and certainly most of the executive committee, is made up of DAs or employees of DAs,” he says. “Where your paycheck comes from influences you a lot.”

Morton’s group, Families of Homicide Victims and Missing Persons (FOHVAMP), has its share of disputes with prosecutors and law enforcement, particularly over the amount of resources allocated to unsolved murder cases. “Quite a few of our members are upset with district attorneys who would not prosecute their cases and left them to remain cold,” he notes. When Colorado voters considered an exemption from term limits for district attorneys a few years ago, COVA came out for the measure. Morton opposed it, and wrote what he calls “a very strong letter” to Lewis asking how the board could take such a position without consulting the organization’s membership.

Lewis laments that term limits ever passed. “My belief – and this is my belief, not a COVA belief – is that with term limits at the legislature and for district attorneys and even some sheriffs, we have seen a real erosion of people who understand victims’ rights,” she says.

As for her board of directors being stacked with prosecutors and cops, Lewis says the board includes crime victims, too. “They don’t wear something on their forehead that says ‘I’m a victim,’” she notes. “Most of them do come out of law enforcement, but our concerns are

not system-driven. I think we have parted company with the DAs several times.”

To critics like Cain, though, COVA appears to be an unofficial lobbying arm for state prosecutors. “Is it appropriate,” she asks, “for this organization, which is really a district attorneys’ organization, to get all this money and hire a lobbyist and claim to be an independent group?”

Only a “very, very, very tiny part of our budget” goes to lobbying efforts, Lewis says, and prosecutors scoff at the idea that COVA is a front for their own agenda. Still, the nonprofit and the district attorneys’ council often seem to speak with one voice in the legislature – even if, behind the scenes, victims and prosecutors frequently disagree about plea bargains and sentencing options, how vigorously cases are investigated or developed and other issues.

The fact that prosecutors often claim to represent victims or “speak” for them in legislative matters troubles Boulder District Attorney Stan Garnett. “Advocating for victims is very much a part of the role of the district attorney,” says Garnett. “However, district attorneys are not lawyers for victims. Our job is to seek justice and do the right thing in individual cases, and that sometimes means we approve a resolution to a case that the victim doesn’t want. We all run across victims who are motivated by personal revenge and other motives that are improper. Victims need to be heard, but they don’t control the process.”

The same goes for sentencing reform and other legislative battles, he adds. “There are a lot of groups that have emerged that do nothing but be a voice for victims,” he says. “That’s not the role we should play in legislation.”

Cain and others have suggested that the apparent muddling of roles could be addressed if the control of VALE funds was shifted from the judicial branch and the Department of Public Safety to the Department of Human Services. Gar-

nett, though, thinks adding another state agency to the mix would only delay the delivery of services to crime victims and the groups that represent them.

“I don’t think that would be an improvement,” he says.

...

Criminologists often describe families of the victims of violent crimes as “co-victims.” The reasoning is simple: Although they didn’t suffer the crime themselves, they also were victimized, and the ongoing loss and trauma can alter their lives forever.

Last month, on the National Day of Remembrance for Murder Victims, state representative Rhonda Fields addressed a grieving gathering of co-victims outside the Denver courthouse. Fields spoke of “my crime,” and how it had changed her into a victim advocate and prompted her to run for public office. Technically, it was a crime against her son, Javad Marshall-Fields, and his fiancée, Vivian Wolfe, who were gunned down in Aurora in 2005 shortly before Javad was expected to testify as a witness to another murder; the men convicted of the killings, Robert Ray and Sir Mario Owens, are now on death row. But her audience knew exactly what Fields meant.

“We all experience grief very differently,” Fields said. “Some of us are still angry, and some of us are in deep depression ... but we don’t stand alone in our grief. Your pain is my pain.”

Like Fields, some co-victims find at least a degree of closure in seeing the perpetrators caught and convicted. Others, though, have to contend with a crime that’s never solved, punished or explained. It’s that kind of pain that has been the driving force behind Families of Homicide Victims and Missing Persons, and that led Morton and his members to an unusual gambit in the state legislature two years ago – one that demonstrated that the

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victim movement is far from monolithic in its goals and intentions.

With the aid of volunteers, FOHVAMP created a statewide database of unsolved homicides; it turns out that three out of ten murders in Colorado are never prosecuted. The total number of unsolved killings in the state now stands at more than 1,500, by Morton's count, and is growing by 3 percent each year. His group pushed for a state team of specially trained investigators to tackle the backlog, but state officials claimed there was no money for such an undertaking. Instead, the Colorado Bureau of Investigation managed to fund one position for a crime analyst to maintain an official database of cold cases.

That wasn't nearly enough for FOHVAMP. In 2009, the group backed a bill by Paul Weissmann, the House majority leader, that would have funded cold-case investigations by abolishing the death penalty. Colorado has executed only one person in the past four decades, and Weissmann argued that the millions of dollars a year the state spends on the seemingly endless appeals process could be better directed to putting more killers behind bars.

District attorneys denounced the bill, describing it as a divide-and-conquer strategy. COVA and the Department of Public Safety also opposed it, while Morton found himself in an odd alliance with the ACLU, the criminal defense bar and other so-called offender advocates in lobbying for it. But he insists FOHVAMP was simply interested in getting cold cases reopened, not the larger ideological debate involved.

"We're not one side or the other on the death penalty," he says. "We just don't

have the investigators we need to address this problem."

The bill squeaked through the House and was narrowly defeated in the Senate. "It came within one vote of passing both houses," Morton sighs.

The defeat hasn't deterred FOHVAMP from keeping pressure on the unsolved homicide issue. In 2010 a group of 26 law enforcement professionals – including a medical examiner, a crime lab specialist, several homicide detectives and an FBI behavioral analyst – began meeting quarterly on a voluntary basis to review cold cases statewide. When Morton learned that the group had cut its meetings from two days to one and had only reviewed five cases in a year, he urged his members to "ask the head of investigations for your loved one's case to present it to this team of experts." The review team has since seen its requests for review rise dramatically – again making the argument for a full-time squad of investigators.

Yet FOHVAMP's decision to break ranks from the "official" victim stance on the death penalty wasn't without some blowback. After the legislative brawl in 2009, Morton found the local VALE funds he relied on for some of his group's operating budget had been slashed. The VALE board in the Colorado Springs judicial district, which had provided FOHVAMP with up to \$10,000 a year, refused to provide any additional funds for the next two years. Arapahoe County's board, which had provided \$18,950 for four years running, trimmed its contribution to \$10,000. Jefferson County, which had supplied \$18,500 in the past, cut back to \$10,000,

then \$8,000. And the Jefferson County board specifically limited its contribution to Morton's \$36,000 annual salary to \$800, when it had previously paid \$5,600 for that purpose.

"They just cut us off at the knees," Morton says.

One district's grant evaluator informed Morton by e-mail that her board members "were not comfortable funding a significant portion of your salary because of the understanding that your activities as director of FOHVAMP involve lobbying, which grant funds cannot support." In response, Morton pointed out that all of his group's legislative lobbying on the death penalty bill had been paid for by a foundation out of San Francisco.

"We did not use one dollar of VALE funds," he says. "We were legitimately doing what nonprofits do, and we were doing it with funds furnished by the Tides Foundation's death penalty mobilization fund."

Maureen Cain believes that FOHVAMP was singled out for punishment because it had dared to take a public position contrary to that of the district attorneys and COVA. "Because they supported [death penalty] abolition, they became the stepchild of the victim groups," she says.

Morton is more diplomatic. "Perhaps there's some anger on the part of some VALE board members that we're growing so fast," he suggests. "I think some people are getting embarrassed by the amount of unsolved homicides in Colorado."

The official victim lobby proved to be a formidable foe in another pitched battle

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## Victim Rights in Colorado (cont.)

involving a cause dear to prison reformers: juveniles convicted of murder in adult court and sentenced to life without parole (LWOP). As of 2009 Colorado had 48 such cases – more than Utah, Arizona and Wyoming combined, but considerably fewer than Pennsylvania (444) or Louisiana (335). In 2006 the state changed the mandatory sentence for juveniles facing life to allow for parole eligibility after serving forty years. The law wasn't retroactive, though, so it had no impact on the existing juvenile LWOP population.

For the past several years, juvenile justice groups – notably the Denver-based Pendulum Foundation, which has been active in campaigning against LWOP measures nationwide – have urged lawmakers to consider extending a forty-year parole window for the current lifers, too. A 2011 House bill would have done just that, but prosecutors and COVA worked strenuously to defeat it. Lewis and others urged victims to “deluge” Crisanta Duran, a freshman state representative, with phone calls and e-mails opposing the bill. It died in committee 6-5, with Duran being the swing vote.

In her “Urgent Call to Action” messages, Lewis described the bill as a “sneak attack” that had been presented in violation of the notification provisions of the Victim Rights Act. “Victims’ families who would have been directly affected by this legislation were NOT notified of the hearing,” she wrote. “Victims who could not come raised objections to the violations of their constitutional rights to be notified and heard.

“Some of the offenders that this legislation would offer early release to are cop-killers ... others killed their whole families. One of the offenders – Erik

Jensen – comes from a wealthy family. He threatened his parents that if they did not get him out of prison in ten years, he would kill himself. They have sunk everything into creating the Pendulum Foundation, which is focused just on getting him out.

“We who have seen the horror of murder have to be stronger and louder now than those who work to free these killers and to deliberately re-traumatize the families of murder victims.”

Mary Ellen Johnson, Pendulum's executive director, replied to Lewis' scorching e-mail with one of her own, saying that COVA's broadside was “filled with erroneous information, and in at least one case, an outright lie.” It wasn't Pendulum's duty to notify crime victims of pending legislation, she pointed out; if anyone had that obligation, it was the district attorneys and COVA itself. The bill's supporters weren't advocating “early release” of *all* the lifers convicted as juveniles, either. As for Jensen, he “never threatened his parents or uttered any of the rest of your nonsense.... Furthermore, the Pendulum Foundation was never created solely to get the Jensens' son out.”

While Jensen's parents supplied major support to launch Pendulum, the nonprofit has since developed other large donors, Johnson says. She insists that not all victim groups opposed the LWOP reform bill – but the victims who supported it evidently don't speak for COVA or vice versa. “They tried to paint us as being very sneaky,” she says. “The fact is, there had been a lot of communication between the bill's sponsors and the DAs.”

Lewis doesn't expect the LWOP issue to go away. While she says she's sympathetic to the idea that many people who committed horrific crimes as juveniles were themselves abused, it rankles her

when people refer to offenders as “victims” of a broken system. In her view, there's a very distinct line between perpetrators and victims.

“It's not that I don't want to build consensus,” Lewis says. “But with some people, I just disagree with where they're going.”

...

Sharletta Evans left her two young sons and their teen cousin in the car while she went into a relative's house in northeast Denver. It was 1995, and the neighborhood had been plagued by recent drive-bys. Evans had come to retrieve another child and take him out of the line of fire.

Gangbangers cruising the area mistook her car for the ride of some rivals. They opened fire on the car and the duplex while Evans was inside. One of the bullets claimed her youngest, Casson Xavier Evans, better known as Biscuit, as he slept in the back of the parked car. He was three years old.

The shooters, fifteen-year-old Paul Littlejohn and sixteen-year-old Raymond Johnson, were sentenced to life without parole. Biscuit's mother was sentenced to grief and sorrow and trying to find a path through something that didn't make sense at all.

The victim advocates did what they could. “They made sure my family understood the charges and that we knew whenever there was a hearing,” Evans recalls. “There was victim compensation that helped us bury our son.”

But after the killers were put away, the support apparatus moved on to the next case. And everyone seemed to expect Evans to move on, too. “You're getting full attention, and then you're just kind of left,” she says.

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Evans became involved in anti-violence campaigns and started a program for at-risk kids called RedCross BlueShield Gang Prevention. She struggled with the bitterness of her loss and sought to forgive the two boys, now men, who had taken her son from her. A turning point came when Littlejohn's mother asked if she could come see her.

"She came to me and took responsibility," Evans says. "She expressed how her actions, her lack of parenting, aided in his decision-making. She apologized for him and for herself."

The visit convinced Evans that she wasn't wasting her time in her gang-prevention efforts, which focused on promoting parenting and addressing the "hole" in the life of the typical gang-banger. "It let me know I was on the right track," she explains. "It was a huge part of my healing."

Both of the shooters have written letters from prison expressing remorse for the killing. Two years ago, Evans decided that she wanted to meet Raymond Johnson face-to-face: "I felt I had reached a cap in my healing, and I needed to go further. This was something I needed to do for myself, my family and my community, as well, which has been affected by this. I would like it to be effective for him, too, so he can be the most productive person he can be in his situation."

But until the passage of the revised restorative justice bill in 2011, there was no process in Colorado's adult justice system to allow such meetings. Evans testified in support of the bill. Among the opponents who showed up that day was Denver Dis-

trict Attorney Mitch Morrissey. It was "very challenging" and uncomfortable, Evans says, to find herself on the opposite side of the fence from the man who put her son's killers away.

Evans hopes to be able to sit down and talk to Johnson soon. But it's not clear when that might actually happen; the Department of Corrections has a list of hundreds of victims who want to meet their offenders and no funds to pay for the costs of the meetings, including transportation and facilitators. In order to get the bill passed, Representative Lee and other sponsors agreed to cut its fiscal impacts to the bone.

"I pulled a rabbit out of a hat," Lee says. "It was all in the spirit of compromise, with no money attached."

Lee says he's working with the DOC to get the pilot program going. He has dozens of restorative justice facilitators who've agreed to provide services for free and says prison officials have been "very forthcoming" in their concerns. "I don't know if there's institutional opposition to restorative justice," he says. "There is a lack of understanding. People are afraid of the unknown."

Many victim groups have welcomed the arrival of such a program, even if the funding is meager. "It's not a program for everybody, but it should be there for people who need it," Cannata says. "It has to be a controlled environment, or it will damage both parties. If it helps victims move on, that would be a good thing. And if it influences offenders so that they never commit another crime, so much the better."

Evans plans to start a restorative justice initiative of her own, working with victims to "get their needs met in a timely manner." But right now she's struggling, like a lot of nonprofit activists, to collect just a few drops from the vast streams of grant money that flow toward the major victim interest groups in the state. "I have spoken with COVA, and they've kind of shooed me away," she says. "They're not really interested in restorative justice."

Her gang-prevention program lost its offices a few months ago after pilot funding ran out. "We're looking for funds for a building now. A lot of minority nonprofits have their credibility questioned, but we've been very active in the Arapahoe County community for years. We do need a building, though, to be effective."

Lewis says COVA welcomes the growing diversity of the victim movement. "I'm encouraged by the Howard Mortons and the Joe Cannatas," she says. "There has been more grassroots victim legislation than with any other cause. Not all of it has been good. But then you have people who serve a population that hasn't been served and bring to light issues we weren't paying attention to."

Evans has thought for years about what she would say if she ever sat down with Raymond Johnson or Paul Littlejohn to discuss the terrible thing they did that extinguished one life and altered so many others. She knows the words. But she's still finding her voice. ■

*This article was originally published by Westword (www.westword.com) on October 20, 2011, and is reprinted with permission.*

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## From the Editor

by Paul Wright

The rights of prisoners and victims are generally depicted as being antagonistic and contradictory, in that one comes at the expense of the other. The reason for this, of course, is that for the past 30 years “victim rights” has been a façade used to expand repressive police and prosecutorial power while seeming to respond to the interests of those victimized by crime.

But not all victims are equal. Most homicide victims in this country were engaged in criminal activity or had prior criminal convictions, yet one would never know that fact from the media or legislative posturing on the topic.

Defining who the “victim” is serves the important political purpose of also defining who the bad actor is. Rodney King was brutally beaten by Los Angeles police officers and some of his attackers were duly prosecuted, convicted and imprisoned, yet King is never referred to as a “crime victim” – since doing so would imply the criminality of his police attackers. When prisoners are raped, beaten or killed they too are not defined as crime victims because they are deemed unworthy of the title, as doing so does not advance the goals of the modern American police state.

The steady expansion of the police state has been accompanied by the drum beat of victim rights. As *PLN* has reported in the past, in California the prison guard's union, the California Correctional Peace Officer's Association, has for decades bankrolled the Doris Tate Victims Bureau,

which they trot out whenever they need to put more people in prison, seek a pay raise or otherwise advance their legislative agenda. While this month's cover story focuses largely on victim rights in Colorado, the policies and trends it describes are applicable to the rest of the nation as well.

On February 15, 2012 the Human Rights Defense Center, the publisher of *PLN*, in cooperation with the ACLU of Hawaii and the law firm of Rosen Bien & Galvan LLP, filed suit on behalf of the estate of Bronson Nunuha, a Hawaii prisoner who was murdered at a Corrections Corporation of America-operated facility

in Arizona. We report the details of that lawsuit in this issue of *PLN*.

Through this suit, Bronson's family seeks to hold the State of Hawaii and CCA accountable for creating another victim – a victim of homicide. This is a case where CCA is paid around \$10 million a year to safely house Hawaii prisoners, and then to maximize its profit margin the company understaffs its facilities, which results in predictable problems including Bronson's preventable death. We will report the outcome of the Nunuha lawsuit in a future issue of *PLN*.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

## Survey Shows College Courses for Prisoners Reduce Recidivism, but Few Exist

by Matt Clarke

Of the various kinds of rehabilitative programs offered to prisoners, only education has been shown to unequivocally correlate with a strong reduction in recidivism. The more education a prisoner receives, the greater the decrease in recidivism – right down to the nearly zero recidivism rate of prisoners who earn a Masters degree while incarcerated. Unfortunately, a report released by the Institute for Higher Education Policy (IHEP) in May 2011 found that prisoners rarely have access to college courses.

“Most inmates never have the opportunity to get a college degree,” said Carlos Rosado, 36, who earned a Bachelors of Arts from Bard College while serving over 12 years for robbery. Rosado credits his degree with helping him get a job as a field engineer for a recycling company following his release from the New York state prison system in 2010.

The IHEP report compiled data from a survey of prison officials in 43 states. The survey revealed that only 6% of prisoners in those states were enrolled in



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vocational or academic higher education programs during 2009-2010. Thirteen states – Arizona, Arkansas, California, Idaho, Indiana, Louisiana, Missouri, Ohio, New York, North Carolina, Texas, Washington and Wisconsin – have made education a priority in their prison systems. Those states accounted for 86% of the prisoners who were enrolled as college students, according to the survey.

Traditionally, prisoners have had access to higher education correspondence programs in most states. However, the trend has been for colleges and universities to discontinue their mail-based correspondence courses in favor of less-expensive Internet-based programs. Few prisoners, of course, have access to the Internet. Therefore, the number of prisoners enrolled in correspondence courses has declined in recent years. Indeed, the survey found that most educational opportunities for prisoners occur in prison classrooms with instructors physically present in the classroom.

Another factor that resulted in a dramatic reduction in educational programs for prisoners was the federal crime bill of 1994, which was signed into law by President Bill Clinton. That law made prisoners ineligible for Pell Grants, a type of federal financial aid for impoverished college students. The IHEP noted that restricting federal aid for prison education was penny-wise and pound-foolish.

“Keeping someone in prison costs about the same per year as sending them to Harvard,” said Bard Prison Initiative (BPI) founder Max Kenner, who noted that studies indicate prisoners with post-secondary degrees have a greatly reduced recidivism rate. BPI makes Bard College classes available to prisoners in five New York state prisons.

The IHEP survey was funded by the Bill & Melinda Gates Foundation as part of a research project examining ways to improve access to higher education to underserved populations. The report recommended that prisoners be given greater access to education – including Internet-based courses – as a way to reduce the estimated \$52 billion annual cost of incarcerating around 2.3 million prisoners in the U.S. by decreasing recidivism rates.

The report specifically recommends that “federal and state statutes be revised to support the development and expansion of Internet-based delivery” of education courses for prisoners, and that “federal and state statutes be amended to

make specific categories of incarcerated persons eligible for financial aid.”

PLN offers an excellent resource for prisoners who want to pursue higher education on their own while incarcerated: the *Prisoners’ Guerrilla Handbook*

to *Correspondence Programs in the United States and Canada*, 3rd Edition, by Jon Marc Taylor and Susan Schwartzkopf, available from PLN’s bookstore (see p.53). ■

Source: *Wall Street Journal*

## Georgia Jail Guards Charged in Prisoner Abuse Incident

Three guards at Georgia’s DeKalb County Jail (DCJ) were arrested and charged in connection with a May 15, 2011 altercation involving a pretrial detainee.

The prisoner, whose name was not released, had been booked into the DCJ on a disorderly conduct charge. He became embroiled in an argument with jail guard Nelson Seals over the use of a bathroom. The argument became physical.

An investigation was launched after Sheriff’s officials received a letter from the prisoner’s attorney. Three days later, arrests were made. On July 25, 2011, Seals was charged with misdemeanor battery and violation of oath of office.

DCJ guards Jean Bruno and Deborah Grier witnessed the incident but failed to report it to their supervisors; they were charged with violation of oath of office. All three guards were suspended without pay.

Two other guards were fired following the investigation by the Sheriff’s Office – Jean Silivus for failing to cooperate with investigators, and Emmett Kater for violation of oath of office. Two more DCJ employees, who were not named, face disciplinary action in connection with the incident.

“I will not tolerate abuse by any of my officers against any person that they are sworn to detain prior to or thereafter their day before a judge,” said

Sheriff Thomas Brown. ■

Sources: *Atlanta Journal-Constitution*, [www.cbsatlanta.com](http://www.cbsatlanta.com)

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# Medical Parole Law Costs California Taxpayers Millions of Dollars

Responding to concerns that prisoners who are granted compassionate release due to terminal medical conditions may “cheat” the system by outliving a doctor’s prognosis, the California legislature enacted a medical parole law in 2010 that allows prisoners to be re-incarcerated if their condition improves enough that they may pose a threat to public safety.

Yet neither the state’s compassionate release law nor medical parole statute is being used sufficiently to make an appreciable difference in the number of comatose, paraplegic or otherwise seriously ill or disabled prisoners serving time in California.

Compassionate release provisions have been on the state’s law books since 1991; they allow a court to “recall” a prisoner’s sentence if he or she is terminally ill and has a life expectancy of six months or less. In the 20 years from 1991 to 2010, prison doctors referred 1,183 prisoners for compassionate release consideration. Approximately 70% of those referrals were rejected because prison administrators or judges believed the prisoners could still pose a risk to public safety.

As discouraging as that statistic may be, it still means that 348 prisoners have been granted compassionate release

over the past two decades, or about 17 a year on average. The 32 other states with compassionate release laws, plus the District of Columbia, also have a poor track record of releasing prisoners with serious medical conditions. [See: *PLN*, Feb. 2011, p.34].

Although there has been no record of reoffending by prisoners released due to medical reasons, the system that allows for compassionate release has nonetheless been subject to intense criticism. In one high-profile case in Scotland, Abdelbaset Mohmed Ali al-Megrahi, a Libyan national who was involved in blowing up a Pan Am flight in 1988 that killed 270 men, women and children, was granted compassionate release in 2009 after doctors determined he had less than three months to live. The American government was outraged not only because al-Megrahi was released, but also because he outlived the doctors’ prognosis; he was still alive as of January 2012.

California’s new medical parole law provides that prisoners may be released if they are “permanently medically incapacitated with a medical condition” and are “unable to perform activities of basic daily living.” They can be re-incarcerated if their condition improves after they are granted medical parole or if they violate the rules of their supervision.

In March 2011, more than five months after California’s medical parole law went into effect – and after preliminarily identifying 25 suitable candidates – the California Department of Corrections and Rehabilitation (CDCR) had yet to schedule a hearing for even one of those prisoners. The reason? The CDCR had not drafted regulations to implement the new law. “These are complex public safety regulations,” explained Terri McDonald, the CDCR’s chief deputy secretary of adult operations.

State Senator Mark Leno, who had sponsored the medical parole law (SB 1399), was not pleased with the delay. “We have school districts on the verge of closing” due to the state’s budget crisis, Leno said, adding, “We don’t have millions of dollars to squander on this kind of nonsense.”

He was referring to the fact that the state pays more than \$50 million

annually to treat and incarcerate the 25 prisoners identified by the CDCR as suitable candidates for medical parole – and countless millions more for other prisoners with serious medical conditions. Roughly 40% of that \$50 million (or \$20 million) goes to salaries, benefits and overtime pay for prison staff to guard those 25 prisoners – many of whom cannot even breathe on their own but require the assistance of a ventilator. Senator Leno noted that less than 1 percent of the state’s prison population accounts for 10 percent of the CDCR’s spending on medical care.

If it weren’t tragic, the situation would be comical. The typical guard detail at an outside hospital consists of two guards watching over each medically incapacitated prisoner who, per standard operating procedure, is shackled to the hospital bed. The officers, meanwhile, are supervised by a sergeant. The reason for such extensive security? To prevent escapes.

Responding to suggestions that incapacitated prisoners with serious medical conditions were unlikely to escape, CDCR spokesperson Oscar Hidalgo said that reducing the level of security for such prisoners would only invite unnecessary risk. “And we are not in the business of taking risks with public safety,” he stated, apparently oblivious to the minimal level of dangerousness posed by prisoners who are quadriplegics, on ventilators or bedridden.

“To have comatose patients guarded 24 hours a day by two prison guards by the side of the hospital bed is just crazy,” observed Senator Leno.

After the *Los Angeles Times* focused the public’s attention on what appeared to be an embarrassing waste of taxpayer money – roughly \$750,000 a year in staffing costs to guard each medically incapacitated prisoner – the CDCR moved quickly to begin scheduling medical parole hearings.

The CDCR approved three incapacitated prisoners for medical parole, all without the benefit of the “complex” regulations that prison officials had formerly claimed prevented them from scheduling such hearings. The first prisoner to be considered by the parole board, Steven Martinez, 42, a quadriple-

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gic, was denied medical parole in May 2011. The board, which did not let him attend the hearing, said his verbal abuse of prison staff indicated he still posed a risk to public safety. More than 40 prison nurses submitted a letter to the parole board arguing against his release. Martinez is serving a 157-year sentence for rape and other serious crimes.

“What we’ve been doing is spending money and not getting anything for it. We have a man in prison who can’t hurt a fly and we’re spending hundreds and thousands of dollars – I think it’s around over \$600,000 a year – to guard this man when he can’t do anything but annoy somebody,” said Martinez’s attorney, Ken Karan. “‘Vengeance for vengeance’ sake is a luxury we can no longer afford.” Obviously the CDCR thinks otherwise.

On June 16, 2011, Craig Lemke, 48, became the first CDCR prisoner granted medical parole. He was serving a 68-year, three-strike sentence for a home-invasion robbery, and was expected to be released within 120 days of the parole board’s decision.

According to the *New York Times*, 29 California prisoners had been released on

medical parole as of mid-January 2012, at an estimated savings to the state of \$19 million. Four are living in a nursing home in Sunnyvale, while others have been placed in nursing homes or medical care facilities in El Cajon and Los Angeles. This concerns California’s long-term care ombudsmen.

“There are worries involved in putting prisoners in with the regular population of frail seniors, but there is a lot of risk involved in putting them in with psych patients,” said Wanda Hale, program manager for the long-term care ombudsman at Catholic Charities in Santa Clara County. “My concern is that there is a lot of potential for problems. They just haven’t happened yet.”

Then again, the four medical parolees at the nursing home in Sunnyvale are being held in a locked unit that also houses psychiatric patients, and are not allowed to leave – thus, their release on medical parole has simply transferred them from a secure prison cell to a secure nursing home environment. ■

Sources: *Los Angeles Times*, *Sacramento Bee*, *San Francisco Chronicle*, *New York Times*, [www.foxnews.com](http://www.foxnews.com)



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# Workers' Comp Claims by Illinois Prison Guards Under Investigation

by David Reutter

Illinois taxpayers have shelled out over \$10 million to settle workers' compensation claims filed by employees at the Menard Correctional Center (MCC), mainly related to repetitive trauma injuries. However, a study concluded that the job duties guards are required to perform are unlikely to cause such injuries, raising questions about the validity of the workers' comp claims.

From January 1, 2008 to December 2010, 389 MCC employees – more than half the workforce at the prison – filed successful workers' compensation claims. The cost to taxpayers to settle those claims was around \$10 million; of that amount, \$5.9 million was for claims involving repetitive trauma. [See: *PLN*, Aug. 2011, p.47].

The most common repetitive injury claim was carpal tunnel syndrome – which guards alleged was caused by manually locking and unlocking doors at the prison. Even the warden at MCC claimed he had developed carpal tunnel, resulting in a \$75,678 settlement in his workers' comp case. Other MCC employees alleged foot injuries from standing or walking on the facility's cement floors. In the face of so many costly claims, state officials had Midwest Rehabilitation, Inc. examine the working conditions at MCC and issue a report.

The seventeen-page report concluded that the guards' required job duties did not approach even minimal levels on a stress index. A score of three is considered safe; the most difficult job for guards at MCC, operating a hand crank that opens 24 cells at a time, had a score of 1.5.

Illinois Central Management Services (CMS) approved settlements of \$20,000 to \$100,000 for the workers' compensation claims filed by MCC employees. Without any further investigation, CMS turned the cases over to the Illinois Department of Corrections (IDOC) and the Attorney General's office.

"The report did not recommend any changes in procedures at IDOC.... Since the report determined the injuries were not caused by IDOC workplace procedures, we did not make any changes," said IDOC spokeswoman Sharyn Elman. "IDOC cannot prevent employees from filing workers' compensation claims; this would be a violation of the law."

The Midwest Rehabilitation report was used by the Attorney General's office

to oppose some of the claims brought by MCC guards. During a January 2009 hearing, the report's author, occupational therapist Tracey Maras, testified that the guards' duties did not cause the alleged injuries.

However, Illinois law does not require workers to prove that a work condition is a significant cause of an injury, only that it could have caused the injury. Arbitrator John Dibble rejected Maras' testimony, and based his decision on the findings of the guards' treating physician, Dr. David Brown. Dr. Brown routinely diagnosed MCC guards with work-related carpal tunnel syndrome.

"Based on arbitrator Dibble's decision that the repetitive trauma cases of Menard correctional officers were 'clear cut' in favor of the officers, these cases were extremely difficult to defend," noted Natalie Bauer, a spokeswoman for the Attorney General's office.

But Dibble is no stranger to work-related injuries. In 2010, he received a \$48,790 settlement for his own claim that he said was caused by stumbling on steps at a workers' compensation hearing office.

Multiple investigations by state agencies and by a federal grand jury into workers' compensation claims filed by state employees were launched as a result of the pattern of claims involving staff members at MCC.

As part of the federal investigation, subpoenas were issued in February 2011 seeking records concerning MCC workers' comp claims, as well as records related to a CMS employee, a former Assistant Attorney General and three workers' compensation arbitrators, including Dibble.

Dibble and another arbitrator were placed on administrative leave while the third, Jennifer Teague, was suspended. Teague reportedly tried to hold a high-profile workers' comp hearing "on the sly," and offered to expedite a hearing in exchange for a faster payment in her own injury claim. All three of the arbitrators were later replaced.

Despite the on-going investigations, 59 more workers' compensation claims were filed by MCC employees during the first half of 2011, including 28 related to repetitive injuries. "This is not common," said Elman. "We haven't seen anything

like that in our other prisons, and we have prisons almost as old as Menard."

In March 2011, CMS had Dr. Anthony Sudekum conduct additional tests. "It is my opinion that the job activities of a correctional officer at Menard Correctional Institute would not serve as a prime etiology [causal] factor in the development of upper extremity repetitive trauma injuries," he concluded. "However, I feel that these work activities could be a possible aggravating factor in the development and or progression of these conditions."

Dr. Sudekum's opinion fulfilled "all that's needed under Illinois law," said Thomas Rich, an attorney who represented many of the MCC guards. He disagreed with the doctor's finding that the job duties were not a "primary" cause of the injuries. "Dr. Sudekum is a pleasant person. He just happens to have a different opinion. It mirrors that of many insurance companies, employers, and governmental agencies who want to defend a claim," Rich stated.

The questionable MCC workers' compensation claims came to light following an investigation by the *Belleville News-Democrat*. The newspaper obtained the Midwest Rehabilitation report through a Freedom of Information Act (FOIA) request. But when the paper asked CMS for anonymous medical test results for MCC guards, it ran into resistance. In April 2011, the Attorney General's Public Access Counselor's Office issued a binding opinion that the records were public and should be released.

CMS, however, filed a lawsuit to prevent the release of 50 nerve conduction velocity tests performed on MCC workers who had filed claims. In response, the state legislature passed a bill in June 2011 to have the test results released.

"The Illinois House overwhelmingly approved and agreed with me that CMS must follow the law and release records requested under the Freedom of Information Act. We owe the taxpayers transparency, due to the fact that nearly \$10 million in workers' compensation claims were awarded at the Menard prison," said state Rep. Dwight Kay, who sponsored the bill.

Also in June 2011, Illinois lawmakers passed legislation (Public Act 97-0018) that limits workers' compensation pay-

ments for claims involving carpal tunnel syndrome, the most common injury alleged by MCC employees.

On January 20, 2012, a Cook County Circuit Court judge issued a ruling in the suit filed by CMS, holding that the MCC employees' medical test results must be released pursuant to the *News-Democrat's* FOIA request.

"We need to get to the bottom of everything and I'm very happy that this is happening," Governor Pat Quinn said in regard to the workers' comp investigations, which remain ongoing.

According to a December 2011 report by the *Associated Press*, MCC employees received \$19 million in workers' comp payments from 2007 through 2010, almost twice the amount that was initially reported. A similar pattern of workers' compensation claims was found at state facilities near MCC, including other prisons and juvenile facilities. The *Associated Press* suggested that the pattern of claims at and around MCC may be due to "an employee culture that encouraged injury claims at the facilities in the vicinity." ■

Sources: *Belleville News-Democrat*, *Washington Examiner*, *Associated Press*

## Offenders Cannot Sue Over Violations of Interstate Probation Transfer Compact

The Interstate Compact for Adult Offender Supervision ("the Compact") does not create a private right of action, the U.S. Court of Appeals for the Second Circuit held on April 11, 2011.

Plaintiff M.F. and his domestic partner sued New York's Division of Parole after New York refused to accept the transfer of M.F.'s probation from New Jersey unless he agreed to the installation of monitoring software on his work computer, employer notification of his conviction and a lifetime period of supervised release.

In 2001, M.F. was convicted of soliciting sex from minors over the Internet. He declined the transfer of his probation to New York due to the onerous conditions, fearing his employer would fire him.

The district court granted summary judgment to the New York Division of Parole. On appeal, the state argued for the first time that the Compact did not confer a private right of action to individuals such as M.F.

While many laws create duties and

confer rights, not all laws are enforceable by private litigants. A law that has been violated must explicitly or implicitly give an individual a private right of action, which basically means the right to sue.

Because the Compact does not provide an express private right of action, the Second Circuit considered whether an implied right of action existed. The Court of Appeals held that one did not.

According to the appellate court, the Compact was not created for the benefit of M.F. or other probationers but rather for the Compact's signatory states. Further, the Court of Appeals held, there was no evidence that Congress intended for the Compact to provide a private remedy.

As such, the Second Circuit concluded that "the Compact and its authorizing statute create neither an express nor implied federal private right of action." The judgment of the district court was accordingly affirmed. See: *M.F. v. State of New York Executive Department Division of Parole*, 640 F.3d 491 (2d Cir. 2011). ■

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## Exec with GEO Group, which Operates Immigration Detention Facilities, Intimidates Immigrant In-Law

Thomas M. Wierdsma is the Senior Vice President for Project Development at The GEO Group, Inc., a Boca Raton, Florida-based company that, according to its 2010 annual report, operates “a broad range of correctional and detention facilities including ... prisons, immigration detention centers, minimum security detention centers and mental health and residential treatment facilities.”

With respect to immigration detention, GEO manages 9 such detention centers in the United States plus other immigration facilities abroad, including the Migrant Operations Center at Guantanamo Bay, Cuba.

In 2010, GEO Group received 53% of its domestic business from contracts with the federal government, including 20% from Immigration and Customs Enforcement (ICE) – the federal agency responsible for overseeing the detention of immigrants awaiting deportation and asylum hearings.

Thus, it is accurate to say that GEO is heavily invested in providing immigration detention services for the federal government, and vice versa.

It is also accurate to say that Wierdsma is a top GEO Group executive. He was hired by GEO as a vice president in January 2007, and according to his employment agreement began working for the company at a base salary of \$315,000 per year plus annual performance awards and additional benefits.

Along with other GEO Group officers, Wierdsma has made donations to political candidates and causes in the company's home state of Florida. In 2011, Wierdsma and his wife, Ann, each gave \$2,500 to Florida Senate President Mike Haridopolos (each later received a \$1,250 refund). The previous year, Thomas Wierdsma contributed \$2,000 to the Republican Florida Victory Committee.

According to the National Institute on Money in State Politics, GEO and the company's subsidiaries and executives contributed almost \$830,000 to Florida political candidates, parties and committees during the state's 2010 election cycle. GEO Group employees also gave thousands of dollars to Haridopolos' run for the U.S. Senate.

In his capacity as a GEO executive, Wierdsma was well aware of the compa-

ny's extensive involvement in immigration detention services and close connections with federal immigration authorities. Thus, it is both odd and disturbing that he apparently told his daughter-in-law, a legal resident immigrant living in the United States, that he was going to report negative information about her to ICE.

That interesting development came about in connection with Wierdsma's son, Charles Wierdsma. While Thomas Wierdsma is a high-ranking GEO executive, his son, as reflected in court records, is a wife-beater. According to a counterclaim filed against Thomas and Charles Wierdsma in a lawsuit in Boulder County, Colorado in July 2011, Charles “has been arrested and charged as a result of a long history of domestic violence against his wife Beatrix Szeremi.” See: *Wierdsma v. Szeremi*, County Court for Boulder County (CO), Case No. 2011 C 3234.

Szeremi, a legal immigrant from Hungary, lived with Charles in a house owned by Thomas Wierdsma and his wife. According to Szeremi's sworn counterclaim, Charles violently assaulted her, which required her to go to an emergency room; tried to drown her; choked her; and falsely imprisoned her.

Charles Wierdsma was arrested on May 29, 2011 on charges of 3<sup>rd</sup> degree assault and false imprisonment after he allegedly attacked Szeremi, and a temporary restraining order (TRO) was issued that barred him from contacting her. Another TRO was issued in June 2011 while Szeremi filed for divorce.

Meanwhile, Thomas Wierdsma tried to remove Szeremi from the house where she had been residing with Charles. Because only Charles' name was included on the lease, Thomas Wierdsma named both his son and Szeremi as defendants in an eviction lawsuit filed in Boulder County Court – a suit that Szeremi's lawyer called “meritless.”

On June 6, 2011, Szeremi's attorney, Dave Rich, emailed Thomas Wierdsma, who had been contacting Szeremi, and informed him that he represented Szeremi and “it would be best that all communications from you be addressed to me and I will relay information to Beatrix as appropriate.”

Despite that notification, on June 21, 2011, Wierdsma sent an email to Szeremi in which he wrote, “Should I send eviction

notices to you or your attorney? Not sure who is representing you for this matter. I understand that you currently have no plans to move out of our home. I will be copying the Department of Homeland Security, Immigration and Customs Enforcement with this and other information. So you know, I funded the legal work and processing fees for you to become a citizen, but am now disappointed in your actions which now require legal proceedings.”

Szeremi filed her counterclaim against Charles and Thomas Wierdsma on July 8, 2011, which stated that Thomas Wierdsma's “threats and attempts to trigger a sham deportation proceeding against Ms. Szeremi is designed by him to interfere with her ability to testify against his son. It is important to note that Thomas Wierdsma is a high ranking official in the GEO Group, Inc., a private prison corporation ... with direct involvement with detention and deportation.”

The counterclaim alleged claims of victim intimidation, retaliation, negligence, abuse of process, outrageous conduct and civil conspiracy against Thomas Wierdsma, plus claims of assault, battery, false imprisonment, outrageous conduct, civil conspiracy and negligence against Charles.

According to Szeremi's attorney, Thomas Wierdsma's eviction claim against Szeremi was eventually dropped and only her counterclaims against Wierdsma and his son remain in the lawsuit, which is scheduled to go to trial in July 2012.

While all of this may merely seem to be a public airing of the Wierdsma's personal dirty laundry, Thomas Wierdsma's apparent attempt to intimidate or frighten Szeremi, by saying he would notify immigration authorities about his efforts to evict her and send them “other information,” is disturbing and a matter of public concern. This is particularly true given that Wierdsma is a top GEO executive, that GEO Group has close and extensive business relationships with federal immigration authorities, and that the company in fact operates immigration detention centers – including the Aurora Detention Facility in Colorado, the state where Szeremi, herself an immigrant, resides.

Knowing this, Wierdsma's email informing Szeremi that he intended to send negative information about her to ICE is

indicative of extremely poor judgment, a sense of impunity due to his lofty position at GEO, or both. Further, the fact that GEO Group employs a top executive who exercises such faulty judgment, and who apparently tries to use GEO's business relationship with federal immigration authorities to pressure or intimidate a family member, reflects poorly on the company.

Charles Wierdsma was indicted on a new set of charges in July 2011, including 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> degree assault, felony menacing and harassment; those charges related to offences committed against Szeremi from November 2009 through May 31, 2011. The first set of charges was subsequently dismissed. Charles pleaded guilty to a felony charge of attempted 2<sup>nd</sup>

degree assault on September 2, 2011, and was sentenced the following month to 60 days in jail and two years on probation.

Neither GEO Group nor Thomas Wierdsma responded to *PLN*'s requests for comments for this article. ■

Additional sources: [www.geogroup.com](http://www.geogroup.com), Boulder County DA's office

## 31,000 Criminal Cases Under Review After Detroit Crime Lab Closes

After the police crime lab in Detroit, Michigan was found to have provided faulty firearm ballistics evidence in criminal cases, the lab was closed in 2008. A subsequent review of around 31,000 firearm-related prosecutions was deemed "admittedly impossible work," said Wayne County prosecutor Kym Worthy.

Indifferent city officials delayed investigating those cases. Finally, in July 2010, Worthy obtained \$2.7 million to review them. She hired three attorneys, other legal experts and support workers to retest the evidence and examine voluminous transcripts and court records.

Of the 31,000 firearm-related cases, only 270 had been closed as of June 2011. Worthy's office prioritized the cases to focus on those involving defendants who were still in prison on firearm possession charges and cases challenged by defense attorneys. Thus far, four prisoners have received retrials; one was exonerated.

When the crime lab closed, legal experts predicted there would be thousands of requests for review. Yet defense attorneys have sought review just 34 times.

"I feel very strongly that we have to continue going through these cases," said Worthy. "It's frustrating. We're the only ones who did anything with these cases."

In May 2011, the crime lab's dilapi-

dated building was found unsecured. It was littered with crime scene photos, chemicals, sealed bags marked with evidence labels, live ammunition, bulletproof vests and thousands of files – some of which contained the Social Security numbers of rape and assault victims.

"We were told that the evidence had been inventoried, packaged, and moved out of the old crime lab to a secure and appropriate location," said Worthy, though apparently that information was incorrect.

"This is just another glaring example of what is now an epidemic in crime lab negligence," stated Drew Findling, who chairs the Forensic Discipline Committee for the National Association of Criminal Defense Lawyers.

The cleanup at the crime lab's abandoned building concluded in June 2011 with the State Police investigating how the evidence and other items were left behind, but the review of the criminal cases possibly affected by faulty lab

work continues.


*PLN* has previously reported on scandals and shoddy forensics work at crime labs across the nation. [See: *PLN*, Jan. 2012, p.26; June 2011, p.32; Oct. 2010, p.1; Jan. 2010, p.32]. ■

Sources: *Detroit Free Press*, *Associated Press*



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## CCA Objects to Shareholder Resolution Filed by Former CCA Prisoner, *PLN* Associate Editor

When *PLN* associate editor Alex Friedmann was released from prison in November 1999, he had served six of the ten years he spent behind bars at the South Central Correctional Center in Clifton, Tennessee, a private prison operated by Corrections Corporation of America (CCA).

Following his release he became a CCA shareholder, purchasing one share of stock so he could attend the company's annual shareholder meetings and ask questions of CCA's executives as a shareholder of record. [See: *PLN*, Sept. 2008, p.40].

Friedmann bought an additional 190 shares of CCA stock in 2010; by holding the shares for a year he was eligible to introduce a shareholder resolution, which he did in November 2011. His resolution called for CCA's Board of Directors to produce bi-annual reports "on the Board's oversight of the company's efforts to reduce incidents of rape and sexual abuse of prisoners housed in facilities operated by the company. The reports should describe the Board's oversight of the company's response to incidents of rape and sexual abuse at the company's facilities, including statistical data by facility regarding all such incidents during each reporting period."

"The purpose of the resolution is two-fold," said Friedmann. "First, to ensure that shareholders know the scope of the problem of sexual abuse at CCA's facilities, the risk that problem poses, and what the company is doing to mitigate that risk. Also, if CCA knows it will be accountable to shareholders, then the company will have an incentive to take actions to reduce sexual abuse of prisoners, particularly by CCA employees – which is a significant problem."

CCA filed a formal objection with the U.S. Securities and Exchange Commission (SEC) seeking to exclude the shareholder resolution, saying the company would voluntarily provide reports related to prisoner rape and sexual abuse. However, the reports that CCA proposed to produce would be issued just once a year and would only include data from a "sample" of CCA's facilities. Friedmann argued in his response to the SEC that such reports would fail to substantially implement the resolution.

"If CCA is serious about reducing rape and sexual abuse of prisoners then

they wouldn't offer to provide incomplete, untimely and less frequent reports," Friedmann stated. "If Walmart or McDonald's employees were raping or sexually abusing customers on a consistent basis, there would be a public outcry. Equally, there should be outrage when CCA's private prison employees rape or sexually abuse prisoners."

Friedmann noted in the resolution's supporting statement that the Department of Justice had found in a 2008 report that a CCA-operated facility had the highest rate of sexual victimization among over 280 jails surveyed. [See: *PLN*, May 2009, p.1]. Two states, Kentucky and Hawaii, removed their female prisoners from CCA's Otter Creek facility in Kentucky following a sex scandal involving at least six CCA employees. [See: *PLN*, Sept. 2011, p.16; Oct. 2009, p.40]. Further, in October 2011 the ACLU of Texas filed a class-action lawsuit alleging that immigrant detainees were sexually assaulted by a CCA guard at the company's T. Don. Hutto facility. [See: *PLN*, Dec. 2011, p.42].

In his response to CCA's objections, Friedmann noted that he had "specifically raised concerns about rape and sexual abuse in the company's facilities at two previous shareholder meetings, and discussed this issue with one of the company's Board members. It is a direct result of the insufficient efforts of the company and its Board to reduce incidents of rape and sexual abuse at CCA facilities" that led him to introduce the resolution.

CCA also argued in its objections filed with the SEC that the shareholder resolution was a "personal claim or grievance," noting that Friedmann opposes prison privatization and has been involved in lawsuits against the company.

"It's true that I oppose incarcerating people for corporate profit," Friedmann admitted. "Regardless, so long as we have private prisons, they need to be run in a manner that minimizes incidents of rape and sexual abuse of prisoners, particularly by private prison employees. I have no 'personal claim' or 'grievance' in wanting to reduce rape and sexual abuse at CCA facilities, other than the concern that all people should share in wanting to reduce such incidents – a concern that apparently is not shared by CCA."

Lastly, CCA objected to Friedmann's shareholder resolution by arguing that it

involved "ordinary business operations" that were not appropriate for shareholders. "Certainly, the company cannot contend with a straight face that the rape and sexual abuse of prisoners is an 'ordinary business matter' rather than a significant social and public policy issue," Friedmann countered in his response.

On February 10, 2012, the SEC rejected CCA's objections to the shareholder resolution. The SEC wrote that it was "unable to conclude that Corrections Corporation of America has met its burden of establishing that it may exclude the proposal" based on the arguments raised by the company. Thus, the resolution will be included in CCA's proxy materials filed with the SEC and sent to shareholders in advance of the company's next annual meeting, to be held in mid-2012.

"I expect that CCA's Board of Directors will recommend voting against the resolution in CCA's proxy statement," Friedmann said. "That would further demonstrate CCA's reluctance to address the serious problem of rape and sexual abuse of prisoners housed in the company's for-profit prisons."

A number of organizations have voiced support for Friedmann's shareholder resolution, including the National Center on Domestic and Sexual Violence; the National Organization for Women; the National Center for Transgender Equality; Citizens United for the Rehabilitation of Errants (CURE); Justice Fellowship, the public policy arm of Prison Fellowship; the National Lawyers Guild; the National Council of Women's Organizations; Detention Watch Network, a coalition involved in immigration detention issues; the Partnership for Safety and Justice; Justice Policy Institute; and Enlace, an alliance of worker centers, unions and community organizations that works against corporate abuses.

Meanwhile, incidents of sexual misconduct involving CCA employees continue to occur. On December 5, 2011, the ACLU filed suit on behalf of former prisoner Tanya Guzman-Martinez, a transgender woman who was held at CCA's Eloy Detention Center in Arizona when she was sexually abused by CCA guard Justin Manford, who masturbated into a cup and then "demanded that she ingest his ejaculated semen." Manford

was charged in June 2010 with attempted unlawful sexual contact and sentenced to two days with time served. CCA also allegedly failed to protect Guzman-Martinez from a second sexual assault by another prisoner. See: *Guzman-Martinez v. CCA*, U.S.D.C. (D. Ariz.), Case No.

2:11-cv-02390-NVW.

Most recently, according to a January 7, 2012 news report, Tammy DeShawn Jackson, 32, a guard at CCA's Silverdale Detention Facility in Chattanooga, Tennessee, was charged with official misconduct and having sexual

contact with a prisoner. ■

Sources: *Human Rights Defense Center press release (Feb. 16, 2012)*, *SEC determination letter and related documents*, [www.reason.com](http://www.reason.com), [www.fronterasdesk.org](http://www.fronterasdesk.org), [www.timesfreepress.com](http://www.timesfreepress.com)

## \$125,000 Settlement in New Jersey Jail Delayed MRSA Treatment Case

New Jersey's Cumberland County Board of Freeholders voted on July 26, 2011 to pay \$125,000 to settle a prisoner's claim related to denial of medical care.

While confined at the Cumberland County Jail (CCJ) in September 2007, James E. Parker, Sr., 50, noticed a boil and tenderness on his left thigh. He suspected it was MRSA and sought treatment from CCJ's private medical contractor, CFG Health Systems, LLC.

When Parker was finally seen on October 1, 2007, a nurse noted severe swelling and determined he needed medical attention from a physician. Despite his repeated requests, it was not until two days later that Parker was seen by a doctor. By then the abscess on his leg had worsened to cover a 10-12 inch section of his inner thigh.

The doctor prescribed medication and ordered Parker sent to an emergency room for treatment. Efforts to control the infection over the next week failed, resulting in a surgical procedure to remove a "substantial amount of tissue and muscle" from Parker's left leg.

His recovery was slow, painful and

only partial. Parker spent the next eight days in the hospital, another two months in a nursing home and received additional care at CCJ for 51 days. He still has trouble standing for more than 30 to 60 minutes, and walks with a limp.

The county's attorney, Brenda Kavanagh, said Parker's claim of medical neglect against the county was "patently false." She blamed CFG. "Unfortunately, prior staff at the prison did not keep adequate records, so essentially, it's our word against the plaintiff's word," she said.

When pressed, Kavanagh contradicted herself. "There may have been a three-day period where he was not given medical attention," she admitted, but still tried to absolve the county because it had contracted with CFG to handle medical care at the jail.

Following the \$125,000 settlement, Parker notified the district court that he had been "misled by his attorney and that

he was told that he was settling with the County and that he would be able to go after CFG." However, on October 27, 2011 the defendants informed the court that Parker had executed a release to complete the settlement agreement. The settlement was finalized and the case dismissed in January 2012. See: *Parker v. Cumberland County Department of Corrections*, U.S.D.C. (D. NJ), Case No. 1:08-cv-06242-RBK-AMD.

CFG's medical care contract with CCJ has since expired and another company, Corizon, has had the contract since 2010. ■

Additional source: [www.courierpostonline.com](http://www.courierpostonline.com)



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# Electronic Monitoring: Some Causes for Concern

by James Kilgore

Electronic monitoring (EM) looms high on the list of alternatives to incarceration for corrections officials seeking solutions to overcrowded prisons and budget deficits. First used in 1983, today some 200,000 people in the United States wear some sort of electronic monitor, typically an ankle bracelet required as a condition of probation, parole, bail or house arrest.

For high-profile lawbreakers like Martha Stewart and Lindsay Lohan, the ankle bracelet is a badge of privilege – a high-tech mode of avoiding time behind bars. For those with more ordinary cases, release on electronic monitoring may offer offenders an opportunity to reunite with their family and find employment. Nonetheless, the introduction of EM on a broader scale raises a number of concerns.

## The Legal Framework

The first issue is that in most cases electronic monitoring programs operate under questionable legal frameworks, typically excluding or minimizing any rights or entitlements for the people being monitored. For example, laws in Illinois, Rhode Island and North Carolina deal primarily with the technical minutiae of supervision, emphasizing guarantees of public safety and spelling out penalties for rule violations. A small section includes a list of activities which a person on electronic monitoring “may” be allowed to do. Those include work, medical treatment and attending educational programs. Other frameworks, such as California’s Penal Code Section 1210.7-1210.16 and the State of Montana’s Policy Guidelines, contain no mention of approved activities for those being electronically monitored.

Since a primary selling point of EM for those on parole is the opportunity to work and reintegrate with family, assurances of access to such activities need to be established as rights. Moreover, in practice, the power to grant or deny “movement,” such as leaving one’s house, rests with parole officers. This can create problems. For example, most supervising authorities require a list of an offender’s movements to be submitted in advance, making responses to requests for job interviews, changes in work schedules, or

tending to family emergencies or medical conditions extremely difficult. Further, parole officers usually have the power to impose a “lockdown” – 24-hour house arrest – for any reason or period of time.

While Hamilton County, Indiana offers specific avenues of appeal to challenge denials of movement, most jurisdictions provide no such guarantees. In general, a parole officer’s decisions may only be contested after the fact through the courts. This may bring some relief in the long run, but in the short term a parolee’s opportunity to successfully reintegrate into society can be jeopardized by overzealous enforcement of EM rules.

This problem with the legal framework of electronic monitoring highlights an issue raised by legal scholar Erin Murphy, who contends there has been insufficient legal scrutiny of “deprivation of liberty by technological means” – a situation which is increasingly becoming an issue as GPS monitors and similar devices are used with greater frequency.

## Further Concern: Private Corrections Companies

Another concern is the involvement of private corrections firms in the EM industry. The giant in this market is Behavior Interventions, Inc. (BI), a Colorado-based company that controls about 30% of the electronic monitoring market in the United States. In 2011, BI was bought out by The GEO Group, the second-largest corrections corporation in the U.S., which positioned GEO for growth in the EM sector. [See: *PLN*, April 2011, p.40].

The role of private corrections companies in electronic monitoring programs raises several questions. First, such firms exaggerate the cost savings of EM by simply comparing per diem costs of EM with those of incarceration. The comparison is not that simple. Many people who are placed on electronic monitoring would not have been incarcerated before the advent of EM technology; they would have been supervised non-electronically, a practice that is still prevalent.

Second, comparing per diem costs between prison and EM distorts the reality. A large part of corrections costs are fixed. For example, if 10% of a state’s prison population was released on electronic

monitoring, staffing and other overhead costs would not decrease by 10%. Hence, the savings delivered by electronic monitoring need to be calculated holistically, not by merely using the rosy estimates of those who advocate EM, including the companies that offer such services.

Then there is the need to generate profit. At present, EM programs are increasingly turning toward user fees, typically \$10–15 per day plus startup costs. While such fees don’t present a problem for the wealthy, like Stewart or Lohan, most people on parole or probation fall in an entirely different income bracket. The questionable history of firms like The GEO Group in terms of prisoner abuse, corruption, lobbying and political contributions foreshadows a range of misdeeds and improper influence with regard to electronic monitoring.

At the most basic level, a continual incremental increase in user fees due to the need for EM companies to generate profit would further disadvantage the predominantly poor people of color who are placed on electronic monitoring. Further, since people who complete their term of EM no longer generate revenue, monitoring companies have a financial incentive to push for longer terms of supervision or stricter rules that would lead to increased recidivism.

In fact, such companies are already seeking to expand their market; i.e., to find new populations to bring under the net of electronic monitoring. Currently at least two new groups are being considered for EM services: immigrants awaiting judicial decisions and high school students with records of extensive truancy.

With respect to immigrants, in 2009 BI signed a five-year, \$372 million contract with Immigration and Customs Enforcement (ICE) to monitor some 27,000 people awaiting asylum or deportation hearings. In the high school student market, a major EM firm in Texas, iSECUREtrac, funded a pilot monitoring project for students with truancy records in a largely Black and Latino school district in Dallas.

It is unlikely the quest for new EM “customers” will stop there. For example, future lobbying efforts by private monitoring companies might advocate electronic supervision for those with drug or mental health histories, people receiving public

assistance or immigrants with green cards. It is difficult to say how far EM services may eventually expand.

Thus, while there might be cause in the near future to celebrate the transfer of thousands of people from prison to electronic monitoring programs, those involved in trying to transform the criminal justice system need to pay close attention to how such programs evolve. Without more careful regulation of EM services and the private companies that provide

them, we may one day be lamenting the problem of mass monitoring in addition to mass incarceration. ■

*James Kilgore is a researcher, criminal justice activist and fiction writer. His two novels, *We Are All Zimbabweans Now* and *Freedom Never Rests*, were written during his six-and-a-half years of incarceration in California. This article emerges from a larger research project on electronic monitoring.*

## Pennsylvania Jail Guard Accused of Stealing from 93-Year-Old Widow

Prosecutors have charged an Allegheny County, Pennsylvania jail guard with theft. Mark Hendrick, 46, was charged with access device fraud, theft and misapplication of entrusted property in April 2011 after it was discovered that he had taken more than \$147,000 from Nerrie Kerr, a 93-year-old widow with dementia.

In July 2010, Kerr gave Hendrick power of attorney over her affairs, though she later said she did not remember doing so. Hendrick helped Kerr set up a will that allotted Hendrick 25 percent of her estate, with the remainder going to Kerr's family and church.

According to investigators, though, Hendrick got greedy. He allegedly made himself the sole beneficiary of Kerr's \$500,000 annuity and \$285,000 investment

account. He also was accused of taking \$147,000 from one of her other accounts and opening a credit card in her name. Plus he was named a partial owner of Kerr's house.

"I don't want that. I didn't want it changed," Kerr told police. "I don't want Mark to get all of it. I never told anyone to change it."

Hendrick was released on \$5,000 bond; the charges against him remain pending. He has been on workers' compensation leave from the Allegheny County Jail since January 2010. A judge froze Kerr's assets during the investigation, to stop Hendrick from further looting her accounts. ■

Sources: [www.correctionsone.com](http://www.correctionsone.com), *Pittsburgh Tribune-Review*

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# U.S. Department of Justice Releases Statistics on Jail Prisoners at Midyear 2010

by Matt Clarke

In April 2011, the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice issued a statistical report on the nation's city and county jail population for the twelve-month period ending June 30, 2010. The report noted this was only the second year in which the jail population had decreased since the BJS began keeping statistics in 1982. The other year of decline occurred in 2008-2009.

On June 30, 2010 there were 748,728 prisoners held in U.S. jails, which was 18,706 (2.4%) fewer compared to the previous year. The vast majority of jail prisoners were male (87.7%). Whites accounted for 44.3%, while Blacks were 37.8% and Hispanics 15.8% of the nation's jail population.

Almost 39% of prisoners held in city and county jails had already been convicted, while 0.8% were juveniles being held as adults and 0.3% were juveniles awaiting transfer to a juvenile facility.

The report provides a break-down of jails according to the size of their average daily population (ADP). During the reporting period, the largest jails, those with an ADP exceeding 1,000, experienced a total ADP decline of 18,187 prisoners. That decline was partially offset by total ADP increases of 2,471 for jails with an ADP between 100 and 249 prisoners, and 760 for jails with an ADP under 50 prisoners.

Six large jail systems accounted for 46% of the decrease in the overall jail population. Los Angeles County, California had the largest ADP decline, with 3,007 prisoners. The ADP also dropped by 1,196 in Maricopa County, Arizona; by 1,143 in Orange County, Florida; by 1,111 in Philadelphia, Pennsylvania; by 1,105 in Fresno County, California; and by 1,096 in Harris County, Texas.

The total estimated rated capacity of all jails in the U.S. was 866,974 as of June 30, 2010. This was an increase of 17,079 beds (2.0%) over midyear 2009. At 86.4%, the percentage of occupied capacity was the lowest since 1984. The decline was solely in jails with an ADP of 50 or more; the occupied capacity decreased from 91.5% at midyear 2009 to 87.4% at midyear 2010. Jails with an ADP under 50 experienced a slight in-

crease in occupied capacity from 62.2% at midyear 2009 to 63.3% at midyear 2010. On an average day, the nation's jails operated at around 86% of rated capacity; on crowded days the occupancy rate increased to about 91%.

During the twelve-month reporting period, city and county jails admitted 12.9 million people; 39% of the admissions in the last week of June 2010 were to jails with an ADP exceeding 1,000. Jails with less than 50 prisoners on average accounted for 6.3% of the admissions. The smallest jails had the highest prisoner

turnover rate (136.7%). The turnover rate at the largest jails was only 51.5%.

The U.S. jail incarceration rate at mid-year 2010 was 242 prisoners per 100,000 population, the lowest since 2003. However, that rate is still very high compared to other advanced nations, so the United States' title of being the world's leading incarcerator remains unchallenged. ■

Source: *Bureau of Justice Statistics, "Jail Inmates at Midyear 2010 – Statistical Tables," (NCJ 233431, April 2011), available online at [www.bjs.gov](http://www.bjs.gov).*

## Settlement in Alabama Prison Overcrowding and Violence Suit

by David Reutter

A class-action lawsuit that alleged conditions at Alabama's Donaldson Correctional Facility (DCF) placed prisoners "at a substantial risk of injury due to violence, lack of security, understaffing, corruption, and severe overcrowding" has concluded with a settlement agreement designed to address deficiencies at the prison.

DCF opened in 1982 with a capacity of 700 prisoners. A subsequent renovation gave it a "design capacity" of 968; however, by December 2008 the population had reached 1,681. This was accomplished by placing bunks in open dormitories "so close together that a prisoner can reach out his hand and touch the person in the next bunk." Three prisoners were crammed into cells designed for two, which did not allow them to sit upright on their bunks or provide adequate room to dress.

In those cell blocks, grooming and hygiene activities often took place in the hallway. Due to an overtaxed plumbing system, the smell of feces permeated those areas of the prison due to regular overflows of toilets into adjacent cells. The heat and lack of ventilation left prisoners lying on their "sweat-dampened mattresses" during the summer months. When their pleas to guards to be moved were ignored, some prisoners would commit "assaults on other prisoners so as to be moved to another area of the prison."

The number of guards at DCF was insufficient to properly run the prison due to overcrowding. The guard shortage was described as a "crisis" by former DCF Warden Stephen Bullard in a letter to the former commissioner of the Alabama DOC. A guard's grievance in May 2008 noted there were two guards for 288 prisoners in one area of the prison, while in another unit there were only two or three guards for 520 prisoners.

Staffing shortages created many problems, including guards working overtime, which was not only an economic drain on DCF but also left the guards exhausted and "less likely to remain alert or able to respond adequately to normal or exigent security needs." Often, the exhausted guards fell asleep on duty.

Guards working in DCF's stressful environment "have become disrespectful, short-tempered, and often violent towards prisoners, contributing to the overall volatility of the prison," according to the lawsuit. Nine cases of excessive force by guards were cited in the complaint. The suit also stated there were numerous assaults on guards by prisoners; as a result, guards "already fearful of walking into prisoner living areas have become even more reluctant to enter the open dormitories where they are greatly outnumbered, often leaving these areas largely unsupervised."

Reports from prisoners stated that



“other prisoners smoke crack cocaine or inject methamphetamines on a near-daily basis in the open areas of some cell blocks.” Corruption by guards contributed to this problem, as many DCF employees “bring drugs, cell phones, cell phone chips, and other contraband into the prison.”

Further, violence was rampant. The complaint described 52 critical incidents at DCF in 2008 and 2009. The vast majority of those incidents were stabbings or other assaults by prisoners on prisoners. The lawsuit also claimed there had been “a number of sexual assaults” reported. “Investigations into violent incidents are often perfunctory or happen not at all,” the complaint charged. “Much of the violence at [DCF] goes unreported. Certain prisoners act as ‘doctors,’ sewing up prisoners’ wounds.”

The settlement in the class-action suit provides relief in many areas. It prohibits the use of triple-bunked cells. A contractor will implement repairs, improvements, renovations and upgrades at the facility. Those improvements include an energy management system upgrade, better lighting, air cooled condensing units, HVAC motor replacement, ice machine counter-flow heat exchangers, and new water fixtures and controls.

Further, the settlement requires DCF to have 258 guard positions. There is to be at least one guard physically present in the dormitories and cell blocks at all times, absent an emergency or exceptional circumstances. DCF has also requested technical assistance from the National Institute of Corrections to reduce the presence of illegal drugs, weapons and other contraband.

Beds in open dorms are to be configured to provide clear lines of sight and unobstructed passageways for guards. Prisoners will be required to wear wrist-

bands to identify their housing location to prevent their movement to unassigned areas. Guards are to search prisoners and the housing areas regularly, completing a “shakedown form” for each search.

Guards entering the facility also will be searched; they will be required to walk through a metal detector and their property is subject to inspection.

Additionally, the settlement contains a use-of-force section, which prohibits “intentional overhead strikes with a baton to vital areas of an inmate’s body unless reasonably necessary to defend oneself or others from an imminent threat of death or serious injury.” Efforts are to be made to avoid head strikes.

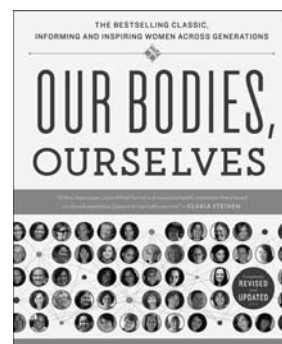
Prisoners who are subject to uses of force will be afforded an opportunity to make a written statement “as soon as reasonably possible after an application of force.” Photographs of prisoners’ injuries shall be taken in color and attached to the incident report. The settlement specifies criteria for use-of-force investigations.

The prisoners’ attorneys are to receive monthly reports on use-of-force incidents, violent or sexual assaults, investigative reports, all logs required by the settlement agreement, staff rosters and reports on recovered contraband. They will also receive \$66,860.10 in attorney fees and costs.

The class was represented by Sarah Geraghty, Lisa Kung and Melanie Velez of the Southern Center for Human Rights, and Herman A. Watson, Jr. and Rebekah Keith McKinney of the Huntsville law firm of Watson, McKinney & Artrip, LLP. The April 2011 settlement provides for the suit to remain on the court’s administrative docket until March 28, 2012; after that time it may be dismissed if the terms are met. See: *Hicks v. Hetzel*, U.S.D.C. (M.D. Ala.), Case No. 2:09-cv-00155-WKW-WC. ■

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# \$10 Million Settlement in Suit Over Oklahoma Sheriff's Sex Abuse Scandal

by David M. Reutter

Members of the public typically have little concern over what happens in the jails and prisons in their communities. Taxpayers in Custer County, Oklahoma, however, are now very concerned following a \$10 million settlement in a lawsuit involving female prisoners who were subjected to rampant sexual abuse.

A federal suit filed on behalf of 14 female prisoners at the Custer County Jail (CCJ) charged that former Sheriff Mike Burgess operated a sex-slave ring that consisted of Burgess using prisoners or people under the supervision of a drug court to commit sex acts for his own gratification.

In order to obtain medicine, cigarettes, ice, telephone privileges, toilet paper, personal hygiene items (including sanitary napkins), additional quantities of food and other items, female prisoners were reportedly required to bare their breasts – not they had much clothing on to begin with. Rather than being provided with standard jumpsuits, female prisoners at the CCJ were forced to wear men's boxer shorts and tight T-shirts without a bra.

Burgess and other guards pinched the women's breasts and buttocks with impunity, groped them, constantly subjected them to sexual harassment and sexually degrading comments, stared at them as they showered and held "wet T-shirt" contests.

Custer County operates a drug court that provides participants with special treatment. If they fail to meet the conditions of the program, however, they can be sent to prison. As a member of the drug court team, Burgess used his authority to force sexual favors from women involved in the program.

Brenda Brown, 44, was in transit to the CCJ on January 3, 2007, when Burgess pulled his truck off the highway near a roadside barn. He threatened to send her to prison for violating drug court rules if she did not "sodomize him." She told a criminal jury that he forced her to perform oral sex.

On more than 30 occasions, Burgess "committed rape, sodomy, sexual battery, and blackmail" against prisoner Joy Mason. As with Brown, he threatened to send her to prison if she did not consent

to his sexual demands. On two occasions he demanded that she violate her drug court terms by going to Oklahoma City to meet him at a hotel to have sex. One of those incidents occurred when Mason and other drug court participants were in Oklahoma City to give presentations to legislators about the program.

Prisoner Kimberly Smith was made a jail trusty after Burgess required her to perform oral sex on him twice in November and December 2006. When she refused a third time, he revoked her trusty status and hired another prisoner who consented to his sexual demands.

The lawsuit detailed the actions of several other CCJ employees who used their authority to force female prisoners to expose their breasts and participate in wet T-shirt contests, and groped them or coerced them into providing sexual favors. It also described incidents when women were stripped naked and placed in cold isolation cells while guards and male trustees took turns ogling them.

The 14 plaintiffs will share the \$10 million settlement, reached in May 2010, as follows: Brenda Brown and Joy Mason each will receive \$3.85 million; Melissa Espinosa, \$2 million; Lauren McGowen, \$100,000; Kimberly Smith, \$50,000; Kerri Jennings, \$26,000; Teresa Chagolla, Jennifer Slinkey and Tammy Baca, \$20,000 each; Ivette Figueroa and Suzanne Elliot, \$17,000 each; and Dana Estrada, Regina Oldbear and Kimberly Summers, \$10,000 each. The law firms representing the women, Seymour & Graham LLP and the Garrett Law Firm, will receive half of the settlement payments in attorney fees and costs.

The settlement is to be paid by Custer County in three annual installments. The first settlement payment was made in 2011; the second installment is due in the summer of 2012 and the final payment in 2013. See: *McGowan v. Sheriff of Custer County*, U.S.D.C. (W.D. Okla.), Case No. 5:07-cv-01168-HE.

Burgess, 57, resigned as sheriff in April 2008 after a 35-count felony indictment was issued. He was convicted of 13 counts, including kidnapping, forcible oral sodomy, sexual battery and rape involving female prisoners and drug court partici-

pants, and was sentenced to 79 years in prison in March 2009. [See: *PLN*, Sept. 2009, p.36; May 2009, p.1].

To pay for the settlement, property taxes in Custer County will increase. "I don't feel sorry for the people of Custer County," said Sue McDonough, Brenda Brown's mother. "Those people voted him into office, and they knew what was going on at that jail. The deputies knew, the commissioners knew, everyone knew, and still they re-elected him."

For Brown, it was a terrible experience that had an eventual positive result. "I used to have nightmares about Mike Burgess. After he raped me, I was afraid to go anywhere by myself. So I didn't. You know, nobody ever stood up to him before. But now, he's where he should be – in prison," she said. "If anything good came out of this, it was that it scared me straight. I've cleaned up my life, and now I'm very happy."

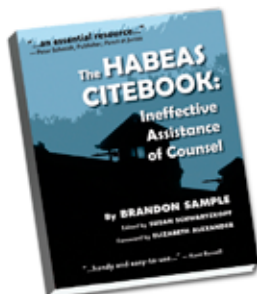
Another positive result was a focus on accountability. "There needs to be more oversight and help to the counties in overseeing the sheriffs' operations," noted Custer County commissioner Lyle K. Miller, who called the sex abuse scandal "a black eye to the whole county."

"Mike Burgess?" said commissioner Darrel Dupree. "I hope I never see him again. Ten million dollars is a lot of money, and it's a shame the people of Custer County will have to pay."

Viewed another way, it's a shame the people of Custer County elected a sexual predator as their sheriff and then failed to supervise what he was doing at the jail, such as running a prisoner sex-slave ring.

Another Oklahoma county recently settled a lawsuit involving female prisoners who were sexually assaulted by jail staff. Delaware County resolved a federal suit for \$13.5 million in November 2011, and the county's sheriff, Jay Blackfox, resigned two days later. Delaware County residents face a tax increase of up to 18 percent to pay for the settlement. Details related to that case will be reported in a future issue of *PLN*. ■

Additional sources: [www.newsok.com](http://www.newsok.com), *Associated Press*



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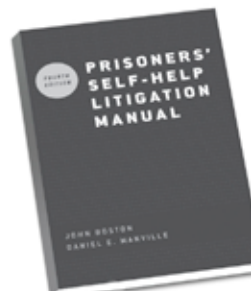


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# Death Sentence Reversed Due to “Accidental” Perjury by Texas Prison Investigator

by Matt Clarke

The Texas Court of Criminal Appeals reversed a death sentence imposed on a state prisoner convicted of capital murder, because a prison investigator had falsely described the prisoner classification system in the Texas Department of Criminal Justice (TDCJ).

In 2007, a Texas jury convicted Adrian Estrada, 27, of the capital murder of his pregnant girlfriend and her 12-week-old fetus. During the punishment phase, in an attempt to show that Estrada would not be a danger to others if given life without parole instead of the death penalty, the defense introduced the testimony of prison expert and former TDCJ spokesman Larry Fitzgerald. Fitzgerald described the classification system in Texas prisons, saying the least restrictive general population classification was G-1 (an outside trusty) and the most restrictive was G-5 (close custody). He testified that the least restrictive classification available to a person sentenced to life without parole for capital murder was G-3.

The state called A. P. Merillat, a criminal investigator for the Special Prosecution Unit, as an expert to counter Fitzgerald’s testimony. The Special Prosecution Unit, an independent office, prosecutes crimes statewide – primarily offences that occur at TDCJ facilities. Merillat claimed that after ten years, a prisoner sentenced to life without parole for capital murder could achieve a less restrictive classification status than G-3. He was incorrect and his testimony was materially false.

During punishment deliberations, the jury sent the judge a note asking about the discrepancy and requesting clarification as to whether Estrada could achieve a custody level lower than G-3 after ten years. The judge did not answer the question, but told the jury to deliberate on the law and evidence. They returned a death sentence, finding that Estrada posed a future danger to society, and Estrada appealed.

The Court of Criminal Appeals took judicial notice of the fact that, effective September 1, 2005, the TDCJ had changed its regulations to specify that the lowest classification level for a prisoner serving life without parole was G-3. The state confessed error in the case, claiming

Merillat’s perjury was accidental, and agreed that “in the interest of justice, [Estrada] should receive a new trial on punishment.”

The appellate court implied that previous versions of TDCJ regulations had allowed a prisoner sentenced to life without parole to advance beyond G-3. However, Texas did not have a crime on the books carrying a sentence of life without parole prior to September 1, 2005, when the alternative sentence in capital cases was changed from life with parole consideration after 40 calendar years to life without parole.

Excusing the defense’s failure to object to Merillat’s false testimony, the Court of Criminal Appeals reversed Estrada’s death sentence due to the state’s unintentional use of perjured testimony and remanded the case to the trial court for a new punishment

hearing. See: *Estrada v. State*, 313 S.W.3d 274 (Tex.Crim.App. 2010).

On April 21, 2011, Estrada accepted a sentence of life without parole, and in return for the prosecution declining to again seek the death penalty he agreed to forfeit his right to appeal the sentence. He had served three years on death row after being sentenced to death due to Merillat’s inaccurate testimony.

Other death-sentenced prisoners may seek re-sentencing due to Merillat’s false description of the TDCJ’s classification system. “He has made the same error in other cases,” said Brian Stull, a staff attorney for the ACLU’s Capital Punishment Project. “We think it could have wide-ranging ramifications.”

Additional sources: [www.sanantonio.com](http://www.sanantonio.com), [www.off2dr.com](http://www.off2dr.com)

## Forty Percent of Adult Offenders Return to Prison Within Three Years of Release

In April 2011, the Public Safety Performance Project of the Pew Center on the States issued a report concerning recidivism rates for released offenders.

The report, which updates a similar though far less extensive 2002 study by the U.S. Department of Justice’s Bureau of Justice Statistics (BJS), concludes that recidivism rates remained relatively unchanged at around 40% between 1994 and 2007, despite a quadrupling of spending on corrections. The system designed to deter offenders from continuing their criminal behavior is thus failing miserably. “That’s an unhappy reality,” the report states, “not just for offenders, but for the safety of American communities.”

Some of the background numbers are both startling and disturbing. In 2008, the Pew Center on the States reported that incarceration levels had increased to the point that one out of every 100 adults in the U.S. was in jail or prison. [See: *PLN*, Jan. 2009, p.46]. A second Pew study reported a year later that one out of every 31 American adults was either incarcerated or on probation or parole – more than 3% of the adult population. [See: *PLN*, Nov. 2009, p.30].

Total annual spending on corrections is currently estimated at about \$52 billion. From 1973 to 2009, while the nation’s prison population increased eightfold, corrections spending doubled as a share of state funding. It now accounts for one out of every 14 general fund dollars; moreover, one of every eight state employees now works for a corrections-related agency.

The Pew report questions whether the return on this investment in corrections, as measured in recidivism, has been worth the high price. The study notes that the crime rate in the U.S. has been falling since the early 1990s and is now at its lowest level since 1968. While crediting prison expansion as being responsible for as much as one-third of the drop in crime, the report then pointedly states that “other factors and efforts must account for the remaining two-thirds of the reduction.” [See: *PLN*, Nov. 2011, p.44].

Since incarceration is by far the most expensive option – it costs, on average, nearly \$79 a day to keep someone locked up – the Pew report notes “there are more cost-effective policies and programs” available. In light of the continuing eco-



conomic recession, the study suggests that such policies and programs need to be examined and explored.

To help policy makers assess the performance of their state's corrections system, Pew developed a single source of state-level recidivism statistics. With assistance from the Association of State Correctional Administrators (ASCA), Pew asked the states to provide recidivism data for the 36 months following an offender's release from prison, and to specify whether an offender was returned to prison for a new criminal conviction or a technical violation of supervision. The survey looked at recidivism from 1999-2002 and then again from 2004-2007, providing an examination of intrastate recidivism rates over time.

The Pew/ASCA survey found the three-year recidivism rate was 45.4% for the 1999 cohort and 43.3% for the 2004 cohort. By contrast, it was 51.8% for the 1994 cohort as measured by the 2002 BJS study. Excluding California (which skewed the statistics), the rates were 40.1%, 39.7% and 38.5% for the 1994, 1999 and 2004 cohorts, respectively, suggesting that the overall national recidivism rate has been relatively stable, with roughly four in ten prisoners returning to prison within three years of release.

Still, there was great variation among the states. For the 2004 releases, six states, led by Minnesota (61.2%) and California (57.8%), reported recidivism rates over 50%, while five states, led by Oregon (22.8%), reported recidivism rates below 30%.

Breaking the numbers down further, 22.3% of the 2004 cohort was returned to prison for new crimes and 21.0% was returned for technical violations. Recidivism due to new crimes ranged from Alaska's high of 44.7% to Montana's low of 4.7%, while recidivism for technical violations ranged from a high of 40.3% in Missouri to Arkansas' low of zero. California's recidivism rate due to technical violations was 40%, which gives some insight as to why that state's prison system is grossly overcrowded.

Among the 33 states that provided data for both the 1999 and 2004 cohorts, there was a nearly even split between states with increasing and decreasing rates of recidivism. Six states, led by Oregon, reported decreases of at least 10% between the two cohort groups, while nine states reported increases of at least 10%. Overall there was an 11.9% increase between the two cohorts in the rate of recidivism due

to new crimes; that increase was offset, however, by a 17.7% decrease in the rate at which offenders were incarcerated for technical violations.

By studying the examples of Oregon, Michigan and Missouri, the Pew report was able to recommend strategies for reducing recidivism while holding offenders accountable and controlling spending on corrections. Those strategies include offering incentives for agencies to reduce recidivism; beginning reentry preparation at the time offenders enter prison; using evidence-based programs specifically

tailored to each prisoner's criminal risk factors; matching post-release treatment and supervision with an offender's risk and needs assessment; imposing swift and certain progressive sanctions for violations of supervision rules, short of incarceration; and creating incentives (such as earned-time credits) to promote positive behavior by released offenders. ■

Source: *Pew Center on the States, "State of Recidivism: The revolving door of America's prisons" (Pew Charitable Trusts, April 2011)*

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# HRDC Files Suit on Behalf of Family of Hawaii Prisoner Murdered at CCA Facility

On February 15, 2012, the family of Bronson Nunuha, a 26-year-old Hawaii prisoner who was brutally murdered at a Corrections Corporation of America (CCA) prison in Arizona in 2010, filed suit in circuit court in Honolulu against CCA and the State of Hawaii.

The lawsuit was based in part on CCA's business model of understaffing its prisons and cutting corners to increase the company's profit margin. Those systemic practices violated fundamental safety requirements and subjected Hawaii prisoners to rampant gang violence in understaffed housing units. Bronson Nunuha was just months away from being released when CCA placed him in a unit with violent, gang-affiliated prisoners.

"Bronson's death was senseless and preventable. CCA and the State of Hawaii needlessly put him in danger," said attorney Kenneth Walczak with the law firm of Rosen, Bien & Galvan, LLP, which, along with the Human Rights Defense Center (HRDC – the parent organization of Prison Legal News) and the ACLU of Hawaii, represents the Nunuha family.

"Private prisons are known to have higher levels of violence due to understaffing and high staff turnover that result from their goal of generating ever-greater profits," added HRDC director Paul Wright. "But prison companies are not allowed to make profit more important than human life. Unfortunately, CCA's desire to turn a corporate profit needlessly cost Bronson Nunuha his life."

Bronson was transferred to CCA's Saguaro Correctional Center in Eloy, Arizona as part of a controversial practice in which Hawaii prisoners are sent to private, for-profit mainland facilities. He was serving a 5-year sentence for burglary and property damage when he was killed by other prisoners. Bronson left behind a grieving mother, sisters and his seven-year-old son. Under state law, state officials were required to return Bronson to Hawaii when he had only a year left on his sentence, so he could complete pre-release programs. The state ignored that law.

Bronson was murdered in CCA's "Special Housing Incentive Program," or SHIP. The SHIP program places rival gang members and prisoners who do not belong to any gang together in one unit, where they share recreation time and sometimes even the

same cell. Predictably, this practice resulted in violent incidents, including Bronson's murder. Only one CCA employee, a correctional counselor, was present to oversee approximately 50 prisoners in the SHIP unit where Bronson was housed.

While at CCA Saguaro, Bronson had asked to be removed from the SHIP unit but CCA staff denied his requests. On February 18, 2010, two gang members attacked Bronson in his cell; the cell door had been opened by a CCA employee, who then left. Bronson was beaten and stabbed over 100 times. His assailants carved the initials of their gang into his chest and even had time to leave his cell, shower and change clothes before CCA staff knew Bronson had been murdered.

One of Bronson's assailants, Miti Maugaotega, Jr., had previously been involved in several attacks on other prisoners at a different CCA prison. Maugaotega, a gang member, was serving multiple life sentences for attempted murder, rape and armed robbery. CCA and Hawaii officials knew that Maugaotega was dangerous and capable of extreme violence but still placed him in the same unit as Bronson, a non-violent offender close to finishing a 5-year sentence.

CCA facilities that house Hawaii prisoners have been plagued with problems in recent years. In addition to Bronson's murder, another Hawaii prisoner, Clifford Medina, was killed at the Saguaro facility in June 2010. In 2009, Hawaii removed all of its female prisoners from CCA's Otter Creek Correctional Center in Kentucky following a sex scandal that resulted in at least six CCA employees being charged with rape or sexual misconduct. [See: *PLN*, Sept. 2011, p.16; Oct. 2009, p.40]. Eighteen Hawaii prisoners sued CCA in December 2010, alleging that CCA employees – including the warden – had threatened, stripped, beaten and kicked them in retaliation for an incident in which a guard was injured. Other Hawaii prisoners filed suit in 2011, contending that CCA had refused to let them participate in native Hawaiian religious practices.

"Why the State of Hawaii continues to contract with this company is mystifying, frankly," said Wright. "After two murders, disturbances, allegations of rampant sexual abuse and a lack of accountability by CCA employees, it's fairly obvious that CCA is unable or unwilling to safely house Hawaii prisoners, and the state is unable or unwilling to adequately monitor conditions at

mainland prisons."

ACLU of Hawaii Senior Staff Attorney Dan Gluck added, "The ACLU has long warned the state about the damaging effects of its short-sighted policy of shipping prisoners to the mainland. This tragedy is bound to be repeated unless Hawaii adopts more effective prison policies."

The State of Hawaii houses around one-third of its prisoners in privately-operated mainland facilities due to a lack of bedspace on the islands. The state is currently pursuing a "justice reinvestment initiative" to reduce its prison population and lower recidivism, which is expected to lead to the return of Hawaii prisoners from CCA facilities. The justice reinvestment initiative is a partnership between the state, the Council of State Governments' Justice Center, the Pew Center on the States and the U.S. Department of Justice's Bureau of Justice Assistance.

"We are committed to bringing Hawaii's prisoners home, and this partnership will help us develop a comprehensive, multi-faceted plan to see that this happens," said Governor Neil Abercrombie.

Returning the state's prisoners to Hawaii would ensure closer connections with their families, as visitation at CCA Saguaro is mainly conducted by video, and long distance phone calls from Arizona to Hawaii are expensive. It would also end the controversial practice of transferring Hawaii prisoners to mainland facilities – a practice that was strongly criticized by the State Auditor's office in a December 2010 report. [See: *PLN*, Aug. 2011, p.38]. It may also save lives, as Bronson Nunuha would likely still be alive had he not been sent to CCA Saguaro and housed in the prison's SHIP unit.

Bronson's family is represented by the San Francisco law firm of Rosen, Bien & Galvan, LLP, by HRDC chief counsel Lance Weber and by the ACLU of Hawaii. A press conference was held on February 15, 2012, the day the lawsuit was filed; Walczak, Gluck, *PLN* associate editor Alex Friedmann and Bronson's mother, Davina Waialae, spoke at that event, which resulted in extensive media coverage. See: *Estate of Nunuha v. State of Hawaii*, Circuit Court of the First Circuit, State of Hawaii, Case No. 12-1-0441-02. ■

Additional sources: [www.hawaii.gov](http://www.hawaii.gov), [www.civilbeat.com](http://www.civilbeat.com)



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## Prisons in California, Indiana and New Mexico Go Solar

While solar-powered prisons may be a thing of the future, they have already arrived in California, Indiana and New Mexico, at least at a few facilities.

In California the move to go solar is part of a larger effort to obtain one-third of the state's electricity from renewable energy sources by the year 2020. Five state prisons have already been or are in the process of being outfitted with over 83,000 solar panels generating 25 megawatts – enough electricity to power more than 89,000 homes. To put that in perspective, using fossil fuels to generate an equivalent amount of power would release as much carbon dioxide as 90,000 vehicles emit each year.

Money is also a factor. The installation of solar panels at the prisons is expected to result in savings of \$55 million to California taxpayers over the next two decades; excess power generated will be sold into the state's electricity grid, with the profits from the sales being split between the state and solar panel contractor SunEdison. The profits are expected to be substantial enough, apparently, that SunEdison is willing to subsidize the cost of the solar panel projects at the prisons.

A solar panel plant was installed at Chuckawalla State Prison in June 2006, while a similar plant was activated at Ironwood State Prison in May 2008. In May 2011, the CDCR announced plans to expand solar power projects to Tehachapi, North Kern and CSP-Los Angeles County.

Meanwhile, in New Mexico, a \$10 million project to install over 23,000 solar panels outside two prisons in Otero County (just north of El Paso, Texas) began in March 2011. The project, which will generate enough electricity to supply about 600 homes, is intended to meet the daytime power needs of the prisons.

In January 2012 the Otero County Commission approved the lease of 25 acres of land near one of the facilities to construct the solar power plant, which is being developed by Alternative Industry Resources with financing by Cadmos, a Spanish firm. The solar panels will be built by Border Solar and the plant will produce 1 megawatt of electricity to power the Otero County Prison, which is run by a private company, Management and Training Corp.

And in Indiana, the Wabash Valley Correctional Facility is operating a pilot

project that uses solar power to heat water for showers in a maximum-security housing unit. The project, which cost \$75,000, began in February 2011 and is expected to break even within 15 years through reduced energy expenditures.

As the costs of mass imprisonment grow, there is a push to reduce the cost of captivity by adopting measures to allow the government to maintain high levels of incarceration at a reduced expense. This is

a classic example where a laudable goal, renewable energy sources, is corrupted with an evil means: continued mass incarceration. Real and bigger environmental questions, like the impact of huge prisons in environmentally sensitive areas, are totally ignored. ■

Sources: [www.sfgate.com](http://www.sfgate.com), *El Paso Times*, [www.alamogordonews.com](http://www.alamogordonews.com), [www.wthr.com](http://www.wthr.com)

## Texas Psychologist Who Approved Prisoners for Execution Receives Reprimand

by Matt Clarke

A Texas psychologist who used questionable methods to examine over a dozen Texas death row prisoners prior to their trials, and found them intellectually competent to face the death penalty, has been fined for using non-standard testing techniques and will no longer perform death penalty evaluations.

Dr. George C. Denkowski was a darling of Houston-area prosecutors. They knew he would deem a defendant suitable for the death penalty even when other psychologists balked. Ultimately, defense attorneys and Denkowski's fellow colleagues proved to be his undoing after they filed complaints against him with the Texas State Board of Examiners of Psychologists (TSBEP).

The U.S. Supreme Court held in 2002 that executing mentally handicapped prisoners was unconstitutional, but did not provide guidelines for determining who was mentally handicapped. See: *Atkins v. Virginia*, 536 U.S. 304 (2002) [PLN, Sept. 2002, p.24]. To be deemed mentally handicapped in Texas, a defendant must demonstrate below-average intellectual function, a lack of adaptive behavior skills and a persistence of those problems since childhood.

To determine a person's adaptive behavior and life skills, family members are given a standard test that asks questions about the subject. Typical questions might include whether the subject can pay rent, fill out job applications, read menus or understand rules of sports or games. Dr. Denkowski insisted that families "tend to underestimate a defendant's actual functioning markedly," so he administered the test to the defendant instead.

Denkowski authored a 2008 paper in the *American Journal of Forensic Psychology* in which he criticized mainstream tests for not compensating for cultural and social factors. He insisted that people from impoverished backgrounds might never have had the opportunity to learn a life skill because it was lacking in their environment. Thus, according to him, a lack of life skills among the poor does not indicate a lack of intellectual ability. He also inflated defendants' IQ scores based on his own subjective observations.

Dr. Denkowski's colleagues rejected his methodology as having no basis in science. In fact, the 2010 manual of the American Association on Intellectual and Developmental Disabilities strongly cautions against using Denkowski's methods "until firmly supported by empirical evidence."

"What Dr. Denkowski has been doing is a pretty radical departure," stated Dr. Marc J. Tasse, an expert in developmental disabilities and the director of the Nisonger Center at Ohio State University. "There is absolutely no scientific basis to his procedure."

Dr. Jack Fletcher, a neuropsychologist who served on the President's Commission on Excellence in Special Education, went even further after reviewing video footage of Denkowski evaluating a death row prisoner, saying Denkowski's testing methods seemed "driven to yield scores outside the range of mental retardation."

Denkowski's approach was, however, lucrative. Prosecutors paid him \$180 per hour for evaluating defendants facing the death penalty, and \$250 an hour for

courtroom testimony. Between 2003 and 2009 he received over \$303,000 from Harris County, Texas prosecutors.

TSBEP settled the disciplinary case against Dr. Denkowski on April 15, 2011 by dismissing the complaints after he paid a \$5,500 fine and agreed to never again conduct an intellectual competency evaluation in a criminal case.

"It really suggests that he screwed up," remarked attorney Richard Burr, who represents Texas death row prisoner Steven Butler and said he intends to use the TSBEP settlement in Denkowski's case despite a clause stating the decision cannot be cited in capital punishment appeals. Burr plans to use the settlement to argue that Butler should be re-evaluated.

State Senator Rodney Ellis, chairman of the Texas Innocence Project, believes that every death penalty case which included an evaluation by Dr. Denkowski should be subjected to court review.

"We cannot simply shrug our shoulders and sit by and watch while the state uses legal technicalities to execute these intellectually disabled men, especially on the word of someone who is no longer permitted to make these kinds of determinations," Ellis said.

At least two prisoners evaluated by Denkowski were later executed. One of those prisoners, Michael Richard, was sentenced to death for the rape and murder of a 53-year-old woman. Dr. Denkowski initially agreed that Richard was mentally handicapped; however, he changed his opinion after prosecutors gave him a list of books found in Richard's cell that included dictionaries. Denkowski then increased Richard's score to find he was not mentally handicapped. When a defense expert questioned Richard it was learned that he used the large books to sit on, as there was no chair in his cell. Richard was executed in September 2007.

On December 14, 2011, the Texas Court of Criminal Appeals remanded two death penalty cases for re-examination of the defendants' competency under the *Atkins* standard. Dr. Denkowski had provided evaluations in both cases, one involving Steven Butler, and the Court of Criminal Appeals specifically cited Denkowski's settlement agreement with the TSBEP in returning the cases to the trial courts for re-evaluation of their "initial findings, conclusions, and recommendation." See: *Ex Parte Matamoros*, 2011

WL 6241295 (Tex.Crim.App. 2011) and *Ex Parte Butler*, 2011 WL 6288411 (Tex. Crim.App. 2011).

"Exonerations, I think, have caused the court to become concerned about the integrity of forensic evidence," said Kathryn M. Kase, executive director of the Texas Defender Services. "That's really, really important here, where the decision about whether someone has [mental] retardation is a matter of life and death." ■

Sources: *Texas Tribune*, *Texas Observer*, *New York Times*



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# California's Race-Based Prison Lockdowns Targeted in Class-Action Lawsuit

The Prison Law Office (PLO) has teamed up with the San Francisco-based law firm of Bingham McCutchen, LLP to challenge the official policy of the California Department of Corrections and Rehabilitation (CDCR) to impose blanket race-based lockdowns in response to potential security threats.

The lawsuit alleges that the CDCR's failure to conduct timely individualized assessments to determine whether every prisoner of the affected race in fact poses a threat to institutional safety and security renders its lockdown policy racially discriminatory and therefore unconstitutional.

The U.S. Supreme Court held in *Johnson v. California*, 543 U.S. 499 (2005) [*PLN*, April 2006, p.20; July 2005, p.22], that the CDCR's policy of using race as the determinative factor in housing assignments for prisoners was akin to segregation and thus subject to "strict scrutiny" analysis. That is, the policy violated the Equal Protection Clause of the Fourteenth Amendment unless prison officials could show it was "narrowly tailored" to advance a "compelling governmental interest." It is likely the same analysis would equally apply to any race-based prison policy.

Indeed, a year before *Johnson*, the Ninth Circuit Court of Appeals held in a case which foreshadowed the Supreme Court's ruling that equal protection rights were implicated when California prison officials used race as the predominate factor in compiling critical-worker lists during lockdowns. *Walker v. Gomez*, 370 F.3d 969 (9<sup>th</sup> Cir. 2004) [*PLN*, April 2005, p.34].

The PLO's class-action lawsuit alleges that the CDCR imposes more than 350 blanket race-based lockdowns every year, roughly one a day, nominally for the purpose of managing prison violence and gangs. While acknowledging the seriousness of those problems, the suit alleges that the CDCR's policies exacerbate rather than ameliorate racial tensions and violence inside California prisons.

"The race-based lockdowns," the lawsuit states, "cause Plaintiffs to suffer from extreme anxiety and depression – the result of being locked up for 24 hours per day in a tiny cell, typically with another prisoner, where both prisoners must eat, use the toilet, sleep, exercise and carry on

all aspects of daily life, even though there is barely enough room for two prisoners to stand up at the same time – and severe humiliation, as a result of being segregated and punished solely on account of race, while members of other racial groups move freely throughout the prison."

In a separate but related claim, the lawsuit alleges that the CDCR has a policy and practice of imposing lockdowns for

excessively long periods of time in violation of the Eighth Amendment. It cites four examples of lockdowns lasting longer than a year, eight lockdowns extending over 200 days, and more than 80 times when lockdowns lasted over 60 days.

The lawsuit, which remains pending, seeks declaratory and injunctive relief. See: *Mitchell v. Felker*, U.S.D.C. (E.D. Cal.), Case No. 2:08-cv-01196-RAJ. ■

## New Prison HIV Medication Rules Subject of Massachusetts Suit

Cost reduction is the "real reason" behind a new policy in Massachusetts prisons that prohibits prisoners from receiving their HIV medication through the Keep On Person (KOP) program, according to a federal civil rights lawsuit. Under the policy, HIV-positive prisoners will have to go to the medication line daily to receive their life-saving drugs rather than being allowed to keep a larger supply on hand.

The complaint was filed in November 2010 by attorneys with Prisoners' Legal Services, and was joined by the AIDS Action Committee (AAC) of Massachusetts. It seeks class-action status to obtain declaratory and injunctive relief for alleged violations of the Eighth and Fourteenth Amendments, the Rehabilitation Act and the Americans with Disabilities Act.

A governor's advisory board was convened in the 1990s to analyze HIV care in the state's prison system and to recommend and enact policies to improve such care. The board recommended that prisoners receive their medications through the KOP program, which only requires a prisoner to report to medical once a month to obtain a renewal of prescribed medications.

UMass Correctional Health (UMCH), a program of UMass Medical School, has the contract to provide Massachusetts prisoners with medical care. In November 2008, UMCH announced a blanket policy change that required KOP renewals every 15 days rather than monthly. Two months later, UMCH eliminated HIV medications from the KOP program and required prisoners receiving those drugs to come to the medication line at the Health Services

Unit for each dose. Only HIV drugs were removed from the KOP program.

"The removal of HIV medication from the Keep On Person program is callous and extremely short-sighted, as patients who refuse or are unable to go to the med line, or who miss doses because of the chronic effects of the med line process, will become more sick," the complaint states.

The reasons for the policy change, according to the lawsuit, "are irrational and pretextual," and the reduction in access to HIV medicines is intended to cut costs. While only two or three percent of the prison population is prescribed HIV drugs, the money spent on such drugs accounts for at least 20% of the overall \$15 million spent annually on medications for prisoners.

The KOP program makes prisoners self-reliant and allows them to take their medications with food or before going to bed, which mitigates the side effects of the multiple drug combinations commonly prescribed as part of an HIV treatment regimen. The medication line, by contrast, is held at times that require prisoners "to endure side effects," and some prisoners are too sick to pick up their drugs multiple times a day.

Additionally, the medication line has problems with privacy. Requiring prisoners to obtain their drugs via the med line allows other prisoners to infer the nature of their medical condition, and guards often reveal the fact that a prisoner is HIV positive after they hear verbal exchanges between the nurse and patient, by reading the patient's chart or medication packaging, or by recognizing the pills that are administered.

Moreover, prisoners can miss receiving their drugs for reasons beyond their control. A medical emergency, altercation, staff shortages, the refusal of guards or work supervisors to release prisoners, or transfers may cause prisoners to miss going to the medication line.

"Even brief disruptions in treatment can result in emergence of viral resistance to one or more of the agents [HIV drugs] in use. Such resistance may have far-reaching implications, as some of these resistant mutations may result in the loss of entire classes of antiviral agents," the lawsuit states. "This loss would restrict future treatment options to more complex and more expensive agents that have more significant side effect profiles, resulting in the need for additional medication management of these side effects."

The AAC noted that such problems "are serious and [have] potentially dire consequences." On September 30, 2011, the district court denied the plaintiffs' motion for a preliminary injunction requiring prison officials to reinstate the KOP program for HIV medication. The case remains pending. See: *Nunes v. UMass Correctional Health*, U.S.D.C. (D. Mass.), Case No. 1:10-cv-12013-RWZ. ■

## Federal Halfway House Director Embezzles \$213,787

by Mark Wilson

A former Oregon halfway house director who embezzled more than \$213,000 from the federally-funded facility was arrested in Rhode Island after failing to appear, fleeing and attempting suicide. She later pleaded guilty and awaits sentencing.

As previously reported in *PLN*, Laura Marie Edwards, 39, served as executive director of the Oregon Halfway House (OHH), now known as the Northwest Regional Re-Entry Center, from 2007 until 2010, when she was fired on suspicion that she had embezzled from the facility. [See: *PLN*, Jan. 2011, p.42].

In 2009, Edwards received a salary and benefits totaling \$107,000. Yet she stole \$213,787 from OHH, in part by using a business debit card to make purchases from the Adoption Shoppe – an online store that she owned.

Edwards admitted to OHH Board President and Oregon Federal Public Defender Steven Wax that she previously had been fired from Cornell Industries, a

California-based halfway house, also for misappropriating funds.

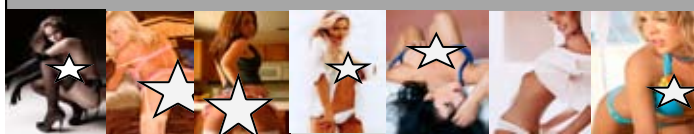
On June 27, 2011, Edwards was scheduled to appear before U.S. District Court Judge Ancer L. Haggerty to enter a plea to the embezzlement charge. She failed to appear, however, and a warrant was issued for her arrest.

Within days, Edwards was hospitalized in Rhode Island following an apparent suicide attempt, according to federal officials. She was arrested and held in Providence, Rhode Island before being returned to Oregon.

On January 9, 2012, the district court accepted Edwards' plea of guilty. She admitted that "Between March 2008 and June 2010, in the District of Oregon and elsewhere, I did knowingly embezzle, steal and obtain by fraud an amount greater than \$120,000" from OHH. She has not yet been sentenced. See: *United States v. Edwards*, U.S.D.C. (D. Ore.), Case No. 3:11-cr-00241-HA. ■

Source: *The Oregonian*

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# Empty Jail Beds Bankrupting Minnesota Counties

According to the FBI's Uniform Crime Reports, violent and property crime rates have dropped steadily across the nation since at least 1992. Yet some states stubbornly insist on building prisons and jails they cannot afford to operate.

Minnesota is just one recent example of such fiscal irresponsibility. As Minnesota county officials are in the midst of an unprecedented jail-building boom, they face a surplus of cells they are unable to fill or afford.

Minnesota's problem stems, in part, from a state-led campaign to modernize and expand deteriorating 19<sup>th</sup> century jails. Many county commissioners were once certain that they could profit by housing prisoners from other jurisdictions. As a result, dozens of counties built new facilities, increased capacity at existing jails or did both, adding about 2,000 beds to the state's jail system since 2003.

Minnesota officials now admit that more than 3,000 cells statewide sit empty on any given day. Goodhue County officials were alarmed when they saw their new jail was only a third full.

"That, from a crime standpoint, should be good," said Goodhue County Administrator Scott Arneson. Of course from a financial perspective it's not so good, as jails are expensive to operate. "We built it and they didn't come," noted former Goodhue County Sheriff Dean Albers.

In Houston County, Minnesota, officials recently questioned whether they should even open a new 84-bed jail that was months away from completion.

"You wouldn't open a motel expecting 50 percent occupancy or less," observed Jack Miller, Chairman of the Houston County Board of Commissioners.

Although the county spent \$17 million to build the jail as part of a criminal justice complex, not opening it would avoid staffing costs. Even so, the Board of Commissioners decided, on a split vote, to open the facility as planned.

Houston County is far from alone. An overabundance of jail beds is a statewide problem, though it mostly affects small, rural communities. In Scott County, jail vacancies have caused daily incarceration costs to spike from \$115 to \$159 per prisoner in just two years. The county is preparing to offer early retirement to jailers to reduce the facility's operating

expenses. Swift County has discussed closing its jail.

In fact, counties with vacant bed space are in competition with each other to house prisoners from other jurisdictions. Brown County is even offering incentives to keep its jail population up, including free prisoner transportation. Goodhue County wants to import prisoners from Wisconsin to fill its empty jail beds.

Nor can counties boost their revenue through pay-to-stay fees imposed on jail prisoners, as the Minnesota Supreme Court held on December 3, 2009 that sheriffs cannot levy such fees on pretrial detainees. See: *Jones v. Borchardt*, 775 N.W.2d 646 (Minn. 2009).

Officials in twelve Minnesota counties have come together to explore ways to solve the excess jail space problem and ease the growing financial burden through a cooperative effort. Ideas that have emerged include sharing contracts for food, clothing and other supplies, as well as sharing transportation costs and even prisoners, to allow counties to close parts of their mostly-empty jails.

Specialized regional facilities have

also been discussed. For example, if all the women prisoners in a specified area were sent to one jail, other counties could shut down their under-utilized and less-efficient units for female offenders. Even when jails house only a few women prisoners they have to operate and staff the entire unit.

"Funding a jail is not highly appreciated," noted Jeff Spartz, head of the Association of Minnesota Counties. While fiscal constraints have apparently trumped the desire of public officials to build more jail beds, some counties remain unwilling to cut back. "There's a reluctance to close a jail even if you aren't operating at its most efficient point," said Spartz. "Things could change in a couple years and then we've got a large expense to open it up again, and we're subject to a lot of criticism."

Cities and counties in Texas have been saddled with expensive jails they are unable to fill, too, resulting in major financial problems. [See: *PLN*, Feb. 2012, p.32].

Sources: *Star Tribune*, *Minnesota Public Radio*

## Maine Prison Warden's Purchase of State Property Voided

Maine's Attorney General has declared a real estate deal between the state and Maine State Prison warden Patricia Barnhart and her partner, Sheehan Gallagher, void. The transaction involved three houses and about five acres of land near the prison.

Barnhart was living in one of the homes at the time of the deal, which was provided for her use by the Department of Corrections. The property was sold to Barnhart and Gallagher for \$175,000. However, the town of Thomaston had assessed the three houses and five acres located in Ship Circle at \$458,000.

As part of the deal, the state agreed that prisoner work crews would provide mowing and landscaping, and would remove snow and trash on the property. In exchange Barnhart agreed to let prison guard trainees stay in one of the houses for the next four years.

State lawmakers had ordered the property sold. "Under the direction of the 124<sup>th</sup> Legislature, the fiscal year 2010-2011

budget was to be balanced, in part, by booking \$1.5 million in anticipated revenue from the sale of a list of state-owned properties, which included the Ship Circle properties in Thomaston," a press release from the governor stated.

Negotiations on the deal began in the fall of 2010, and the Department of Administrative and Financial Services completed the property sale to Barnhart in June 2011. State officials defended the deal as being the best they could obtain, but the evidence indicates otherwise.

Before the transaction was finalized, local resident Bill Bird heard the property was available and contacted CBRE Boulos, the company hired to coordinate the sale. A January 18, 2011 email from William Leet, Director of the Division of Leased Space, to Chris Paszyc of CBRE Boulos stated, "I had a conversation with Bill Bird from Thomaston, who was interested in the homes on Ship's Circle. I was not sure where the negotiations are with the potential

buyer, so I gave him your number to call to discuss. What is the situation in Thomaston?"

"I have spoken to Bill Bird – it appears he had heard at Thomaston Town Hall that the property was selling," Jon Leahy of CBRE Boulos responded the next day. "I have expressed that we are in basic agreement with a prospective buyer. He was accepting of that response."

"I didn't have much choice," Bird said about his acceptance of Leahy's reply. As for the property sale going through as it did, without sufficient public notice, Bird complained, "I don't think it's right." He said he may have paid more to buy the property than the state received from Barnhart and Gallagher.

In fact, the sale of the property to Barnhart violated state law, which specifies that "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the state shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation hereof is void." Maine Revised Statutes, Title 17, Chapter 101 § 3104.

Based upon that statutory language, Attorney General William J. Schneider declared the property sale to Barnhart and Gallagher to be in violation of the law and therefore void. "We suggest that the

parties and their counsel meet as soon as possible to discuss the process for unwinding this matter," Schneider wrote in a July 8, 2011 letter.

That unwinding did not go smoothly. Since Barnhart had obtained a mortgage on the property, the mortgage had to be paid off so the property could revert to her, and then be returned to the state. The transaction was completed on September 22, 2011 at a loss of \$2,000 to the state, which repurchased the land for \$177,000.

In the meantime, the legislature held hearings regarding the illegal sale. Barnhart attended one of those hearings and said she had done nothing improper in connection with the real estate deal. Lawmakers agreed, but said the process for sales of state property needed to be changed and made more uniform.

"I think this has been on [our] radar for awhile, both the sale and the disposal of state-owned property, but the Thomaston sale certainly brought it to the forefront," noted state Rep. David Burns.

Of course, one would hope that when a state prison warden buys state property, including the house she is living in, for less than half its assessed value, state officials would take notice before rather than after the fact. 🐻

Sources: *The Herald Gazette*, <http://knox.villagesoup.com>, [www.sunjournal.com](http://www.sunjournal.com), *Bangor Daily News*



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# \$105,000 Settlement for Pennsylvania Jail Prisoner Assaulted by Tobacco Gang

Pennsylvania's Northampton County agreed to pay \$105,000 to a former prisoner on July 25, 2011 to settle a lawsuit alleging guards failed to protect him from other prisoners, some of whom were dealing tobacco with a guard's help.

Aristotle Tarboro was booked into the Northampton County Prison (NCP) in August 2007. He was placed in minimum-security housing with four other prisoners, two with a higher security rating.

In a federal civil rights suit filed after his release, Tarboro alleged two instances of being assaulted, resulting in severe injuries due to guards' "recklessness and deliberate indifference" to their duty to protect him.

A March 17, 2008 incident occurred after Tarboro told another prisoner, named Klotz, that a prisoner named Louis had stolen property from him. Louis confronted Tarboro several hours later. A fight ensued involving Louis and three other prisoners. One of them kicked Tarboro in the head and eye. Louis hit Tarboro near his eye and beat him with a mop handle. The fight lasted over an hour. It was alleged that guard Jackie Vazquez failed to make her semi-hourly rounds, and thus failed to stop the fight.

The second incident occurred several months later. It began when Tarboro noticed his cellmate dealing tobacco to two prisoners out of their cell. The prisoners left when Tarboro asked them to, but later had guard James Boehm electronically open Tarboro's cell. Once opened, the prisoners assaulted Tarboro; he lost two teeth, required six stitches, received permanent scarring and suffered recurring headaches. He was left to bleed in his cell for an hour and a half.

Boehm told Tarboro that if he reported the incident, he would lose his parole. Boehm and the prisoners who attacked Tarboro offered him a pack of tobacco if he promised not to report the assault.

The settlement in Tarboro's lawsuit came days before a scheduled trial. "I never like to see settlements that cost the taxpayers money," said County Executive John Stoffa. "We've basically cut our losses in this situation." The county will pay \$25,000, with its insurance company covering the rest. See: *Tarboro v. Northampton County*, U.S.D.C. (E.D. Penn.), Case No. 5:10-cv-00964.

The county, however, faces more litigation related to Boehm helping prisoners who ran a "tobacco gang." According to a lawsuit filed by NCP prisoner John J. Mucha, whose complaint raises claims similar to Tarboro's, Boehm was suspended for his involvement in "illicit and organized tobacco distribution" at the prison. Mucha said he, Tarboro and two cellmates were assaulted by three other prisoners

with Boehm's knowledge.

Stoffa confirmed that Boehm and Vazquez are no longer employed at NCP. Mucha's case remains pending, with a trial scheduled for May 14, 2012. See: *Mucha v. Boehm*, U.S.D.C. (E.D. Penn.), Case No. 5:11-cv-00624-TR. ■

Additional source: [www.lehighvalleylive.com](http://www.lehighvalleylive.com)

## Report Says Reentry Agencies Should Hire Former Prisoners

by Joe Watson

When released prisoners meet throngs of otherwise upstanding, Ivy League WASPs offering transitional assistance, it's like getting a tune-up from a mechanic with clean fingernails. It simply doesn't inspire much confidence in the work being done.

Thus, a recent collaborative report led by the Prisoner Reentry Institute at New York City's John Jay College of Criminal Justice proposes that transitional agencies become "culturally competent" to better assist the nearly 10 million people who are released from prisons and jails across the U.S. each year.

Cultural competence is an academic concept that, when implemented by reentry services, reengineers the revolving doors of recidivism and relapse by employing former prisoners and recovering addicts as counselors, mentors and case workers. It is also a pragmatic solution to finding jobs for released prisoners who desperately need them.

"Because incarceration both profoundly impacts those who experience it and disproportionately affects low-income people of color," the June 2011 report notes, "the response to it needs to be culturally competent across a spectrum of issues."

Hiring former prisoners would simultaneously boost the credibility of reentry agencies and undermine job discrimination against people with criminal records. As of 2009 only eight states, including New York, had passed laws "protecting the formerly incarcerated from job discrimination by private employers." Thus, the reentry community – including rehab

centers and vocational and housing services – should consider employing people from among the population they serve.

The report also argues that "the services needed ... do not require advanced degrees, and the formerly incarcerated could be trained to provide those services, having lived through similar experiences."

The John Jay report documents the successes of the Fortune Society in New York City and London-based Thames Reach, a charity that assists the homeless, as case examples.

Founded in 1967, the non-profit Fortune Society is a comprehensive reentry organization with a \$16 million budget that employs a staff of 190. Like many transitional agencies, it offers substance abuse treatment, parenting classes and housing assistance. But unlike the majority of its counterparts, around 70 percent of Fortune Society employees have histories of incarceration, substance abuse and/or homelessness, and more than 80 percent are minorities.

Thames Reach helps London's homeless get off the streets, find jobs and receive educational opportunities. Over a five-year period, Thames Reach quadrupled the percentage of its employees who were formerly homeless, from 6% of the organization's staff in 2005 to 23% in 2010. It then commissioned a study to measure the results, which concluded the organization had realized "lowered costs without any reduction in quality of services" by hiring people who had been homeless.

According to Fortune Society CEO JoAnne Page, cultural competence is

ultimately a matter of integrity for organizations that work with people who are frequently ostracized.

"If we say we have certain values, then we have to walk the talk," she said. "If we want others to take back in people

with histories of incarceration, substance abuse and homelessness, we have to do it and promote it." ■

Sources: [www.fortunesociety.org](http://www.fortunesociety.org); "Employing Your Mission: Building Cultural

Competence in Reentry Service Agencies Through the Hiring of Individuals Who Are Formerly Incarcerated and/or in Recovery," *The Fortune Society and John Jay College of Criminal Justice* (June 2011)

## South Carolina Crime Stoppers Snitch Line Scammed

by Brandon Sample

Most people are familiar with Crime Stoppers, the "snitch line" for individuals with information about crimes. Successful tips can result in benefits to the tipster – which can take the form of cash, leniency with a new case or a time cut if the tipster is already in prison. Not surprisingly, Crime Stoppers receives a lot of calls from prisoners.

Rather than calling to report crimes, though, some crafty South Carolina state prisoners figured out a way to use the Crime Stoppers phone line to make personal calls, racking up some \$7,000 in charges at Crime Stoppers' expense, according to a July 2011 news report. The toll-free tip line was billed for 4,000 calls in one month, apparently after prisoners used the Crime Stoppers phone number as a third-party billing source for long distance calls.

"Some inmates are very resourceful and have a lot of time on their hands," said Joey Hudson, President of Greenville County Crime Stoppers. "We know definitively the calls were made from corrections institutes in the Pee Dee area," he stated. "We are still working to see if we can trace the calls back to a specific inmate or inmates."

Telecompute, the company that provides Crime Stoppers with its toll-free number, temporarily blocked further calls from state prisons and pay phones. South

Carolina prison officials disputed that the fraudulent phone charges originated from the prison system; while the investigation continues, though, prisoners are unable to call Crime Stoppers. Which presents a problem, as prisoners are considered a valuable source for tips about unsolved crimes.

"They are a wealth of information," noted South Carolina Law Enforcement

Division Chief Mark Keel. "We want to be able to continue to receive tips from them."

The \$7,000 bill for the fraudulent phone charges was reduced by Telecompute to \$3,000, which will be paid from funds donated to Crime Stoppers. ■

Source: [www.2.wspa.com](http://www.2.wspa.com)

## Former Oregon Prison Nurse Pleads Guilty to Drug Charges

On May 3, 2011, a registered nurse formerly employed by the Oregon Department of Corrections (ODOC) was arrested on misconduct and drug-related charges, according to the Oregon State Police (OSP).

The previous month, a Washington County grand jury returned an indictment against Linda Marie Coakley, 47, following an OSP investigation. She was charged with six counts of tampering with drug records, six counts of official misconduct and three counts of possession of a controlled substance.

ODOC spokeswoman Jeanine Hohn reported that Coakley was hired in June 2006 to work at the Coffee Creek Correctional Facility (CCCF), a women's prison and intake center.

In 2009, Coakley diverted medication from CCCF prisoners to herself, including

Vicodin and oxycodone, stated Deputy District Attorney Mark Richman. Coakley was "stationed at home" by the ODOC on October 26, 2009 and resigned in June 2010, said Hohn.

According to the Oregon State Board of Nursing, Coakley voluntarily surrendered her nursing license in August 2010 due to "inaccurate and incomplete recordkeeping, and unauthorized removal of narcotics from the workplace."

Coakley pleaded guilty to official misconduct and drug offenses on July 22, 2011 and was sentenced to 25 days in jail plus 18 months on probation. She also was required to participate in a drug treatment program. ■

Sources: *The Oregonian*, <http://losbn.oregon.gov>

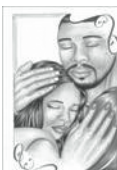
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## Two Charged with Scamming \$2.6 Million from Prisoners and Prisoners' Families

Two Michigan men have been charged with defrauding thousands of prisoners and their families nationwide out of an estimated \$2.6 million. Their scheme targeted black and Hispanic prisoners with direct mailings that offered to provide legal and appellate work.

In September 2010, John Henry Wilson, 54, was charged with 66 counts of fraud while Lari Zeka, 27, was charged with 60 counts of aiding and abetting mail fraud. Wilson owned University Legal Services LLC, University Legal Research Services LLC and Appellant Research Services LLC. Wilson and Zeka worked for two of the companies.

They told their victims that for a fee they could conduct legal research and retain lawyers. The victims were led to believe the legal research was needed to help win an appeal and the retainer would be used to assist in the case. Wilson and Zeka used fake names when corresponding with their victims and portrayed themselves as attorneys or as representing attorneys who worked for the companies. Zeka was diverting money to another firm he operated, Paramount Research Group.

Neither Wilson nor Zeka were licensed to practice law, nor did their companies employ lawyers. Once the victims paid, no research was done and no attorney worked on the prisoner's case. Some of the money the pair fraudulently obtained apparently was used to restore vintage military jeeps; federal agents confiscated two "museum quality" jeeps from Wilson before the indictments were issued.

"This fraud scheme preyed upon family members who were desperate to obtain help for loved ones," U.S. Attorney Barbara McQuade said in a prepared statement. "Not only did this scheme exploit people in need of legal services, but it also denied them access to justice."

Wilson was additionally charged with being a felon in possession of 13 firearms and four counts of failing to file tax returns. The charges against Wilson and Zeka remain pending, with a jury trial scheduled for April 3, 2012. See: *United States v. Wilson*, U.S.D.C. (E.D. Mich.), Case No. 2:10-cr-20581-RHC-MAR.

This is not the first time Wilson has been busted for running a scam involving legal representation for prisoners. According to the State Bar of Michigan, a

permanent injunction was issued against Wilson and University Legal Services in January 2003, enjoining him from drafting legal documents, supplying legal advice and providing legal services. At that time, Wilson was offering research related to

"post conviction remedies" for prisoners for a fee, but "few, if any, services were ever provided." ■

Sources: *Detroit News*, [www.macombdaily.com](http://www.macombdaily.com), [www.michbar.org](http://www.michbar.org)

## \$500,000 Jury Award for Rape of New York Pretrial Detainee Reinstated on Appeal

On August 18, 2011, the Second Circuit Court of Appeals reversed a New York federal district court's entry of judgment for the defendants. The district court had thrown out a \$500,000 jury verdict in favor of the plaintiff, which found the defendants knew that female prisoners faced a risk of sexual abuse by guards, and the defendants' failure to prohibit unmonitored one-on-one interaction between guards and female prisoners had demonstrated deliberate indifference to their affirmative duty to protect prisoners from sexual exploitation.

At the trial in this case, it was undisputed that Erie County Deputy Marchon Hamilton forcibly raped pretrial detainee Vikki Cash on December 17, 2002 when he worked as a guard at the Erie County Holding Center (EHC). While escorting female prisoners to recreation, Hamilton ordered Cash to remain behind. When he returned, he put his hands over her nose and mouth, forced her into the deputies' bathroom and raped her. Hamilton subsequently pleaded guilty to third-degree rape and resigned his deputy position.

After Cash filed suit, a default judgment of \$500,000 in compensatory damages and \$150,000 in punitive damages was entered against Hamilton. The only issue at trial was that of municipal liability for Erie County. The jury found the county liable and awarded Cash \$500,000 in compensatory damages. The district court then granted the defendants' motion for judgment notwithstanding the verdict, and Cash appealed. [See: *PLN*, July 2009, p.23].

The Second Circuit began its discussion by clarifying the issues. There was no dispute that Cash's due process rights had been violated as a result of Hamilton raping her while she was a pretrial detainee at EHC, nor that Hamilton was acting under color of law, nor that former Sheriff

Patrick Gallivan was the county's relevant policy maker for the purpose of assessing municipal liability. The defendants' motion for judgment notwithstanding the verdict focused solely on the sufficiency of evidence to demonstrate that Gallivan acted with deliberate indifference to the risk that Cash would be sexually assaulted by an unmonitored guard.

New York law prohibits guards from having any sexual contact with prisoners, and specifies that a prisoner cannot consent to sex while in custody. Jail employees also have a duty to protect prisoners. The district court held that EHC's policy of allowing unmonitored one-on-one interaction between guards and female prisoners was not unconstitutional, and the scant history of prior sexual assaults at EHC failed to alert Gallivan to the risk that prisoners might be raped.

However, a 1999 incident, of which Gallivan was aware, allowed the jury to conclude that EHC's policy of merely proscribing sexual contact between guards and prisoners was insufficient to deter sexual exploitation. The report on the 1999 incident "indicated, at best, that a female prisoner had engaged in sexual exhibitionism before various guards, none of whom had reported the activity and some of whom may have paid for it with commissary items," wrote the appellate court.

That incident qualified as placing the defendants on notice that their no-sexual-contact policy to deter sexual misconduct, standing alone, was insufficient. Indifference was also inferred by the Sheriff's office imposing a three-day suspension on the guard involved in the 1999 incident, which was satisfied by giving up accrued compensatory time, when a 30-day suspension had been recommended. Thomas Frame, who was a Pennsylvania prison warden for 24 years, testified as an expert for the plaintiff that the failure to make

policy changes in light of the 1999 incident posed a risk to prisoners.

“Defendants cannot claim that the evidence was insufficient to alert them to the risk of sexual exploitation posed by male deputies guarding female prisoners at ECHC,” the appellate court wrote. “That risk is acknowledged in New York state law, which pronounces prisoners categorically incapable of consenting to any sexual activity with guards ... and subjects guards to criminal liability for such conduct.”

As such, the Second Circuit found the defendants were not entitled to judgment

as a matter of law, and ordered the jury’s \$500,000 verdict against Erie County reinstated. The Court of Appeals also found the district court had properly denied the defendants’ motion for a new trial. Chief Circuit Judge Dennis G. Jacobs dissented, saying the majority ruling would “impose strict liability on municipalities and policymakers for any incidents that arise in a prison.” See: *Cash v. County of Erie*, 654 F.3d 324 (2<sup>nd</sup> Cir. 2011), *petition for cert filed*. ■

Additional source: [www.courthousenews.com](http://www.courthousenews.com)

## Supreme Court Boots Challenge to SORNA

The U.S. Supreme Court has dismissed an Ex Post Facto Clause challenge to the federal Sex Offender Registration and Notification Act (SORNA).

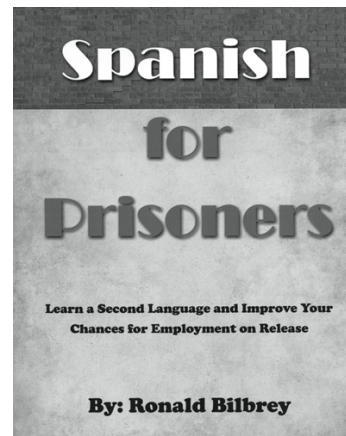
In a *per curiam* opinion handed down on June 27, 2011, the Court found that an unnamed Montana juvenile’s claims were moot in light of a Montana Supreme Court decision holding that the juvenile was required to register as a sex offender under state law irrespective of SORNA’s registration requirements.

To avoid a finding of mootness, the juvenile had to show that he was subject to collateral consequences stemming from SORNA’s registration requirements, as he was no longer subject to federal supervision. Thus, the Supreme Court sought clarification from the Montana Supreme

Court as to whether the juvenile had a duty to register under state law as a result of SORNA.

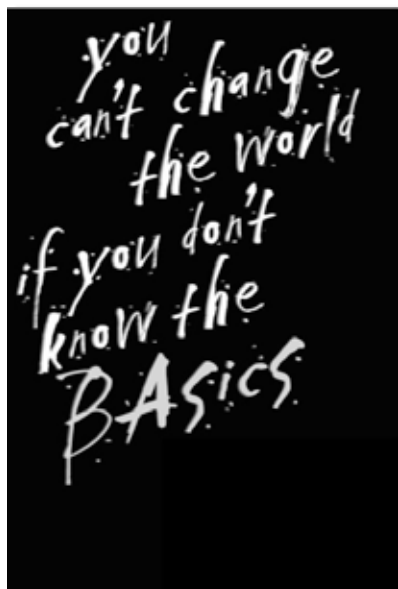
After the Montana Supreme Court’s decision, the juvenile attempted to avoid a mootness finding by arguing that his challenge to SORNA was “capable of repetition, yet evading review.” The U.S. Supreme Court, however, rejected that argument. “The capable-of-repetition exception to mootness does not apply [because the juvenile] will never again be subject to an order imposing special conditions of juvenile supervision,” the Court wrote.

Accordingly, the judgment of the lower court was reversed and the case remanded with instructions to dismiss the juvenile’s appeal. See: *United States v. Juvenile Male*, 131 S.Ct. 2860 (2011). ■



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# Florida Jail to Discontinue Providing Underwear

by David Reutter

As a cost-cutting measure, Polk County, Florida Sheriff Grady Judd has decided his jail will no longer provide underwear to prisoners. "There's no state law, there's no federal law that says we have to provide underwear in the county jail," he said.

Judd has instituted several other changes to make conditions at the Polk County Jail more onerous. He has ordered less expensive food to be served to prisoners; removed coffee, juice and fresh milk from the menu; had the jail's basketball hoops taken down; and limited TV options to focus on educational programming. He contends the changes are motivated toward saving money.

The plan to cut underwear would save \$45,000 per year, Judd said when he presented his proposal to the county commissioners on July 14, 2011. "Why shouldn't they pay like the rest of us pay? We pay to maintain the county jail; to keep them there," he stated. "Certainly they can pay their way as much as they can afford. This is the county jail; it's not a welfare program."

He proposed selling underwear to prisoners on the jail's commissary for between \$2.54 and \$4.48 a pair.

Florida's prison system, and many of its jails, provide prisoners with underwear while also offering them the ability to purchase those garments. "We provide the inmates with their clothing and they don't have to pay for it, and that includes their underwear," said Gretel Plessinger, spokeswoman for the Florida Department of Corrections (FDOC). "They can purchase underwear if they want a different kind or more pairs than we can give them."

The standard issue of underwear at FDOC facilities is four pair of boxers and four T-shirts for men, and four bras and seven pairs of panties for women. Those garments are generally purchased through PRIDE, Florida's prison industry program. Prisoners can also buy underwear from the FDOC's canteen system. Some male state prisoners receive boxer shorts made from recycled bed sheets as a way to cut costs.

Indigent Polk County prisoners who can't afford to buy underwear may have to go without, but in doing so the sheriff may be creating a hygiene issue. "Inmates don't have a constitutional right to underwear.

It's well within the discretion of the sheriff to not provide inmates with undergarments," said Don Leach, former president of the American Jail Association. "Of course, from the other side of it, he [Judd] might have to increase his laundry cycle to

cut down on unhygienic practices because you don't want inmates walking around with soiled clothing on." ■

Sources: [www2.tbo.com](http://www2.tbo.com), *Broward Palm Beach New Times*

## Indiana Cuts Prison College Courses

by Matt Clarke

After the Indiana General Assembly passed a budget for FY 2012-2013 that eliminated \$9 million in financial aid for college programs for prisoners, the Indiana Department of Correction (DOC) is shifting such programs away from liberal arts studies and four-year degrees, and instead focusing on vocational courses.

Under the new plan, the DOC will spend around \$2 million on post-secondary education programs but will emphasize classes leading to a work skills certificate or a two-year associate degree in a limited number of fields that reflect the specific needs of Indiana employers.

The DOC canceled contracts with six colleges, including Ball State, Grace College and Indiana State University. It plans to have one university provide all of the DOC's vocational classes. This change, combined with the elimination of liberal arts curriculums, will reduce the number of higher education offerings available to Indiana's 28,000 state prisoners.

In 2010 there were 1,760 prisoners enrolled in courses leading to a degree in the DOC's Corrections Education Program, including 676 enrolled in four-year bachelor's degree studies – one of the largest higher education programs for prisoners in the nation.

According to Steven J. Steuer, executive director of the Correctional Education Association, those prisoners will have a reduced chance of returning to prison after their release. He noted, as repeatedly reported in *PLN*, that prisoners who complete college courses have much lower recidivism rates.

Steuer believes the elimination of liberal arts education is short-sighted. "Why don't they just come out and say that they are cutting money because they don't want to give anything to offenders or that they have different priorities?" he asked.

"All of our educational programs must focus on one endpoint: employment," said John Nally, the DOC's director of education. "Most bachelor degrees are in liberal studies or general studies. We suspect that those nonspecific degrees are not a market signal for employability. An unemployed ex-offender is 2.1 times more likely to recidivate than an employed offender. Realistically, released offenders need to find a job with sustainable wages and acceptable benefits."

This, Nally believes, is best accomplished with work skills courses, vocational certificates and associate degrees in fields such as HVAC, welding and automotive design and repair. "The recidivism (re-arrest) rate for associate degree holders with employment is 54 percent less than the recidivism rate for the general prison population," he noted.

Rhiannon Williams, executive director of Public Advocates in Community re-Entry, applauded the DOC's shift in priorities for higher education for prisoners.

"You have to have something to sell an employer," said Williams. "A certificate or a degree can be extremely important. We have had some clients who come to us with a bachelor's degree in something and they find out that it can't be put to use. Any degree should cater to our market. We want them to be working, because if they are working they are less likely to become a repeat offender."

Indiana State University English professor Laura Bates has taught prisoners for over two decades and designed the university's Bachelor of Arts program for prisoners. She believes a liberal arts education has great value and that employers appreciate the communications skills taught in liberal arts courses such as English, literature and history.

"After working with prisoners

throughout the state of Indiana for more than 25 years, I feel strongly that what they need most is a humanizing education,” said Bates, who disagrees with the cuts to the DOC’s college program. “This is a tragic loss for prisoners, in favor of a more narrow vocational education.”

According to a May 2011 news report, Indiana was cutting off Frank O’Bannon Grants to incarcerated stu-

dents, which were used to fund higher education programs in the DOC. Prisoners close to completing degree programs will be allowed to finish.

“The State Student Assistance Commission of Indiana (SSACI) is no longer funding the prison education program, which will now be funded through the Department of Correction as a result of recent legislation,” said Tony Proudfoot, a

spokesman for Ball State University.

Of course, given the lip service that is generally paid to higher education for prisoners, it’s surprising that any college programs are still being offered by the Indiana DOC – or by other state prison systems for that matter. ■

Sources: [www.indystar.com](http://www.indystar.com), [www.thestarpress.com](http://www.thestarpress.com), [www.indianastatesman.com](http://www.indianastatesman.com)

## Report Criticizes Ohio Prison Doctor Who Resigned

by David M. Reutter

An August 2011 performance report by the Ohio Department of Rehabilitation and Correction (ODRC) found that a prison doctor failed to properly follow-up with his patients, and improperly discontinued medications and treatment without meeting with patients. The review that led to the report was spurred by a prisoner’s suicide.

The report examined the performance of Dr. Myron Shank, who served as the Chief Medical Officer (CMO) at the Allen Correctional Institution (ACI) from July 6, 2010 until his resignation on June 20, 2011. After Dr. Shank assumed the position of CMO, the number of medical grievances filed by prisoners exploded. In the year prior to his taking that position, 57 medical complaints were filed at ACI. During Dr. Shank’s brief tenure as CMO, 131 grievances were filed.

The majority of those complaints concerned diagnosis and treatment. Grievances claiming improper or inadequate medical care, or delay or denial of medication, increased by 25% and 24% respectively. Grievances that disagreed with a diagnosis or treatment increased 17%, while complaints regarding access to or delay in receiving medical care jumped by 12%.

During his tenure, Dr. Shank was called in for corrective meetings with ODRC supervisors on six occasions in a five-month period. The report identified the following issues with his performance: 1) appropriate follow-up with patients following specialty consultations; 2) complete and timely documentation in patients’ interdisciplinary notes; 3) proper follow-up with patients after emergency room visits; 4) review of lab work; 5) discontinuation of medication and treatment without first meeting with patients and discussing options; and 6) lack of teamwork.

“Dr. Shank’s propensity to discontinue and/or change medication or treatment

without effective communication and patient education was problematic in a correctional setting and inconsistent with ODRC medical policy,” concluded the report’s author, ACI Warden Assistant Dean McCombs.

Dr. Shank’s deficiencies were definitely problematic for state prisoner Gregory Stamper. According to the Ohio Justice and Policy Center, Stamper was in severe pain due to damage to his nervous system, but Dr. Shank took him off his Neurontin pain medication. Stamper, 61, committed suicide on June 1, 2011.

The Ohio Justice and Policy Center was about to file a lawsuit on Stamper’s behalf at the time he killed himself. “Unfortunately, this report, and Dr. Shank’s resignation, cannot bring back Mr. Stamper,” said the Center’s executive director, David Singleton.

Shank was placed on administrative leave during a review into Stamper’s suicide, and resigned while that investigation was pending.

Dr. Shank has had other problems beyond his resignation from the ODRC. The State Medical Board of Ohio notified him in January 2011 of charges of improperly prescribing pain medication in his private practice. The Board cited inappropriate and excessive narcotics prescriptions that he had written for patients, including failing to recognize patients who were doctor-shopping for drugs and traveling long distances to get them. It also said his medical charts were unprofessional and sometimes illegible.

On December 14, 2011, the State Medical Board found “serious deficiencies in Dr. Shank’s prescribing practices and care rendered to patients but believes that he is amenable to additional training in order to improve his practice in the future.” The Board suspended his certificate to practice medicine and surgery for 90 days,

though the suspension was stayed during a probationary period that included various requirements, such as taking courses in professional ethics, prescribing controlled substances and medical records. Dr. Shank has appealed the Board’s ruling. See: *In the Matter of Myron Lyle Shank, M.D.*, State Medical Board of Ohio, Case No. 11-CRF-005. ■

Sources: *Associated Press*; [www.therepublic.com](http://www.therepublic.com); <http://med.ohio.gov>; *ODRC Performance Report - Dr. Myron Shank, Chief Medical Officer - Allen Correctional Institution (August 9, 2011)*



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# Texas Prisoners Serve Average of 58% of Their Sentences

by Matt Clarke

According to a recent report by the Texas Department of Criminal Justice (TDCJ), during fiscal year (FY) 2010, Texas state prisoners served an average of 58% of their sentences before being released. That percentage is down from 60% in FY 2006. The average sentence length was 19.2 years, and time served before release averaged slightly more than 11 years.

The TDCJ's 12,000 state jail prisoners served sentences ranging from six months to two years, and averaged one year. Such short terms provided little time for early release.

The sentences for other TDCJ prisoners ranged from two years to life without parole or the death penalty. Among the prisoners entering Texas state prisons in FY 2010, the average sentence length was around 10 years for violent offenders and about 5.8 years for prisoners convicted of drug offenses.

In FY 2010, about 12,000 prisoners were admitted for violent crimes such as robbery, sexual assault and kidnapping. Around 950 were admitted for murder while about 9,000 were sent to prison for drug offenses and 3,800 for DWI. In FY 2010, 247 new arrivals to the TDCJ were sentenced to life, 85 to life without parole and 7 were sentenced to death. Most Texas prisoners were serving sentences between 3 and 5 years.

Of the TDCJ's 140,000 prisoners in FY 2010, about 93% were male. Approximately 51,000 were black (36.4%), 45,000 were Hispanic (32%), 42,000 were white (30%) and 708 fell into the "other race" category (0.5%). Around 58% had high school diplomas or GEDs, a 2% increase over FY 2009. The average educational achievement for Texas prisoners was close to 8<sup>th</sup> grade level in state prisons, but about 7<sup>th</sup> grade level in state jails.

TDCJ spokeswoman Michelle Lyons attributed much of prisoners' criminal behavior to a lack of education.

"If they don't feel they have job skills, then they have to find other ways of making money, like stealing, selling drugs or getting involved in other criminal activities," said Lyons, who noted that two legislative sessions ago the state passed laws to increase funding for prisoner education, including literacy and drug treatment programs. "That makes their

chances of success rise for when they get out," she stated.

Lyons was correct in saying that prisoner education has helped to reduce recidivism. What she failed to mention, however, is that during the last legislative session the vocational and academic

programs in Texas prisons were gutted in the name of austerity and "closing the budget gap." How that will affect future demographics for Texas prisoners remains to be seen. ■

Source: [www.timesrecordnews.com](http://www.timesrecordnews.com)

## Texas Prison Employees Accused of Improper Relationships with Sex Offenders

Three Texas Department of Criminal Justice (TDCJ) employees have been accused of engaging in improper relationships with prisoners in sex offender evaluation or treatment programs at the Goree Unit in Huntsville. Two of the employees were counselors in the Sex Offender Treatment Program (SOTP) and the third was a guard. The TDCJ credited other staff members with uncovering the misconduct, but in at least one case a prisoner reported the employee's behavior.

In the first incident, an unidentified associate psychologist in the Goree Unit SOTP was suspected of having an inappropriate relationship with a sex offender. The prisoner was awaiting transfer to another facility when the psychologist attempted to continue the relationship, and tried to enter areas of the prison she had no reason to go to. Her coworkers reported her. When confronted with evidence that she had been visiting those parts of the prison, she resigned. She later denied any wrongdoing and said she was unaware that she had appeal rights after being forced to quit.

Another associate psychologist at the Goree Unit SOTP, Lisa Marie Bailey, resigned on September 10, 2010 after TDCJ investigators intercepted numerous letters she had written to a sex offender she was counseling. Bailey sent the letters under the alias of Marie Jones, using a PO Box as a return address.

"When the inmate was moved to another facility, while [Bailey] was being investigated, then we noted that the letters continued and they were romantic in nature," said TDCJ spokeswoman Michelle Lyons. Bailey quit after being confronted about the letters and accused of engaging in an improper relationship.

In the third case, prison guard J.D. Lemke, Jr., 44, resigned on June 20, 2009

after he slipped a piece of paper with his phone number on it to a male prisoner who was at the Goree Unit for "Dynamic Risk Assessment" to determine what Sex Offender Registry security classification he would receive.

"This officer apparently gave him his phone number and said: 'Hey, why don't you call me when you get released' and the inmate reported it," Lyons stated. "They did not end up meeting, but the evidence was enough that the officer resigned."

In fact, after the prisoner was released, and with TDCJ investigators present, the prisoner called the number Lemke had given him; Lemke answered and said he would pick up the prisoner the next day. He was then confronted with this information and accused of solicitation of sexual favors.

The TDCJ confirmed in April 2011 that all three of the employees had resigned due to the allegations of misconduct. Bailey and Lemke were not identified by the mainstream news media; *Prison Legal News* obtained their names and details of their misconduct investigations by filing a public records request with the TDCJ.

Prison officials said they had forwarded a report about the allegations involving Bailey to the Texas State Board of Examiners of Professional Counselors. There is no indication the Board took any action against her, however, as she remains licensed as an SOTP counselor.

Some people have tried to blame the prisoners.

"Any inmate can be very manipulative in order to get more privileges and so the boundaries have to be really strict," said Dr. Barbara Levinson, a certified sex offender counselor. "Sometimes that trust gets exploited by the inmate and the purpose of that is so they can get more privileges or

they can have what they deem as a special relationship with a therapist.”

Levinson recommended extra training to help counselors recognize and prevent manipulation by sex offenders. “You have to really know what that offender is trying to do. Sometimes they can manipulate you, sometimes they can try to seduce you, sometimes they can try and act out their arousal patterns on the therapist and the therapist really has to understand what the boundary is,” she said.

According to Levinson’s worldview, there are no predatory counselors – only manipulative prisoners. Apparently it is always the prisoners’ fault even though prison employees have all the power and control in the staff-offender relationship. Other than prisoners, there is no other group of sex offense victims for which such a blame-the-victim mentality would be tolerated.

Meanwhile, TDCJ Inspector General John Moriarty said he was never notified

of potential criminal conduct by prison employees in at least two of the Goree Unit cases, even though his office is required to investigate such incidents. “We should have at least taken a look at it and asked some questions,” he acknowledged.

Perhaps that failure to investigate is somehow the prisoners’ fault, too. ■

Sources: *www.examiner.com*, *TDCJ investigative records*

## Idaho Jail Institutes Pay-to-Stay-Out Program

A jail in Canyon County, Idaho has taken the concept of pay-to-stay one step further by charging certain convicted prisoners to stay out of jail. First-time offenders with a non-violent crime who are compliant may have the opportunity to pay up to \$15 a day to serve their sentence in the community rather than behind bars.

Most of the people participating in the pay-to-stay-out program were convicted of misdemeanors, such as driving without a license or petty theft. Those convicted of a sex offense, domestic battery and most other felonies, as well as known members of violent gangs, are not allowed to participate. The program saves the county about \$50-\$54 per day in jail costs, plus generates revenue of \$15 per day per participant. The payments are placed in the jail’s indigent fund, with any surplus going to the county’s general fund.

There are several alternatives to serving jail sentences. The sheriff’s Inmate Labor Detail allows prisoners to work under supervision in community service programs. Such services include stereotypical chores such as picking up trash, but also involve working in the animal shelter, unloading trash at the county dump, shoveling snow from sidewalks, sweeping sand spread on streets in winter, and lawn care on government property.

Another program uses GPS ankle bracelets to track participants, who are limited in where they can go and excluded from some areas, with deputies performing in-person spot checks. A different type of monitor is used in a house arrest program in which participants must have prior approval from the sheriff’s office to

leave home. There is also a work-release program where participants are held in a separate facility from the jail and allowed to leave to go to work.

There are around 225 people enrolled in the county’s pay-to-stay-out programs. That is also the approximate number of prisoners held at the Canyon County jail, which is overcrowded. The pay-to-stay-out programs, which have generated over \$100,000 in revenue per year over the past few years, were implemented in part to deal with the jail’s overcrowding problem. However, some prisoners who are offered

alternative sentencing options refuse to participate.

“I have some people who would rather be in jail than in these programs because they don’t like to work,” said Alternative Sentencing Coordinator Cpl. Eric Williams.

Then again, perhaps they just don’t want to pay for the privilege of performing slave labor for the county or being monitored by the sheriff’s office. ■

Sources: *Idaho Press-Tribune*, *www.idahoreporter.com*

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# California Court of Appeal Upholds Attorney's Fee Award in Excessive Force Case

On June 23, 2011, the California Court of Appeal upheld an award of over \$311,000 in attorney's fees in a case involving excessive use of force by a Los Angeles County deputy sheriff.

In March 2006, after celebrating his birthday at a bar, Glen Jochimsen was detained by two Los Angeles County deputies and placed in a holding cell for several hours. He was never charged with any offense.

Without justification, one of the deputies, identified as Deputy Hernandez, entered Jochimsen's cell and physically assaulted him. The assault ended only after another deputy arrived at the scene.

Jochimsen subsequently filed suit in state court, alleging a cause of action for excessive force against Hernandez pursuant to 42 U.S.C. § 1983, and a cause of action against the county pursuant to *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). After a 5-day trial in September 2009, a jury returned a verdict in favor of Jochimsen on his excessive force claim against Hernandez, awarding him \$35,000 in compensatory damages for pain and emotional distress.

In exchange for an agreement by Hernandez not to appeal the jury verdict, Jochimsen dropped his *Monell* claim against the county.

As a "prevailing party," Jochimsen's counsel filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988 in excess of \$385,000. The county objected that the rates for Jochimsen's counsel were too high, and that the proposed award was excessive in light of what the county perceived as Jochimsen's "modest success" at trial. Addressing those objections, Jochimsen's counsel proposed that the overall fees be reduced by 20 percent.

When the trial court ruled on the motion in February 2010, it reduced the requested fee award (which by then had increased to over \$400,000) by 23.5 percent. Jochimsen's counsel was awarded \$311,218.26.

On appeal, the appellate court rejected the county's arguments regarding the award of attorney's fees, finding them to be without merit. In particular, the Court of Appeal rejected the county's contention that the trial court had awarded excessive hourly rates inconsistent with prevailing

market rates. It also rejected arguments that the trial court had abused its discretion by inappropriately double-counting certain factors in setting the award, and by failing to take into account the extent

of Jochimsen's recovery at trial. See: *Jochimsen v. County of Los Angeles*, California Court of Appeal, Second Appellate District, Case No. B223518 (unpublished), rehearing denied; 2011 WL 2485992. ■

## \$1 Million Settlement in Oklahoma Jail Prisoner Wrongful Death Suit

by Matt Clarke

In May 2011, Oklahoma County approved a \$1 million settlement in a civil rights lawsuit involving a prisoner who was first denied his anti-seizure medication and then fatally beaten by guards after he had a seizure at the Oklahoma County jail. Correctional Health Care Management of Oklahoma, Inc. (CHM), the jail's medical service provider, had previously entered into a confidential settlement with the plaintiffs.

Christopher Beckman, 34, was arrested for DUI, driving with a suspended license and not wearing a seatbelt. He was transported to the Oklahoma County Detention Center. During the booking process jail employees confiscated his medications, despite his informing them that he needed his prescribed Xanax and Lortab to prevent seizures and that he would experience seizures if he didn't take the medication.

Two days later Beckman still had not been given his medications, and suffered a seizure in his cell. Responding deputies struck Beckman on the back of his head, slammed his head into the elevator and ran him into a door headfirst to open it as they took him to the jail's clinic. At the clinic, Beckman was beaten in the face.

He was then transported to a hospital where he died a few days later. The medical examiner's report listed the cause of death as blunt force trauma to the head. Beckman's wife, parents and estate filed a civil rights complaint under 42 U.S.C. § 1983 in federal district court against CHM, the Oklahoma County Board of County Commissioners, Sheriff John Whetsel and Deputies Justin Mark Isch, Robert Roy, Gavin Douglas Littlejohn, William Ira Hathorn, Kellie Cunningham, Ervin Busby and Teri Streeter.

The complaint alleged that Littlejohn, Roy and Isch had caused Beckman's fatal injuries while the other deputies watched

and failed to intervene. The suit included claims of excessive use of force; deliberate indifference to serious medical needs; and failure to properly hire, train, supervise and discipline deputies working at the jail. A state-law wrongful death claim was also included pursuant to 12 O.S. §§ 1053 and 1054.

The sheriff asked the FBI to investigate Beckman's death. That investigation resulted in three of the deputies being criminally charged, and the civil case was delayed until the criminal trials were resolved.

One deputy, who had been fired, was acquitted of using excessive force against Beckman. Another former deputy was sentenced to six months in prison for using excessive force early in the confrontation. A third former deputy was sentenced to eight months for lying to a federal grand jury and the FBI. [See: *PLN*, March 2010, p.50; Dec. 2009, p.33].

After the deputies' criminal convictions, the remaining defendants agreed to settle the lawsuit for \$1 million. Of the settlement, \$110,387.90 went to Beckman's surviving spouse, \$220,775.82 to each of his parents, \$400,000 for attorney fees and \$48,060.46 for costs. Oklahoma City attorneys Ed Abel, Kelly S. Bishop and Nicholas J. Larby represented the plaintiffs, including David Beckman – Christopher Beckman's brother and the personal representative of his estate.

Oklahoma County Commissioners said the settlement would result in a small increase in property taxes for county residents over the next three years. See: *Beckman v. Correctional Health Care Management of Oklahoma, Inc.*, U.S.D.C. (W.D. Okla.), Case No. 5:08-cv-01076-L.

Additional sources: [www.dailyjournal.net](http://www.dailyjournal.net), [www.allbusiness.com](http://www.allbusiness.com)

# Los Angeles ADA Agrees to Pay \$1.2 Million to Settle DUI Suit

by Mike Brodheim

On July 19, 2011, Marilyn Seymour, an Assistant District Attorney for Los Angeles County, agreed to pay \$1.2 million to settle a lawsuit filed by two women who suffered injuries when Seymour, while drunk, crashed into their car a year earlier.

Attorneys on both sides claimed victory. Mike Alder of Beverly Hills, who represented the two victims, Chelsea Ann Caughran and Jocelyn Hernandez, said the settlement would provide immediate compensation to his clients and prevent Seymour from appealing.

Meanwhile, Albert DiRocco, Jr. of Los

Angeles, Seymour's attorney, said "No one is happier that the plaintiffs have agreed to a reasonable settlement than my client."

Seymour did not contest liability in the case, and had previously pleaded no contest to misdemeanor charges related to the accident.

She had gone to a bar after work on April 2, 2010. By the time she left around midnight, her blood-alcohol level was almost 0.26%—more than three times the legal limit. She rear-ended the car in which Caughran and Hernandez were driving home, causing them both to sustain serious injuries.

The parties reached a settlement the

same day that a Los Angeles jury returned a verdict in the case, awarding more than \$1 million in compensatory damages to Caughran and Hernandez. As a result of the settlement there will be no second trial to determine punitive damages.

"She admitted on the stand [that] she knew she was drunk but nonetheless got in her car because she hoped she wouldn't get caught; ... she had done this several times before without getting caught," Alder said of Seymour, who remains employed with the DA's office. ■

Source: *The National Law Journal*



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# California: Orange County Settles Suit Over Jail Detainee's Death for \$2.1 Million

by Mike Brodheim

In April 2011, the family of a detainee who died while being restrained by Orange County jail guards agreed to settle a lawsuit against the county for \$2.1 million.

The April 1, 2008 death of prisoner Jason Jesus Gomez, 35, was not an isolated incident; it resulted, at least in part, from a culture at the jail that condoned the use of force against prisoners who were already restrained. That culture, which led to the injury or deaths of other detainees who, like Gomez, were Tasered while handcuffed or otherwise immobilized, was the legacy of disgraced ex-sheriff Mike Carona, who is now serving a federal prison sentence for witness tampering. [See: *PLN*, Feb. 2009, p.1; Nov. 2009, p.38; July 2011, p.49].

If there is a silver lining in this case it is that the deaths of Gomez and other jail prisoners may have produced much-needed reforms. For one, the use of Tasers against detainees who are already restrained is now expressly prohibited in Orange County jails. For another, there is a new sheriff in town, Sandra Hutchens, who received praise from the Gomez family's attorney, Jerry Steering, for "attempting to reform the culture of violence and cruelty practiced by jail deputies" when Carona was in charge.

Still, Gomez's death was a needless tragedy. He was serving 90 days for a misdemeanor probation violation. Not having received his psychotropic medication for five days, he was transferred to the jail's psychiatric unit for evaluation. There, he broke a nurse's arm. That led to deputies trying to place him in a strait-jacket. Gomez resisted; according to news reports, he "fought and spat at deputies, biting one jailer on the finger."

The deputies, of course, fought back. They succeeded in handcuffing Gomez, then placed him in leg irons and a wheelchair used to restrain unruly prisoners, fitted him with a spit mask and shocked him with a Taser.

Unfortunately, somewhere during that process, something went horribly wrong. One of the guards, evidently, kept pushing Gomez's head down. According to Steering, Gomez repeatedly said he couldn't breathe; the guards responded,

"If you can talk, you can breathe."

Then Gomez stopped talking – and breathing – resulting in a coma, his being placed on life support and his subsequent death. See: *Lares v. County of Orange*,

U.S.D.C. (C.D. Cal.), Case No. 8:09-cv-00945-DOC-MLG. ¶¶

Sources: *blogs.ocweekly.com*, *Orange County Register*

## California: CDCR Releases 2011 Recidivism Report

On November 23, 2011, in the second in a series of annual reports designed to provide new insights to policy-makers and correctional stakeholders with respect to recidivism rates, the Office of Research of the California Department of Corrections and Rehabilitation (CDCR) released its 2011 Adult Institutions Outcome Evaluation Report.

The report presents recidivism rates from a three-year follow-up period for all felons released from the CDCR's Division of Adult Institutions in fiscal year (FY) 2006-2007, plus one-year recidivism data for FY 2008-09.

In the past, the CDCR measured recidivism by tracking released prisoners who return to prison. While still regarding that as the most reliable and useful measure, the CDCR now reports recidivism by tracking three different measures: arrests, new convictions and returns to prison. Arrests yield the highest rate of recidivism while convictions yield the lowest. For example, in FY 2008-09 the one-year recidivism rate was 57.2% as measured by arrests; it was 45.2% based on returns to prison and only 20.0% as measured by new convictions.

Additionally, whereas in the past the CDCR provided recidivism rates only for felons paroled for the first time on their current term during a specified period of time (and tracked those parolees only until their discharge), beginning in 2010 the CDCR expanded the study cohort to include not only first-time releases but also direct discharges and re-released felons, and tracked them for the full follow-up period regardless of their status as active or discharged from post-release supervision. Re-released felons – those who were paroled, reincarcerated and then released again – made up 41.8% of the prisoners

in the expanded study cohort.

Significantly, the 2011 report presents recidivism rates in terms of various characteristics, including gender, age at release, ethnicity, type of commitment offense, length of prison stay and number of stays, providing lawmakers and correctional stakeholders with data that can be useful in shaping the CDCR's policies and practices in the future.

Among the report's "key findings" was a slight decline in the one-year rate of recidivism since FY 2006-07 for arrests, convictions and returns to prison, with the exception of a small increase in arrests in FY 2008-09.

Overall, 65.1% of all felons released in FY 2006-07 returned to prison within three years; therefore, 34.9% successfully stayed out during that time period. Significantly, for first-time releases the three-year rate of recidivism (56.9%) was much lower than the rate for re-releases (76.4%).

Of the 75,019 released CDCR prisoners who recidivated within three years, nearly three-quarters (73.5%) returned to prison in the first year after their release.

Male prisoners recidivated at a rate of 66.3% within three years – nearly 11 points higher than females (55.1%). Male prisoners outnumbered females by almost nine to one in the FY 2006-07 cohort.

In general, recidivism rates decreased with age, with felons released at age 20-24 returning to prison at a rate of 71.7%. For prisoners released between the ages of 25 and 49, rates of recidivism varied between 67.8% and 62.8%. The rate was 58.4% for felons between the ages of 50 and 54, 54.3% for felons aged 55 to 59, and 46.3% for felons over 60 years old.

Comparing races, three-year recidivism rates for the FY 2006-07 cohort varied as follows: 67.1% for whites, 59.5%

for Hispanics/Latinos, 71.4% for Blacks/African-Americans, 58.7% for Asians, 72.4% for Native Americans/Alaska Natives, 59.3% for Native Hawaiians/Pacific Islanders and 56.2% for all other races.

Prisoners convicted of property crimes consistently recidivated at a higher rate (69.1% over three years) than those convicted of other offenses, while prisoners who committed crimes against persons recidivated at a lower rate (62.7%). The commitment offense with the highest recidivism rate was vehicle theft (74.3%), while the crime with the lowest reported rate was second-degree murder (7.3%).

Registered sex offenders recidivated at a rate higher than other felons (66.9% over three years). Of the sex offenders who recidivated, 84.4% received parole violations, 9.7% committed new offenses that were not sex crimes and 5.9% committed new sex crimes.

Released prisoners designated as seri-

ous or violent offenders recidivated at a rate lower than those without that designation – 60.9% over three years, compared with 66.2% for prisoners not considered serious or violent offenders.

Approximately 14% of released CDCR prisoners were designated as having mental health problems and were classified for an Enhanced Outpatient Program (EOP) or placed in the CDCR's Correctional Clinical Case Management System (CCCMS). Such prisoners had higher recidivism rates over three years: 75.1% for EOS prisoners and 70.3% for CCCMS prisoners, compared with 63.9% for prisoners with no designated mental health issues.

Prisoners who were assigned to a Security Housing Unit (SHU) while incarcerated had three-year recidivism rates higher than those of prisoners without SHU status (69.8% vs. 64.8%).

The report found that over a prisoner's

entire criminal career, the rate of recidivism was likely to increase with each additional return to prison. Prisoners with 15 or more prison stays had a recidivism rate of 86.5%. However, recidivism rates dropped as offenders served lengthy sentences and presumably "aged out" of crime; for example, prisoners who served over 15 years had a recidivism rate of 40.1%.

"Although most inmates released from CDCR in FY 2006-07 recidivate and return to prison," the report concluded, "it is important to recognize that slightly more than one-third of these releases remain in the community."

California's three-year recidivism rate is significantly higher than the average national rate of 43.3%, based on 2004-2007 data as calculated by the Pew Center on the States [see article on p. 26 of this issue]. Source: *2011 Adult Institutions Outcome Evaluation Report, CDCR Office of Research* (November 23, 2011). ■

## Missouri Federal Court Enjoins Denial of Housing Assistance to Sex Offender

by Matt Clarke

On March 14, 2011, a federal court in Missouri temporarily enjoined the Housing Authority of St. Louis County (HASLC) from denying housing assistance to a seriously ill man who had been convicted of sex offenses and was required to register as a sex offender for life.

Alton M. Perkins-Bey, 55, was convicted of two counts of rape in 1975. After 14 years in prison, he was paroled. He has not been charged with any offenses since then.

In 2004, Perkins-Bey applied for Section 8 housing assistance with HASLC and was put on a waiting list. In November 2008, he filed a Criminal History and Activity Disclosure Statement, and HASLC conducted a full background check. After two meetings with HASLC officials, Perkins-Bey was approved for the Section 8 Voucher Program in January 2009. Section 8 paid his entire rent plus \$74 per month toward his utilities. During that time, Perkins-Bey had surgery to remove a cancerous bladder.

In August 2009, Perkins-Bey's parole officer informed him that pursuant to the federal Sex Offender Registration and Notification Act, 42 U.S.C. § 16913, he was required to register for life. He then registered as a sex offender.

On October 8, 2010, HASLC sent Perkins-Bey a notice entitled "Proposed Termination of Rental Assistance," informing him that his housing assistance would be discontinued because he was required to register for life as a sex offender. A hearing was held on October 28, 2010, and Perkins-Bey's Section 8 assistance was terminated based on 24 CFR § 982.553, which requires discontinuation of assistance to any household that includes a person required to register as a sex offender for life. Perkins-Bey then filed a complaint in U.S. District Court seeking both preliminary and permanent injunctions against HASLC's termination of his housing assistance.

The district court held that HASLC's actions posed the threat of irreparable harm, and that Perkins-Bey was likely to prevail on the merits. The court noted that the public interest did not weigh in favor of rendering homeless a seriously ill individual who had successfully complied with the terms of his parole for 23 years.

The district court further held that the hearing officer had misinterpreted the applicable regulations, as 24 CFR § 982.553 "only compels the Authority to deny initial participation when any household

member is subject to lifetime registration; it does not mandate the termination of previously approved assistance." Consequently, the court enjoined HASLC from terminating Perkins-Bey's housing assistance and ordered the agency to continue paying the assistance until a hearing was held on the request for a permanent injunction.

On May 9, 2011, the district court awarded \$9,760 in fees and \$350 in costs to Perkins-Bey's attorney. See: *Perkins-Bey v. Housing Authority of St. Louis County*, U.S.D.C. (E.D. MO), Case No. 4:11-cv-00310-JCH. ■

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# Haitian Prison Conditions Deteriorate in Aftermath of Massive Earthquake

by Holly Cooper

On January 12, 2010, a 7.0 magnitude earthquake rocked the island nation of Haiti. Well-known are the catastrophic numbers of victims left in its wake, leaving hundreds of thousands of people entombed in rubble and over one million homeless. For many of Haiti's prisoners, however, the earthquake bequeathed a momentous opportunity to escape. Over 5,000 Haitian prisoners escaped in the aftermath of the disaster, including all 4,125 prisoners from the National Penitentiary, Haiti's largest prison.

In Haiti's Les Cayes prison, however, escaping prisoners met a different fate – a brutal massacre by guards. Prisoners packed inside overcrowded cells, originally built in the nineteenth century, began to scream in fear for their lives during the earthquake's violent shaking. The guards refused the prisoners' basic demand that they be allowed to sleep in the prison courtyard during the aftershocks. Instead, the guards retaliated against the most vocal prisoners, packing them in overcrowded cells and refusing them bathroom "privileges." Prisoners responded by throwing buckets of urine at the guards and escaping their cells.

To quell the unrest, a week after the earthquake the police and guards used tear gas and massacred between ten to fifteen prisoners. Even prisoners trying to surrender were shot in their locked cells. The officials then buried the bodies in unmarked graves and burned the evidence. The prison's investigator alleged a prisoner ringleader had murdered the victims but this was refuted by an extensive *New York Times* investigative report, witnesses and a commission inquiry. [See: *PLN*, Nov. 2010, p.32].

Fourteen prison guards and police officers were charged with murder, attempted murder and other offenses, and twenty-one officers who fled were tried in absentia.

"This trial is historic," said lead prosecutor Jean-Marie Salomon. "This is the first time in Les Cayes we've held our own police officers accountable for their abuses. What is decided will be an example for those who come after us of how we respect our citizens."

The events at Les Cayes prison brought Haiti's criminal justice system into the fore-

ground and exposed to the world the dark underbelly of Haiti's prison conditions. Photos of the prisons reveal what Haitian prisoners already know – that they are egregiously overcrowded. Approximately 8,000 prisoners are held in detention facilities designed to only hold 2,450 persons. The most crowded prison in Hinche holds more than ten times its design capacity. The average space allotted is .3 meters per person, meaning that prisoners take turns sleeping on the floor and many must stay standing for excruciating lengths of time, with temperatures in the cells reaching as high as 105 degrees. Prisoners also lack access to clean water and many prisoners have died of cholera – a horrific waterborne disease that can kill its host within hours yet whose treatment can be as simple as rehydration therapy. Food and clean water are so scarce in prisons that many prisoners rely on food and water from family to survive. Children prisoners are mixed with adults and women are not always fully segregated from men.

Some commentators have likened Haitian prison conditions to the horrific conditions of the slave ships that crossed the Middle Passage. See, e.g., *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) (detailing "brutal and harsh conditions" in Haiti's prisons). For the Haitian people such a historical regression is particularly sensitive, being the first Black Republic in the world after enslaved persons revolted and liberated themselves from their oppressors. In pursuit of equality and dignity, Haitians reclaimed the indigenous name of Haiti for their nation and cast off the former imperial name of Saint-Domingue. Moreover, in creating the flag for the new republic, Jean Jacques Dessalines, a Haitian revolutionary leader, ripped the white center from the French colonial flag and sewed back together only its red and blue portions – an unequivocal symbolic gesture that the new Haiti rejected white oppression. To equate anything in Haiti with the conditions of enslaved people is a monumental accusation.

The conditions in Haiti's prisons are miserable, however analogized, and overcrowding has worsened since the earthquake. On this author's visit to the Mirebalais prison, prisoners were so crammed into the

cells that limbs protruded from cell doors and windows. Men sat perched in high window sills hoping to catch fresh air while the men below were so cramped that their bodies were tangled together. Looking into the dark cells, one could only make out the silhouettes of men and only the whites of their eyes were visible.

After adjusting one's eyes to the darkness, however, one could make out countless faces of men sitting completely silent in the dark, half-naked in squelching heat – some waiting for years in these cells just for an initial hearing. More appalling is that children as young as 13 years old are among the faces. No bathrooms or sinks are available in the cells, and prisoners get only two bathroom breaks a day. The guards treat the water with bleach and tablets, and put it in buckets near the cells where prisoners have to request a drink. If a prisoner needs to meet with his attorney, no confidential space is allotted for the meeting. No rehabilitative or recreation activity exists.

Part of the overcrowding problem lies in the lack of adequate criminal procedural protections in Haiti. Eighty to ninety percent of Haiti's prisoners are pretrial detainees who wait anywhere from one to five years for a trial. Bond or bail for pre-trial detainees is not a possibility and plea bargaining is non-existent. Thus, most Haitians must endure lengthy prison time before any finding of guilt and are not given full credit for time served in pretrial detention.

One remarkable, yet often unnoted, aspect of Haitian prisons is that Haiti has the lowest percentage of prisoners anywhere in the Caribbean. Experts estimate that Haiti has about 8,000 prisoners and a population of almost ten million, meaning prisoners constitute only .0008% of the population. Thus, while the conditions are deplorable, the low incarceration rates are quite distinct from the United States, which has an incarceration rate of around 1%.

On January 19, 2012, a verdict was announced in the trial of the 14 police officers and prison guards charged in the Les Cayes prison massacre. Eight were found guilty and received sentences ranging from 2 to 13 years. The former warden of the Les Cayes prison, Sylvestre Larack, who had been promoted after the massacre,

was sentenced to 7 years.

"The decision of the judge is his expression of the truth," said Judge Ezekiel Vaval, who presided over the case. "There are other versions that exist but this is mine. And that is the law."

Defense attorneys had argued that

the officers and guards were simply doing their jobs. "But killing people was not doing their job," noted Haiti's ombudsman, Florence Elie.

The verdict was an anomaly in a nation where law enforcement officials are rarely held accountable, even for murder. ■

Sources: *Republic of Haiti Submission to the United Nations Universal Periodic Review*, Oct. 3, 2011; *New York Times*; *U.S. Department of State 2010 Human Rights Report: Haiti*; [www.haitilibre.com](http://www.haitilibre.com); Wilentz, Amy, *The Rainy Season: Haiti Since Duvalier*

## Nebraska Judge Dismisses Charges Against Omaha Jailers

by Matt Clarke

**D**ouglas County, Nebraska District Court Judge Peter Bataillon has dismissed official misconduct charges against jailers who allegedly let a prisoner bleed to death while he begged for his life. Bataillon interpreted Jail Standards Board regulations as putting the burden of ensuring that prisoners receive medical care solely on the facility administrator, not on the jail's line staff.

In September 2007, Alexander Simoens, 47, was in the Omaha City Jail on charges of driving with a suspended license when he began to experience serious medical problems. Simoens was in agony and begged for medical attention for two days, writhing in his cell and vomiting blood, while jailers ignored his condition and pleas for help. Finally, he collapsed and was taken to a hospital where he died of gastrointestinal bleeding caused by a ruptured ulcer.

"In hindsight, we would have prescribed appropriate medical attention," said Omaha Police Chief Thomas Warren.

Jail surveillance cameras captured Simoens' plight, and the video sparked outrage among his family members and others who viewed it. In December 2007, a grand jury indicted jail supervisors Jeanelle Moore

and Andrew Freeman, as well as guards Mark Haele and Joachim Dankiw, on misdemeanor charges of official misconduct in connection with Simoens' death. [See: *PLN*, July 2008, p.36].

Judge Bataillon threw out the criminal charges against the supervisors in March 2009 because he found insufficient evidence that they had direct knowledge of Simoens' medical condition, leaving only the misdemeanor charges against the guards.

In April 2011, within a week of a scheduled trial, Bataillon dismissed the charges against Dankiw on the grounds that the Nebraska Jail Standards Board regulations gave insufficient notice to low-level guards that they were responsible for providing medical care to prisoners. Judge Bataillon's ruling effectively dismissed the charges against Haele, too.

The Board regulation states, "Observation of inmates: If there are indications of illness or injury, the facility administrator shall, to the best of his ability, insure that the proper medical attention is provided as soon as possible."

"I don't interpret that regulation to be that expansive to go beyond the facility

administrator," said Judge Bataillon. In interpreting the Jail Standards Board regulations, however, Bataillon ignored the jail's own operations manual, which said individual jailers were responsible for ensuring that prisoners receive "adequate medical care."

Does this mean no one bears criminal responsibility for the fatal denial of emergency medical attention to prisoners at the Omaha City Jail? Apparently so.

"I'm appalled. I'm appalled that they're sweeping it under the carpet and acting like my father never died in that jail," said Simoens' son, Shawn. "I want to see somebody held accountable for my father's death," he added. "These guys are walking scot-free while my dad is sitting [in an urn] on top of my TV."

Unable to find justice on the criminal side of the law, Simoens' family is pursuing a federal lawsuit against the city and jail officials. That suit remains pending, with a trial scheduled in April 2012. See: *Higgins v. Dankiw*, U.S.D.C. (D. Neb.), Case No. 8:08-cv-00015-JFB-TDT. ■

Sources: *Omaha World-Herald*, [www.therepublic.com](http://www.therepublic.com), [nebraskastatepaper.com](http://nebraskastatepaper.com), [www.wowt.com](http://www.wowt.com)



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## News in Brief

**Alabama:** In October 2011, Limestone County Sheriff Mike Blakely said he would not be rounding up sex offenders at Halloween to ensure they don't hand out candy to children. He stated he didn't have the authority and lacked the manpower to conduct such an operation, and could not arrest sex offenders who refused to participate. Meanwhile, the Russell County Sheriff's Department said it would require around 35 sex offenders on probation or parole to attend a mandatory meeting on Halloween evening, and would ask 115 other sex offenders to voluntarily attend. Those who volunteer to come to the meeting would have their annual registration fee reduced by \$20.

**Florida:** Lake County Jail prisoner George McCovery, 37, was released 9 days early from his 29-day sentence for driving with a suspended license due to his weight loss at the jail. When sentencing McCovery, Judge Donna Miller said she would take a day off his sentence for each pound he lost. McCovery, who weighed 345 pounds before he went in, had lost 25 pounds when he went back before the judge after serving 20 days. Judge Miller is known for offering creative alternative sanctions to defendants, such as having them make greeting cards for patients at medical facilities, enroll in dance classes or work in a community vegetable garden.

**Florida:** A male teenager said he had been kissed on the cheek by a prisoner during a court-ordered tour of the Orange County jail, according to a November 2011 press release from the Orange County Corrections Department. "Our investigation did find policy violations for which one officer received a two-day suspension without pay, another officer received a written reprimand. The tours coordinator received a one-day suspension without pay for allowing the juveniles to be separated from their parents while inside the jail," stated Allen Moore, a spokesman for the Corrections Department. Tyrell Staffine, the prisoner involved in the kissing incident, which occurred during a jail tour in February 2011, may face charges of assault or battery.

**Georgia:** On November 29, 2011, former Fulton County Jail guard Akil Scott, 31, pleaded guilty in federal court to extortion and drug-related offenses. Scott and other deputies were involved in smuggling cellphones, cigarettes and drugs to prisoners. Scott met with an undercover

FBI agent and accepted two balloons filled with what he thought was cocaine, which he smuggled into the jail in exchange for \$650. Another former Fulton County jailer, Derrick Deshun Frazier, 32, was sentenced on January 11, 2012 to six months in federal prison, 3 months of house arrest and two years of supervised release after pleading guilty to smuggling cellphones and cigarettes into the jail. A third former guard, Marvie Trevino Dingle, Jr., 34, pleaded guilty to similar charges in November 2011 and awaits sentencing.

**Idaho:** At the Kootenai County jail, prisoners who can afford to pay can get more than two half-hour visits a week. On October 27, 2011, the *Associated Press* reported that jail prisoners can have additional visitation time at the rate of \$.25 per minute. According to Sheriff's Captain Kim Edmonson, the extra visiting time was made possible by new equipment that speeds visitor sign-ups. Half the revenue generated from the visitation fees will be paid to the company that provided the equipment.

**Illinois:** Stateville Correctional Center prisoner Cesar Sanchez, 37, escaped from a transport van while being returned from a court hearing on December 2, 2011. He hopped on the back of a delivery truck, which took him to an area near a waste management yard used to store portable toilets. A Cook County helicopter located Sanchez using infrared sensors, and he was captured in a chemical tank of one of the port-a-potties after six hours on the run. The Will County Sheriff's Office, Illinois DOC, U.S. Marshals Service, Illinois State Police and Chicago police participated in the search. Sanchez was serving a 7-year sentence for burglary.

**Massachusetts:** Former MCI-Cedar Junction prison guard Nicholas B. Desmarais, 29, pleaded guilty to charges of disseminating obscene matter and possession of child pornography, and was sentenced to a six-month jail term on November 1, 2011. He was also ordered to pay a \$1,000 fine and \$250 surfine, and faces termination if he does not resign. According to a state police investigation, Desmarais had received and sent pornographic images of underage girls via email.

**Michigan:** Ryan Correctional Facility guard Joseph L. Jordan, 27, and former guard Corey L. Young, 37, were arrested on November 24, 2011 on charges of

smuggling marijuana and tobacco into the prison. Jordan and Young allegedly accepted money from prisoners' friends and family members in exchange for delivering the contraband; they were charged with misconduct in office and drug offenses. Also charged was Ryan prisoner Carlos Neely, 29.

**Missouri:** On November 7, 2011, former state prisoner Danwine Dewayne Renard, 47, was sentenced to 12 years in federal prison for participating in an identity theft ring while he was incarcerated. Renard and others used stolen identities to open bank accounts, then deposited bad checks and withdrew the money before the scam was discovered. Renard provided advice to other people involved in the scheme while he was serving time in state prison. He pleaded guilty to federal charges of wire and bank fraud, conspiracy, aiding and abetting bank fraud, and aiding and abetting aggravated identity theft. In addition to the 12-year prison term, he was ordered to pay \$122,943.72 in restitution and forfeit \$49,000.

**New Hampshire:** Two state prisoners may face murder charges after severely beating another prisoner, Anthony Renzulla, 44, who died in November 2011. Renzulla had been attacked by fellow prisoners William Edic and Thomas Milton in July 2010. The assault left Renzulla with major head injuries, and he had been on life support for over a year at the time of his death. Milton and Edic were previously indicted on charges of attempted murder, first-degree assault, assault by a prisoner, conspiracy to commit first-degree assault and conspiracy to commit assault by a prisoner. Another prisoner, Randall Chapman, was charged with falsifying physical evidence and hindering prosecution in relation to the attack on Renzulla.

**New Jersey:** On November 9, 2011, Gloucester County Jail guard Thomas C. Hahn, 32, was charged with complicity, conspiracy and official misconduct in connection with an assault on an unidentified 20-year-old prisoner. Hahn is accused of taking the prisoner to an area of the jail with the intent to have him assaulted, and then failed to intervene when another prisoner attacked the victim, who required hospital treatment. Following his arrest, Hahn was released on \$25,000 bail.

**New Mexico:** A guard at the CCA-operated Torrance County Detention Center was arrested on November 24,

2011 after police officers found him smoking heroin in a car with another man in an area known for drug activity and prostitution. CCA guard Stephen Trujillo, 21, reportedly "admitted to smoking the heroin," according to police Sgt. Robert Gibbs. Trujillo had been busted for marijuana possession in 2010, but that charge was dropped. CCA did not comment on Trujillo's most recent arrest.

**New York:** David I. Byrnes, 42, was found not guilty of second-degree assault on October 27, 2011. Byrnes was incarcerated at the Broome County Jail when he was involved in an altercation with a

guard; he suffered a broken nose while the guard broke his hand. Apparently, Byrnes was prosecuted for assaulting the guard's hand with his nose. The jury deliberated less than 20 minutes before reaching a not guilty verdict.

**New York:** Two prisoners at the Watertown Correctional Facility face disciplinary action after putting sugar and lemonade mix in love letters sent to their girlfriends. Prisoners Jafar Torkpour and Desmond McNeil apparently wanted their girlfriends to know they were still "sweet" on them. Instead, the powder they placed in the envelopes leaked out, which led to a

hazardous-materials investigation and state police and fire and rescue units responding to the prison on November 18, 2011.

**Oklahoma:** On October 26, 2011, members of the U.S. Marshals Service Metro Fugitive Task Force and Oklahoma Highway Patrol apprehended escaped prisoner Brian Keith Soileau after spotting him at a Walmart in Norman, north of Oklahoma City. Soileau had escaped from the Pine Prairie Correctional Center, a Louisiana prison operated by LCS Corrections, almost two weeks earlier. He was suspected of robbing a bank while on the run, and was shot after exchanging gunfire

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## News in Brief (cont.)

with the Marshals and Highway Patrol when he was captured. Soileau had been serving time for aggravated burglary.

**Oklahoma:** Two prisoners were found hanging in separate cells at the Oklahoma State Penitentiary on November 3, 2011. Adam T. Wright, 42, and James R. Thomas, 36, apparently committed suicide. Both were housed in the facility's maximum-security H Unit, and prison officials are investigating whether they killed themselves as part of a suicide pact. In December 2011, death row prisoner Gary Roland Welch was found bleeding in his

H Unit cell following a suicide attempt. Welch had cut his neck with a razor blade; he was treated in the prison's clinic and later executed on January 5, 2012.

**Pennsylvania:** Randell Lamar Peterson, 32, a prisoner participating in a work-release program at the Lycoming County jail, was charged on October 4, 2011 with conspiracy, indecent exposure, open lewdness and disorderly conduct for having a sexual tryst with his girlfriend, Amanda Confer, 24, on a city bus. While Peterson and Confer engaged in oral sex and intercourse in the back of the bus, another work-release prisoner, Joshua Schill, sat in front of them and held Confer's infant daughter. The encounter was

filmed by a surveillance camera in the bus; Confer also faces criminal charges.

**Utah:** On November 2, 2011, Jaime Alvarado, 27, a U.S. citizen, was charged in state district court with giving false material statements (a felony) and giving false personal information to a peace officer (a misdemeanor). During a 2010 arrest, Alvarado had told the police, a judge and immigration officials that he was an illegal immigrant. As a result, instead of going to prison for up to 15 years for possession of cocaine and heroin with intent to distribute, Alvarado was deported. He then returned to the U.S. using his American passport, but was later arrested on an outstanding warrant. ■

## Criminal Justice Resources

### *ACLU National Prison Project*

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### *Amnesty International*

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### *Center for Health Justice*

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### *Critical Resistance*

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### *Family & Corrections Network*

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### *FAMM*

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### *The Fortune Society*

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### *Innocence Project*

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### *Just Detention International*

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### *Justice Denied*

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### *National CURE*

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### *November Coalition*

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### *Partnership for Safety and Justice*

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### *The Sentencing Project*

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)

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# PRISON

## Legal News

VOL. 23 No. 4

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

April 2012

### State-by-State Prisoner Rape and Sexual Abuse Round-Up

*by Matt Clarke and Alex Friedmann*

In 2006, *Prison Legal News* published a cover story, *Guards Rape of Prisoners Rampant, No Solution in Sight*, that presented a compilation of news reports concerning the rape and sexual abuse of prisoners by prison and jail staff, police officers and other law enforcement officials. [See: *PLN*, Aug. 2006, p.1].

Three years later *PLN* ran another cover article, titled *Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic*, which described dozens of reports involving prisoner rape and sexual assault in correctional facilities across the U.S. [See: *PLN*, May 2009, p.1].

Despite the enactment of the optimistically-named Prison Rape Elimination

Act (PREA) by Congress, the criminalization of sex acts between prisoners and those who guard them, and the adoption of “zero tolerance” policies by many prison and jail systems, the situation has not greatly improved. This is partly because reducing prisoner rape and sexual abuse is simply not a priority for corrections officials. Indeed, rape and sexual assault are integral elements of American prison and jail management. How else to explain the prevalence, tolerance and acceptance if not encouragement of the practice? Unfortunately, “rape camps” is a term only used to describe prisons in other countries, not the United States.

Although PREA was signed into law in September 2003, almost nine years later the U.S. Attorney’s Office still has not promulgated PREA standards for prisons, jails and juvenile facilities. Further, the proposed standards being considered by the U.S. Attorney have been considerably watered down to make them more palatable to corrections officials and more cost effective – as if a price tag can be placed on the prevention of prisoners being raped and sexually assaulted. [See: *PLN*, July 2011, p.38].

According to a survey by the U.S. Department of Justice, Bureau of Justice Statistics, from 2008 to 2009, 2.8% of state and federal prisoners and 2.0% of jail prisoners reported at least one incident of sexual victimization by a corrections employee within the preceding 12 months. While those percentages may seem low, they reflect an estimated 57,000 incidents of sexual victimization by staff members in just one year.

Most of those incidents (an estimated

36,800) were described as “unwilling”; e.g., unwanted sexual contact involving prison and jail employees. While the remaining incidents were considered “willing,” prisoners cannot legally consent to sex acts with staff members.

The same survey found that 2.1% of state and federal prisoners and 1.5% of jail prisoners reported they had been sexually victimized by other prisoners. Thus, according to the survey data, prisoners housed in both prisons and jails reported they were more likely to be sexually victimized by corrections employees than by other offenders. [See: *PLN*, June 2011, p.40].

Rates of sexual abuse reported at juvenile facilities are even higher, with an estimated 10.3% of juvenile prisoners reporting staff sexual misconduct in 2008-2009, according to a separate Bureau of Justice Statistics report. [See: *PLN*, March 2010, p.22].

Are some prison and jail employees wrongly accused of rape or sexual abuse? Of course – just as some defendants who are not employed in corrections are wrongly accused of sex offenses. However, the sheer number of such allegations, including those self-reported by prisoners and those documented by corrections officials, indicate that prisoner rape and sexual abuse by staff members remains a significant problem.

Unfortunately the sexual assault of prisoners is the only form of rape deemed fit for humor, with entire movies (*Let’s Go to Prison*, *Big Stan*) dedicated to making fun of prison rape victims. The pain and suffering of prisoners who are raped is minimized, ignored, mocked or

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## **Prisoner Sexual Abuse (cont.)**

worse by the very government officials charged with enforcing the law. Despite the seeming crackdown on sex offenders, when the victim is a prisoner and the rapist is employed by the government, we enter the land of dropped investigations, lackluster prosecutions, sweetheart plea deals, probation, suspended sentences and generally very light punishment. Proving that it is less the act of rape that rouses governmental ire as the identity of the victim and the perpetrator.

In this latest round-up of news reports from 35 states, we examine incidents involving prison and jail staff and other corrections employees who were indicted, arrested, convicted or sentenced for raping or sexually abusing prisoners over a 12-month period, from March 2011 to March 2012. This compilation is far from exhaustive, but demonstrates the scope of the continued problem of prisoners being sexually victimized by staff members.

### **Alabama**

On October 1, 2011, Carolyn Burns, 53, a kitchen worker at Holman Prison, was arrested after a guard found her having sex with a prisoner in a kitchen closet. She was charged with sexual custodial misconduct and resigned after being released on \$10,000 bond. She had been employed at the facility for two months.

Former Morgan County jailer Tracie Lynn Thompson, 38, pleaded guilty on June 1, 2011 to charges of promoting prison contraband and custodial sexual misconduct. She was prosecuted for having sex with a male prisoner and smuggling a cell phone and prescription medication into the jail for him. According to court records, Thompson was sentenced on September 27, 2011 to three years with one year suspended.

Jimmy Katrell Craft, 23, a jail guard with the Baldwin County Sheriff's Office, was arrested on April 11, 2011 after he reportedly admitted to investigators that he had sex with a male prisoner. Craft was charged with sodomy for allegedly engaging in sexual activity in an employee bathroom during the night shift. "The inmate said he did feel at one time pressure to do that, and also probably in exchange for some favoritism," said Sheriff Hoss Mack. Craft was placed on paid administrative leave.

### **Arkansas**

In July 2011, Billy Joe Smith, 48, a guard at the Union County jail, was charged with three counts of sexual assault and three counts of furnishing prohibited articles to a prisoner. Prisoners told investigators that Smith had given a female prisoner photos of her children in exchange for sex, and had provided other prisoners with a cell phone and cigarettes. He pleaded guilty in September 2011 and was sentenced to five years probation.

### **California**

Brandon McKinney, 34, a guard at the federal Metropolitan Correctional Center in San Diego, was indicted for sexual abuse of a ward on March 16, 2011 and arrested by Department of Justice and FBI agents. He is accused of having sex with a female prisoner. McKinney was released on \$100,000 bond in April 2011.

On May 16, 2011, James Arroyo, 54, a former cook at the Orange County jail, was sentenced to nine months after pleading guilty to four misdemeanor counts, including sexual battery of two female prisoners he supervised. He followed one prisoner into a closet and fondled her breasts, and cornered the other in a storage room and forced her to kiss him. Arroyo will also have to serve five years on probation and register as a sex offender. He had been arrested and placed on administrative leave in February 2011. [See: *PLN*, May 2011, p.50].

Orange County sheriff's deputy Jennifer McClain, 29, was arrested on February 9, 2012 on suspicion of having sexual contact multiple times with a prisoner at the Men's Central Jail in Santa Ana. McClain, who had been employed with the sheriff's department for five years, was released on her own recognizance. The sexual acts reportedly occurred in November and December 2011.

A Fresno County jail guard, Akinsoji Oscar Okin, was arrested and charged with sexual contact with a female prisoner on October 7, 2011 after other prisoners reported the incident. Okin, who had worked at the jail for six years, was released on \$100,000 bond on the felony charges. According to a news report, Okin had previously been fired from the Sheriff's Department in 2006 for picking up a prostitute; he was reinstated two years later after filing a successful appeal with the Civil Service Board.

## Prisoner Sexual Abuse (cont.)

On January 4, 2012, Joseph Struzziere, 28, a civilian employee with the Chula Vista Police Department assigned to supervise female prisoners at the city jail, was arrested on a misdemeanor charge of consensual sexual activity with a prisoner. Struzziere, who is no longer employed by the police department, was released on his own recognizance. A female prisoner said she had engaged in sexual activity with him twice in an unsupervised area at the jail. "Based on information based on the interview with the inmate and also based on the information from the employee himself, we have more than sufficient information, evidence and facts that sexual activity did occur between both of them," said Chula Vista police chief David Bejerano.

Ralph James Kress, a former detentions deputy at the Mojave Jail in Kern County, was arrested on March 9, 2012 on charges of sexually assaulting a female prisoner when she was being booked into the facility. Kress faces charges of oral copulation via threats or force, oral copulation with a confined prisoner and assault under color of authority. He was initially placed on administrative leave, then later fired.

Another Kern County detentions deputy, Anthony Michael Lavis, 56, was sentenced in June 2011 to 40 months in prison on three felony charges of sexual misconduct involving female prisoners

at the Lerdo Jail. Lavis had pleaded no contest to the charges; his attorney said he was manipulated by the prisoners. According to the prosecution, Lavis' misconduct included telling a female prisoner who had been taken off suicide watch that she would have to "show him something" before she got her clothes back; he also allegedly touched other prisoners in a sexual manner.

Former Lompoc Federal Correctional Complex guard Renee Noelle Gutierrez, 42, pleaded guilty on January 18, 2012 to a felony charge of sexual abuse of a ward. She reportedly committed a sex act with a prisoner in April 2010 when she worked as a dorm supervisor at the prison. She resigned before she was indicted, and has not yet been sentenced.

### Connecticut

On July 13, 2011, Neal Kearney, 50, a former deputy warden at the Bergin Correctional Institution, was sentenced to 30 months in prison and 6 years of special parole for second-degree sexual assault after a male prisoner informed his probation officer that he had sex with Kearney both inside and outside the prison. The prisoner said he felt unable to refuse Kearney's advances because he feared retaliation; he was required to perform oral sex on Kearney about 25 times. The prisoner hid a rubber glove containing some of Kearney's semen in a broom closet, which was later recovered by investigators.

"I felt like I could not tell him 'no'

because he had such power over me and he would keep me in prison if I did not do it," said Kearney's victim.

Kearney continued to receive his \$5,555 monthly pension from the state following his conviction on the sexual assault charge, but under a settlement reached in October 2011 in a lawsuit filed by the Department of Correction, he will forfeit \$2,000 a month to defray the cost of his incarceration.

### Florida

On September 9, 2011, Jack Chris Jackson, 45, a guard at the Federal Correctional Institute Miami, was indicted for engaging in a sexual act with a prisoner and falsely denying his misconduct to federal investigators. Jackson pleaded guilty on December 20, 2011 to sexual abuse of a ward. On March 19, 2012, he was sentenced to 12 months and 1 day in federal prison plus five years supervised release.

Chadwick Buford Holmes, 32, a jail guard with the Levy County Sheriff's Office, was arrested on June 30, 2011 on a third-degree felony charge of sexual misconduct. He is accused of repeatedly having sex with a female prisoner in a bathroom, and was booked into the same jail where he is alleged to have committed the sex acts.

### Georgia

Gwinnett County sheriff's deputy Duone Clark, 40, was arrested on February 8, 2012 for allegedly sexually assaulting a male prisoner at the county

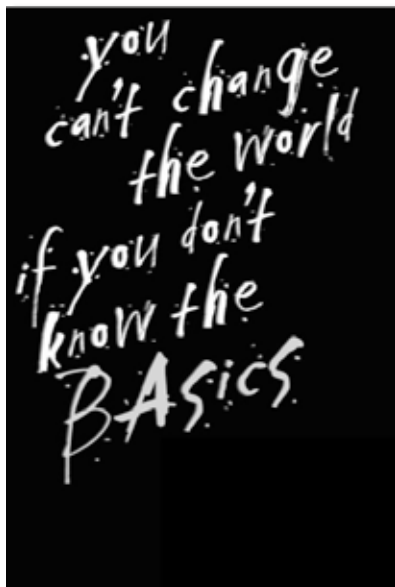
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jail. Sheriff's officials said other prisoners witnessed the incident, which occurred in January 2012. Clark, who was charged with sexual assault and violation of oath by a public officer, resigned and was jailed without bond.

## Hawaii

On April 7, 2011, Ryan Malasig, 44, was sentenced to 18 months in prison after he admitted to having sex with a 33-year-old transgender prisoner and pleaded no contest to second-degree sexual assault. Malasig was a guard at the Oahu Community Correctional Center when he told the prisoner to perform oral sex on him. The prisoner preserved a shirt containing Malasig's semen and turned it over to authorities. Malasig will be required to register as a sex offender for life. [See: *PLN*, July 2011, p.50].

## Illinois

Former McHenry County jailer Elias D. Fortoso, 31, pleaded guilty in March 2011 to two felony custodial misconduct charges and was sentenced to 40 days in jail, to be served on weekends, plus 30 months probation. As part of a plea agreement he must also participate in sex offender treatment

and pay a \$1,806 fine. Fortoso admitted that he had asked two female prisoners to show him their breasts when he worked at the jail in 2008 and 2009.

On October 20, 2011, a jury convicted former Illinois Youth Center supervisor George E. Sabie, 55, of criminal sexual assault, custodial sexual assault and official misconduct for having a 17-year-old male prisoner perform oral sex on him in exchange for a promise of payment. Sabie said he would give the prisoner \$400. The juvenile saved some of Sabie's semen on a tissue, and has since filed a lawsuit seeking \$22 million in damages. Sabie was sentenced in February 2012 to 6 years in prison and will have to register as a sex offender.

Kimberly D. George, 34, a nurse at the Big Muddy Correctional Center, was taken into custody on October 20, 2011 on felony charges of having sex with prisoner Leslie Matos. George was released the same day she was arrested, on \$40,000 bond. Matos was charged with possession of contraband after he was found with a cell phone, which he had obtained from another prison employee, dental hygienist Nova Clarry, 52.

On May 5, 2011, former Illinois

Department of Corrections probation officer Robert Rowels, 46, was convicted at a bench trial on charges of custodial sexual misconduct and official misconduct for having sex with a female parolee under his supervision. Rowels had threatened to send the woman back to prison if she didn't perform oral sex on him. The parolee was able to preserve some of Rowels' semen on a tissue, which was later matched to him.

Former Ford County jailer Phillip S. Santefort, 41, pleaded guilty to one count of sexual abuse of a person in official detention and was sentenced on May 20, 2011 to 8 months in federal prison followed by three years of supervised release, including 8 months on home confinement. He must also register as a "Tier I" sex offender for a minimum of ten years and pay a \$3,000 fine; he was prosecuted for having a female prisoner perform oral sex on him.

Santefort was previously employed as a Calumet City police officer, but that career ended in 2006 when he pleaded guilty to misdemeanor theft after being accused of stealing \$26,000 in cash seized during drug busts. He then became a jail guard. The prisoner he victimized has filed a lawsuit seeking

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## Prisoner Sexual Abuse (cont.)

\$300,000 in damages from the county, sheriff and four sheriff's department employees. [See: *PLN*, May 2011, p.50].

### Indiana

Michelle Jackson, a South Regional Community Corrections officer in Dearborn County, was arrested on February 17, 2012 and charged with sexual misconduct by a service provider, a felony, for having a sexual relationship with Eric Coleman, a jail prisoner who was on work release and later placed on home confinement. Coleman told investigators that Jackson would pick him up while he was on work release for sex, and that she had changed the perimeter of his home confinement monitoring device so they could have sex in his driveway.

Vigo County jailer Shelby Smith, 25, was fired on April 11, 2011 following his arrest on charges of sexual misconduct with a detainee, official misconduct and trafficking with a prisoner. According to investigators, Smith was smuggling tobacco to prisoners in exchange for sex acts. He allegedly went to a cell block housing female prisoners and had one prisoner perform oral sex on him while he fondled another.

### Iowa

On March 25, 2011, Megan Elizabeth Cecil, 32, a former Department of Correctional Services residential officer, was sentenced to two years probation on two counts of sexual misconduct and required to register as a sex offender. She had been charged with having sex with a male prisoner at the Burlington Men's Residential Facility four times in March 2010. [See: *PLN*, June 2011, p.50].

According to court records, former

Dallas County jailer Kevin Paul Hines, 60, pleaded guilty to sexual misconduct with an offender and was sentenced on June 10, 2011 to two years; he was also ordered to register as a sex offender and pay \$1,599.02 in restitution. Hines had been arrested in 2009 for raping prisoner Tamera Poeschl three times in a temporary jail cell.

### Kentucky

In July 2011, James B. Johnson, a sergeant at the Kentucky Correctional Institution for Women, was arrested and charged with 50 counts of official misconduct, 25 counts of second-degree sexual abuse, one count of promoting contraband and one count of trafficking in a controlled substance. He is accused of smuggling drugs into the facility and sexually abusing female prisoners.

### Louisiana

Two Dixon Correctional Institution guards were arrested on December 21, 2011 after they were accused of having sexual relationships with prisoners. Bernadette Ellis, 48, and Therez Wicker, 33, were charged with malfeasance in office by sexual contact with a prisoner. Both were later released on bond.

On April 7, 2011, Joseph Taunton, 32, a former guard at the LaSalle Correctional Center, pleaded guilty to engaging in a sex act with a federal prisoner; he was sentenced in July 2011 to 10 months in prison and will have to register as a sex offender. Taunton admitted to entering the prisoner's cell while on duty and engaging in sexual activity.

Orleans Parish Prison guard Dejuan R. Thomas, 38, was arrested on September 9, 2011 for sexual misconduct involving a male prisoner. Charged with aggravated rape, second degree kidnapping and sexual malfeasance, he is accused of removing

the prisoner from his cell in handcuffs and forcing him to perform oral sex in a closet. Thomas was released on a surety bond following his arrest, but failed to turn himself in after being indicted. He was re-arrested on March 6, 2012.

Paul Nathan, 50, a former contract medical technician at the St. Tammany Parish jail, pleaded guilty in September 2011 to malfeasance after a female prisoner accused him of sexual misconduct. The prisoner told investigators that he exposed himself and asked her for oral sex, which she performed out of fear of retaliation. She preserved Nathan's semen by spitting it into a sling she was wearing, then mailed the evidence to a friend who passed it on to the prisoner's attorney. Nathan claimed he was "suckered" by the woman, who made advances and seduced him, and that he finally "gave in and allowed her to do it."

Nathan was sentenced to four years in prison on the malfeasance charge; at the time he was staying in a halfway house after pleading guilty to unrelated federal charges of acquiring OxyContin, Ambien and hydrocodone by misrepresentation, for which he received one year of supervised probation. He had previously been sanctioned by the state Board of Medical Examiners and was required to surrender his license to prescribe drugs.

St. Tammany Parish Sheriff Jack Strain said he knew about Nathan's federal conviction when he hired him, but defended the hiring decision because Nathan was willing to work at the jail "for a fraction of the typical cost," according to a news report.

### Maryland

In November 2011, Somerset County Detention Center guard Roland Vernon Bozman, 24, was charged with sexual misconduct with a female prisoner. The

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prisoner, Carla Ruf, 19, informed the acting warden at the facility that she had sexual contact with Bozman in a control room, which included kissing and performing oral sex on him. Bozman reportedly admitted to the incident.

Terrance L. Schoolfield, 31, a guard at the Wicomico County Detention Center, was arrested in July 2011 on charges of second-degree assault, fourth-degree sex offense, general prostitution, perverted practice and sex offense with a prisoner after a weeks-long investigation into allegations that he sexually abused female prisoners. He was jailed without bond.

Schoolfield pleaded guilty to sexual misconduct charges on November 14, 2011. He was sentenced to 18 months in jail and will be allowed to participate in a work release program. He had asked the prisoners for sex in exchange for candy, cigarettes and access to a telephone.

### Massachusetts

On April 6, 2011, a federal jury found that former South Middlesex Correctional Center (SMCC) guard Moises Ballista had violated the civil rights of former prisoner Christina Chao, 31, by having sex with her while she was incarcerated. The jury also

found SMCC supervisor Kelly A. Ryan liable for failing to prevent the sexual abuse despite a history of complaints against Ballista for having sex with prisoners. Chao was awarded \$73,700 in damages.

Ballista, who maintained that he could not be held liable for “consensual” sex, even if it violated state law, admitted to routinely engaging in sexual activity with female prisoners. He previously had been convicted and sentenced to nine months in jail for sexual misconduct at SMCC. [See: *PLN*, Sept. 2011, p.23; Feb. 2010, p.34].

In July 2011, a grand jury indicted Patricia Papa, 41, for sexual relations with a prisoner. Papa worked as the reintegration coordinator at the Lawrence Correctional Alternative Center, a pre-release facility operated by the Essex County Sheriff’s Office. Accused of having sex with a male prisoner, Papa pleaded guilty on March 16, 2012 and was sentenced to 3 years probation and 50 hours of community service. She claimed she had engaged in the sex acts during a “manic” episode due to an undiagnosed bipolar disorder.

### Michigan

Former Tuscola County Sheriff’s Department deputy Dale L. Tompkins, 41,

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## Prisoner Sexual Abuse (cont.)

was arraigned on three counts of second-degree criminal sexual conduct involving a female prisoner on July 27, 2011. He also was charged with receiving a bribe (sexual favors) for nonperformance of a duty (returning the prisoner to jail), permitting escape by delaying arrest, willful neglect of duty and possessing a firearm during the commission of a felony.

Tompkins, who had been a deputy for 13 years, resigned in August 2010. The crimes are alleged to have occurred when he was transporting a female prisoner to the Tuscola County Jail in July 2010, and he let her escape in exchange for having sex with her on the hood of his patrol car. Tompkins pleaded no contest to permitting escape and bribery for nonperformance of duty in October 2011, and was sentenced on December 12, 2011 to 185 days in jail with work release, followed by 180 days on electronic monitoring and three years probation.

On January 24, 2012, former Muskegon County jail deputy Roger James Swan, 43, was bound over on two counts of second-degree criminal sexual conduct and one count of official misconduct, all felonies. Swan is accused of sexually touching and having an improper relationship with a female prisoner in 2009. The touching incidents occurred in a storage room near the jail's laundry area, and Swan reportedly gave the prisoner favors such as free phone calls and a meal from Burger King. He was initially charged with only the two sexual conduct offenses; prosecutors dismissed that case so they could re-charge him with the original counts plus official misconduct. Swan is scheduled to go to trial on those charges in June 2012.

Dwight FitzGerald Mosley, 46, a former parole agent for the Michigan Department of Corrections, pleaded no contest to two counts of second-degree criminal sexual conduct for inappropriately touching a prisoner at the Tuscola Residential Reentry Program. He received a one-year delayed sentence on October 10, 2011.

Mosley, who had previously been accused of sexually assaulting young men, was accused by a 22-year-old male prisoner of touching his penis through his clothing in Mosley's office and sexually penetrating him at Mosley's home. If Mosley completes the one-year delayed sentence, he must serve five years on probation. He also has to register as a sex offender. If he successfully completes his entire sentence the charges will be reduced to misdemeanor fourth-degree criminal sexual contact.

On July 27, 2011, former Lenawee County jail guard Leo Merle Swinehart, 59, was sentenced to one year in jail following a no contest plea to second-degree criminal sexual conduct. He will also have to serve five years on probation. Swinehart was charged with sexually groping a male prisoner in March 2010; he retired while the incident was being investigated. The prosecutor agreed to the no contest plea because Swinehart said he was on medication that made it hard for him to remember the incident.

## Minnesota

The Minnesota Board of Psychology found on July 7, 2011 that Nicole Holman, 33, had been having sex with a Department of Corrections prisoner she was treating for chemical dependency at MCF-Lino Lakes. Recordings of telephone calls revealed "explicit sexual dialogue," and the prisoner had called Holman's cell phone 106 times. The board revoked her license for a minimum of 10 years. She had previously worked as a Hennepin County child protection social worker.

## Mississippi

Kristen Willis, a guard at the Choctaw Detention Center, was indicted on two counts of sexually abusing a prisoner and two counts of sexual contact without permission on September 21, 2011. The jail is on a Native American reservation and the prisoner and Willis are both members of the tribe, thus the charges were filed in federal court. Willis pleaded guilty to one count of abusive sexual contact and was

sentenced on February 2, 2012 to three years probation.

Walnut Grove Mayor William Grady Sims, 61, the former warden of the Walnut Grove Transition Center, was indicted on October 18, 2011 on a federal civil rights charge for sexually assaulting a prisoner, plus a charge of using intimidation or force against a witness for attempting to cover-up the incident. Sims allegedly took a female prisoner to a motel and had sex with her in November 2009, then told her to lie to investigators. On February 14, 2012, Sims pleaded guilty to the witness tampering charge; he has not yet been sentenced.

## Missouri

In May 2011, Ryan Scott Cole, 26, a guard at the Miller County Jail, was accused by a female prisoner, Geneva Darline Parkhurst, of having oral sex with her and engaging in sexual intercourse with two other female prisoners, Teresa Hahn and Vicky Riggs. Cole confessed and was charged with two Class D felonies for sexual contact with a prisoner. On June 8, 2011, he was sentenced to five years probation under a suspended imposition of sentence.

Former Franklin County jailer Damon Berti, 25, was sentenced to four years in prison on October 14, 2011 after pleading guilty to two counts of sexual contact with a prisoner. A third count of rape was dropped as part of the plea agreement. Berti's sentences were run concurrent, then suspended after the judge ordered him to spend 120 days in jail and complete a sex offender treatment program, plus perform 50 hours of community service.

## Nebraska

State Patrol officers arrested Michael M. Huston, 33, a corporal at the Nebraska Correctional Center for Women, on August 25, 2011. He was charged with sexual abuse of a prisoner or parolee and prohibited acts by a corrections officer for having sex with a parolee, and suspended without pay. Huston allegedly ran into the woman after her release on parole in March 2011, and an exchange of phone numbers led to sexual activity. She moved in with him in early August 2011 before investigators were tipped off.

On January 4, 2012, state prison guard Anthony J. Hansen, 27, who worked at the Omaha Correctional Center, was arrested on suspicion of sexually abusing a male prisoner. Hansen allegedly forced the





prisoner to perform oral sex on him despite a policy of "zero tolerance for sexual relationships with inmates," according to Robert Houston, director of the Nebraska Department of Correctional Services. Initially placed on unpaid suspension, Hansen later resigned. Douglas County prosecutors said they have DNA evidence in the case.

### New Jersey

Derick Stevens, an assistant director at the Middlesex County Adult Corrections Center, was charged on December 22, 2011 with second-degree sexual assault, witness tampering and hindering prosecution in connection with sexually abusing a prisoner over a decade before. Stevens, 39, is accused of having sex with a female prisoner when he worked at the county's juvenile detention facility in 2000, then paying her so she wouldn't report the incident. He was suspended from his job at the Adult Corrections Center pending resolution of the charges.

### New Mexico

In September 2011, Leroy Garcia, 59, a former San Juan County jail guard, was sentenced to 18 years in prison for two counts of second-degree felony criminal sexual penetration. Accused of forcing a prisoner to undress and inappropriately touching her, he said she had lured him into the November 2010 encounter. He reportedly gave his victim gum and toilet paper in exchange for not saying anything about the incident, but a guard overheard the prisoner telling her brother about the sexual abuse during a phone call.

Richard Bradberry, 54, a youth care specialist at the Camino Nuevo Youth Center, an Albuquerque juvenile detention facility, was arrested and charged with criminal sexual contact, contributing to the delinquency of a minor, false imprisonment and voyeurism on August 5, 2011. He is accused of groping two 16-year-olds and a 17-year-old girl at the center; investigators were able to corroborate some of the allegations using surveillance video footage. Bradberry, who had worked at the facility for 10 years, was placed on paid administrative leave following his arrest.

### New York

New York City Department of Corrections guard Andrea Buchanan, 30, was arrested on September 20, 2011 and charged with sexual misconduct, forcible

touching and official misconduct. She had been caught having sex with a prisoner at the Eric M. Taylor Center on Rikers Island. Buchanan had worked for the Department of Corrections for six years; she was suspended following her arrest.

Another Rikers Island guard, Clara Espada, 41, pleaded guilty on March 8, 2012 to third degree bribe receiving, a felony, and misdemeanor forcible touching. She was prosecuted for having sex with a male prisoner three times and smuggling drugs, cigarettes and alcohol into the George Motchan Detention Center at Rikers. As part of a plea agreement, Espada is expected to receive a six-month sentence plus probation.

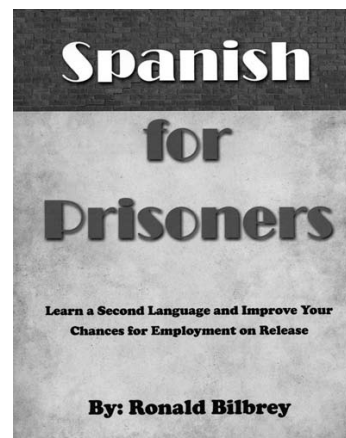
On August 25, 2011, Amy J. Sebella, 42, was charged with four counts of third-degree rape, three counts of third-degree criminal sexual act and official misconduct after she admitted to engaging in sexual activity with a prisoner at the Gouverneur Correctional Facility five times. Sebella, who had been employed as a clerk in the prison store, also admitted she had exchanged "dirty" and "sexually graphic letters" with the prisoner.

Frank DeTucci, 70, a chaplain at the Queensboro Correctional Facility, was arrested in July 2011 on charges of official misconduct, engaging in a criminal sexual act and sexual misconduct after he was discovered kneeling in front of a prisoner with \$200 in his shoe and \$153 in his wallet. DeTucci confessed to having paid the same prisoner \$200 and \$150 on two previous occasions to perform oral sex on him in the chaplain's office. He had been a prison chaplain for 27 years and was a deacon at Our Lady of Mount Carmel Church in Astoria.

Attica Correctional Facility cook Joseph D. Krauss, 46, resigned on October 3, 2011, one day before he was charged with Class E felony third-degree criminal sex act, Class A misdemeanor second-degree sex abuse and Class A misdemeanor official misconduct for having a prisoner perform oral sex on him. Krauss, a 13-year state prison system civilian employee, pleaded guilty on February 7, 2012 to the misdemeanor charges and is awaiting sentencing.

### North Carolina

A Burke County jailer was arrested on March 4, 2011 and charged with sexual activity by a custodian for having sex with a female prisoner. Thomas Edward Pearson, 58, was employed as a sergeant



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## Prisoner Sexual Abuse (cont.)

at the Burke-Catawba Confinement Center when he allegedly had a sexual relationship for over a year with prisoner Alicia Camille Goode, who was awaiting trial on murder charges. [See: *PLN*, May 2011, p.50].

### Ohio

Keli N. Jones, 30, employed at the Warren Correctional Institution, was indicted on charges of sexual battery of a prisoner on September 26, 2011. She is accused of having sexual contact with the prisoner in July, and faces up to five years in prison. Jones had been arrested on August 4, 2011 and released on bond.

Former Lorain Correctional Institution prison guard Elizabeth J. Dennis, 31, was arrested on November 23, 2011 and charged with sexual misconduct with a prisoner. She faces a third-degree felony count of sexual battery and two misdemeanor counts of dereliction of duty. Dennis, who worked in the mail room at the facility, was released on \$4,000 bond two days after her arrest.

### Oregon

On February 29, 2012, Multnomah County corrections deputy Eddie James Miller, 59, turned himself in after he was indicted by a grand jury for having sexual contact with a female prisoner at the Inverness Jail. He pleaded not guilty to charges of official misconduct and custodial sexual misconduct, and was placed on unpaid leave.

Mark John Walker, 52, was employed as a federal probation officer in Eugene for over two decades. He pleaded guilty in April 2011 to sexually abusing five female probationers under his supervision,

and was sentenced on July 18, 2011 to ten years in prison for forcing one woman to have sex with him and fondling the other four. He will also have to serve five years on supervised release, pay a \$25,000 fine and register as a sex offender.

According to a press release from the U.S. Attorney's Office, Walker sexually abused the women by "kissing them or touching their breasts, buttocks, and inner thighs without their consent and in order to gratify his own sexual desires. With one victim, Walker pulled her pants down and forced her to have sexual intercourse with him when he visited her home as part of his official duties." [See: *PLN*, Feb. 2012, p.36].

### Pennsylvania

Kayla D. Davis, 23, was sentenced to five years probation on November 4, 2011 after pleading guilty to two counts of felony institutional sexual assault. She admitted to having sex multiple times with prisoner Kenneth Kunkle when she worked as an intern at the York Community Corrections Center in October 2010. They had sex at a private residence while Kunkle was on weekend passes from the facility. Davis will be required to register as a sex offender for ten years. "If the circumstances were different, she might have been the victim in this," her attorney stated.

On November 23, 2011, a female guard at the Indiana County Jail was arrested on charges of sexually assaulting three female prisoners. Molly Gross, 43, was accused of engaging in sexual misconduct with the victims between 2009 and 2010. One prisoner said Gross would kiss and fondle her in a closet and restroom. Another guard at the facility, Margaret Jane Dailey, 51, who was in a relationship with Gross, was charged with official oppression and making terroristic threats. She is accused of threatening a prisoner with whom Gross was intimately involved. Both Gross and Dailey were suspended without pay.

John Johnson, Jr., 60, a nurse formerly employed by Allegheny Correctional Health Services at the Allegheny County Jail, pleaded guilty to three counts of sexual contact with prisoners in October 2011; he also pleaded no contest to three similar charges. Johnson reportedly gave female prisoners candy, soda and extra medication if they let him fondle them. He threatened them with disciplinary action if they declined. In July 2011, Allegheny

County agreed to pay \$5,000 to settle a lawsuit filed by a prisoner who had been sexually assaulted by Johnson; the county settled a similar suit brought by another prisoner in November 2011 for \$6,000. As this issue of *PLN* goes to press, Johnson has not yet been sentenced.

Another female prisoner at the Allegheny County Jail was sexually abused in 2009, by guard Charles L. Walker. Walker, 40, was prosecuted for exposing himself, putting the prisoner's hand on his groin and forcing her to perform oral sex. He pleaded guilty in March 2011 to a sexual assault charge, and was sentenced to nine months on home confinement and 7 years probation. The prisoner he victimized filed a lawsuit in October 2011, claiming she was physically assaulted by other guards when she returned to the jail to testify against Walker at a court hearing. [See: *PLN*, April, 2010, 50].

A former SCI Houtzdale prison guard, Rachele Autumn Thompson, 47, was charged in November 2011 with three counts of institutional sexual assault and contraband offenses, the latter for smuggling cell phones and money into the facility. Thompson reportedly told investigators that she had delivered the contraband to prisoners Jason Campbell and Maurice Carter, and engaged in sex with Campbell. She also allegedly gave Campbell information about two other staff members at the prison, which he used to contact and threaten them. Campbell was charged with terroristic threats, harassment and contraband offenses; he refused to testify against Thompson, even after being given immunity, and was held in contempt of court.

In September 2011, Harry F. Nicoletti, Jr., 60, a guard at SCI Pittsburgh, was arrested on 89 charges related to sexually abusing prisoners, including multiple counts of institutional sexual assault, involuntary sexual intercourse and official oppression. The criminal complaint accuses Nicoletti of fondling a transgender male prisoner and calling him a "weird freaky monkey" before sexually assaulting him, among other offenses.

Two civil rights lawsuits have been filed against Nicoletti and other prison officials, alleging that for over two years Nicoletti was the ringleader of a group of guards who sexually abused prisoners – especially those convicted of sex offenses against children or believed to be homosexual. Eight guards were suspended and four prison administrators

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were fired or allowed to resign following an investigation. All of the administrators were named as defendants in one of the lawsuits, filed by a prisoner under the pseudonym John Doe.

The prisoner stated in his complaint that he was approached by Nicoletti in January 2010 and given a choice of being anally raped, performing oral sex or touching Nicoletti's genitals. If he refused, Nicoletti threatened him with physical abuse or false disciplinary charges. The second lawsuit, also filed by a John Doe plaintiff, makes similar claims. Nicoletti has denied the allegations and the Pennsylvania State Corrections Officers Association filed grievances over the suspensions, claiming they were baseless and imposed without due process. An arbitrator agreed, and ordered the eight suspended guards reinstated with back pay in March 2012. Criminal charges against five of the guards, including Nicoletti, remain pending.

### South Carolina

Former Charleston County Detention Center guard Samuel Lamar Brown, 25, was arrested on August 30, 2011 and charged with official misconduct by an officer and sexual misconduct with a prisoner. He allegedly engaged in inappropriate contact with a female prisoner in June 2011, and was fired two days after his arrest.

On May 28, 2011, a contract nurse at the Sheriff Al Cannon Detention Center in Charleston was arrested after a guard discovered her performing oral sex on a prisoner who was awaiting trial

in a murder case. Angela Marie Smith, 33, was charged with first degree sexual misconduct with a prisoner. Her bond was set at \$25,000.

Gary Whisonant, 28, a guard with the Department of Juvenile Justice (DJJ), was arrested on October 7, 2011 and charged with sexual misconduct with a prisoner, assault and battery, and two counts of misconduct in office. He allegedly had sex with a prisoner multiple times in August and September 2011 at the Birchwood Campus in Richland County, and improperly touched another on an activity bus. The prisoners were 16 and 19 years old. The DJJ said Whisonant, who reportedly confessed, was fired the day before his arrest.

Georgetown County Detention Center guard Belvin Lee Sherrill, 28, was sentenced on January 23, 2012 to 18 months in prison after pleading guilty to one count of criminal sexual conduct. He also must serve 30 months on probation and register as a sex offender. Sherrill was charged with sexually abusing three female prisoners in 2009; he reportedly went to a cell where the prisoners were held and ordered them to perform an unspecified sex act on him. Sherrill said prior to his sentencing hearing that he was "truly sorry" and "wished it did not happen." Two of the prisoners, who have since been released, have sued Sherrill and the Georgetown County Sheriff's Office.

### Tennessee

Former Shelby County Sheriff's Office sergeant Robert Bradshaw, 53, was arrested and charged with rape, sexual

contact with a prisoner and official oppression in June 2011, after a prisoner accused him of sexual misconduct with another prisoner. Responding to investigators' questions, the alleged victim reported that Bradshaw had touched her inappropriately. The 25-year veteran of the Sheriff's Office was fired on July 19, 2011; he was bound over to a grand jury in late August 2011.

On January 20, 2012, Silverdale Detention Facility guard Tammy DeShawn Jackson, 32, made an initial court appearance and entered a not guilty plea to charges of official misconduct and sexual contact with a prisoner. Jackson, 32, was fired after Corrections Corporation of America (CCA), the company that operates the Chattanooga facility, conducted an investigation. She is accused of having a sexual relationship with a prisoner.

Jon Greer, 27, a former guard at the New Visions Youth Development Center in Nashville, was charged on February 20, 2012 with two counts of sexual battery by an authority figure and two counts of statutory rape for allegedly having sex with a 17-year-old girl held at the state facility. Other juvenile offenders reported Greer, which led to an investigation and his termination in August 2011.

On October 12, 2011, former Hickman County jail administrator Quinton Jerry Wasden, 68, was arrested by Tennessee Bureau of Investigation officers on a charge of rape. He is accused of having sex with a female prisoner on jail property in exchange for giving her "extra freedoms." Wasden had resigned in April 2011 after he was indicted on one count



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## Prisoner Sexual Abuse (cont.)

of sexual contact with a prisoner; that charge was dismissed due to the statute of limitations.

A former corrections officer with the Dickson County Sheriff's Office, Darick S. Wall, 34, turned himself in on February 24, 2012 to face three counts each of sexual battery without consent and sexual contact with prisoners. The charges were the result of an investigation by the Sheriff's Office, the District Attorney's office and the Tennessee Bureau of Investigation, after prisoners at the Dickson County jail reported that Wall had engaged in sexually abusive conduct. He was released on \$10,000 bond.

### Texas

Retired Harris County Sheriff's Office deputy Paul Briones, 54, was arrested on September 28, 2011 after he failed to appear in court on charges of improper sexual activity with a person in custody, a state jail felony. He said he didn't go to court due to health issues. A female prisoner claimed Briones had sex with her at the Harris County Jail in exchange for preferential treatment. Briones also faces charges related to sexually assaulting an underage female relative.

In late February 2012, another former Harris County Sheriff's Office employee, Tony Richards, 48, a senior deputy, was charged with improper sexual activity with a person in custody. He was fired after being accused of having sex with a female prisoner in November 2010.

Kraig D. Lavan, a former guard at Federal Medical Center Carswell, was indicted on December 20, 2011 on one count of sexual abuse of a ward. Lavan allegedly engaged in sexual misconduct at

the facility, which houses female prisoners with medical and mental health needs. He has pleaded not guilty.

"Carswell has a dismal record for protecting women, the female prisoners, from sexual assault," said Tahira Khan Merritt, an attorney who represented a Carswell prisoner in a prior lawsuit related to sexual abuse by a chaplain at the facility. [See: *PLN*, Sept. 2010, p.1].

Former Brown County jailer Jeremy Wayne Essary, 29, was arrested in July 2011 and charged with improper sexual activity and violation of civil rights of a person in custody. Essary had been fired on June 30, 2011 after he was accused of engaging in sex acts with a female prisoner. He was released on \$10,000 bond.

On September 8, 2011, Donald Charles Dunn, 31, a former guard at the T. Don Hutto Family Residential Center, an immigration detention facility operated by CCA, pleaded guilty to federal charges of deprivation of the civil rights of a person in custody. Dunn admitted he had touched female immigration detainees "in a sexual manner" between December 2009 and May 2010, when he transported them to a bus station or airport terminal in a prison van. He was sentenced to 10 months in federal prison on November 22, 2011. The ACLU has since filed a class-action lawsuit against Dunn, CCA and ICE. [See: *PLN*, Dec. 2011, p.42].

Edwin Rodriguez, 30, a former guard at the Willacy County Regional Detention Center, a private prison operated by Management & Training Corporation (MTC), pleaded guilty on August 4, 2011 to sexual abuse of a ward. He admitted to pulling a female prisoner into a guards' restroom and having sex with her in 2008. His victim immediately reported the incident, which was investigated by the Office of Professional Responsibility of the Department of Homeland Security.

"Officers in correctional facilities are entrusted with a great deal of power so that they can carry out their critical public safety responsibilities. This officer abused his power, violating the civil rights of a detainee under his supervision, and violating the public trust," said Thomas Perez, Assistant Attorney General for the Civil Rights Division. Rodriguez was sentenced on October 31, 2011 to 14 months in federal prison plus 10 years on supervised release. He will have to register as a sex offender for life.

According to news reports, Johnson County Law Enforcement Center guard

Amy Sue Lancaster, 40, was arrested on July 14, 2011 and charged with violating the civil rights of a person in custody after she admitted to having sex with a prisoner. She was released on \$5,000 bond. Lancaster was employed by LaSalle Southwest Corrections, the private company that runs the facility; she was caught after passing a suggestive hand-written note to the prisoner.

Marco A. Cedillo, 38, a former Bexar County jail guard, was charged with violating the civil rights of prisoner Laura Elizalde, 25, who reported that he had forced her to have sex and touched her inappropriately at least seven times over a three-week period. Cedillo, who resigned in August 2011, pleaded no contest to the charge and was sentenced on October 27, 2011 to 18 months.

"I had nobody to tell, and when I did tell someone I had people wanting to hurt me," said Elizalde. "So, it's really hard, especially in jail, to even speak to somebody about, you know, stuff that's going on in jail. I mean, it happens quite too much."

On February 15, 2012, Michele L. O'Neal, a Bureau of Prisons guard at the Fort Worth Federal Correctional Institution, was indicted on one count of sexual abuse of a ward. The incident, which occurred in May 2011, allegedly involved O'Neal engaging in sexual conduct with a prisoner identified only as "D.E." She surrendered to the U.S. Marshals on February 23 and was released the same day.

A guard at the Giles W. Dalby Correctional Facility, which houses federal prisoners, was arrested on February 14, 2012 on bribery and contraband charges. Johnny Haynes reportedly smuggled drugs to a prisoner in exchange for cash payments; during an investigation he met with an undercover agent at a Wal-Mart and accepted \$750 and an ounce of marijuana. According to a criminal complaint filed in federal court, he also admitted to having a sexual relationship with a male prisoner at the facility, which is operated by private prison firm MTC.

Whitney Fleming, 27, a former guard at the McLennan County Jail, was sentenced on May 3, 2011 to five years probation after pleading guilty to two counts of improper sexual activity with a person in custody. Fleming, who must also perform 600 hours of community service, had sexual relationships with two male prisoners at the jail in 2009.

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## Utah

On June 8, 2011, former Wasatch County deputy sheriff Christopher Stein Epperson, 33, was indicted by a federal grand jury on three counts of deprivation of civil rights under color of law for engaging in sexual misconduct with a female prisoner. He allegedly touched a 34-year-old prisoner's breast, watched her while she was undressing, forced her into a corner to grope her, made her fondle his genitals, showed her photos of his penis, sexually assaulted her and tried to sodomize her in December 2009.

The prisoner was contacted by investigators after a witness reported the sexual abuse. She has since sued Epperson and the Sheriff's Office, alleging that several other jailers witnessed the sexual misconduct but failed to stop it. A superseding indictment was filed against Epperson on February 1, 2012 which added two more counts of deprivation of civil rights, both related to sexually abusive conduct.

## Vermont

Richard Gallow, 44, a guard at the Chittenden Regional Correctional Facility, was arrested in January 2012 on a

charge of lewd and lascivious conduct for exposing and touching himself multiple times in front of a female prisoner in 2010. According to a State Police press release, other prisoners witnessed Gallow's misconduct. He was placed on paid leave.

## Virginia

On June 13, 2011, former Middle River Regional Jail guard Emerson K. Bell, 31, entered into a plea agreement after he was charged with having sex with a female prisoner. He received a suspended two-year sentence plus two years probation.

Former Richmond City Sheriff's Office deputy Matthew D. Lyttle, 38, was charged with carnal knowledge of a female prisoner at the Richmond City Jail on October 5, 2011. Another deputy at the jail, Mark Kelly, Sr., 49, was charged the same day with having sex with a different female prisoner. Both were fired. Lyttle pleaded no contest on March 21, 2012 and received a five-year suspended sentence.

A former lieutenant at the Fluvanna Correctional Center for Women was arrested on February 28, 2012 and charged with three counts of carnal knowledge of a prisoner. John Bernard Bland, Jr., 40, al-

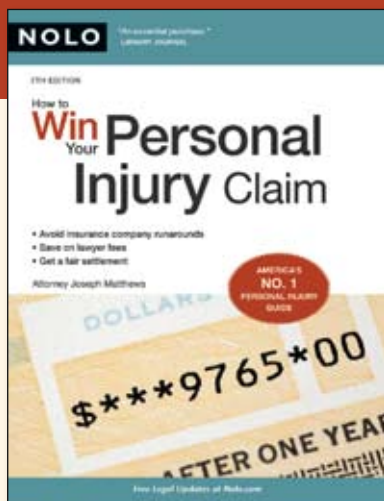
legedly engaged in sexual misconduct with a female prisoner in June and July 2011. The Fluvanna facility was found to have one of the highest reported rates of sexual victimization in the nation according to a 2008-2009 survey of prisoners conducted by the U.S. Department of Justice, Bureau of Justice Statistics.

## Washington

Former state prison guard Danette Skelton, 41, pleaded guilty to custodial sexual misconduct in the first degree, a Class C felony, and was sentenced to six months in jail with work release on September 15, 2011. She will have to register as a sex offender for ten years. In 2009, it was discovered that Skelton had a sexual relationship with a prisoner at the Washington State Reformatory at Monroe.

Jonathan Ryan Clapper, 29, was arraigned on a felony charge of first-degree custodial sexual misconduct on May 18, 2011. He is accused of forcing a prisoner to have sex with him at the Washington Corrections Center for Women, where he worked as a guard, in July 2008. Clapper allegedly discovered two prisoners stealing from canteen carts, then later caught one of them alone and compelled her to

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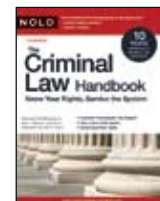
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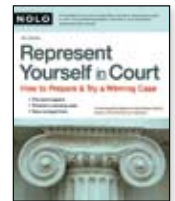
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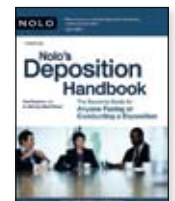
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## Prisoner Sexual Abuse (cont.)

perform a sex act on him. She kept the clothing she was wearing at the time and mailed a camisole to her mother, who gave it to an attorney. The camisole was found to contain Clapper's semen. Following his arrest, Clapper was released on his own recognizance.

### West Virginia

On May 25, 2011, Ron Ray Legg, 64, entered a guilty plea to sexually abusing a female prisoner at the Federal Prison Camp at Alderson, where he worked as a contract testing administrator. Legg admitted that he had forced the prisoner to perform oral sex on him. He was sentenced to a year in federal prison, a \$3,000 fine and one year of supervised release on October 6, 2011.

### Wisconsin

In January 2012, Green Bay Correctional Institution guard Kristina Frappier, 37, was charged with two counts of second-degree sexual assault. Frappier had been suspended in November 2011 during an investigation into her alleged six-month relationship with a prisoner serving a life sentence. She reportedly told investigators that she was in love, she had smuggled a cell phone into the facility so the prisoner could call her, and they had had sex several times in bathrooms at the prison. She was placed on paid administrative leave.

A nurse at the Kettle Moraine Correctional Institution who had a sexual relationship with a prisoner was sentenced to three years probation on April 5, 2011. Laurie A. Blum, 45, was also ordered to participate in counseling and perform 40 hours of community service. Staff at the facility became suspicious when a prisoner was found in the medical unit when he had no reason to be there; a search of his cell uncovered a graphic photo of Blum

and letters they had written to each other. The prisoner, Marlon M. Anderson, 36, has since filed a lawsuit against Blum and prison officials.

### Contributing Factors

The problem of prisoners being raped and sexually abused by prison and jail employees will persist so long as this issue is not taken seriously by policy makers and corrections officials. Although PREA will provide some much-needed direction and guidance in terms of setting standards designed to reduce incidents of prisoner rape and sexual assault, those standards have not yet been promulgated by the U.S. Attorney's Office – nearly a decade after PREA was enacted. And while issuing standards is a good start, they must then be enforced.

Another contributing factor is that some corrections officials still don't grasp the scope of the problem, or even that there is a problem in terms of prisoners being sexually victimized. For example, when representatives from the Orleans Parish Prison in Louisiana and the Clallam County Correctional Facility in Washington State testified before the U.S. Department of Justice's Review Panel on Prison Rape on September 9, 2011, they denied they had the high rates of sexual abuse reflected in a 2008-2009 survey of prisoners at their facilities.

Orleans Parish Prison officials claimed, incredibly, that prisoners had falsely reported sexual abuse in exchange for "bags of cookies" they were given by staff conducting the survey. The lead researcher over the survey noted that there was no difference in the average rates of sexual victimization at facilities where prisoners who participated in the survey received or did not receive cookies.

Clallam County Sheriff Bill Benedict went further, comparing prisoner rape to "cultural delusions" such as UFO sightings, although he acknowledged that

sexual abuse does occur. Of the prisoners surveyed at the Clallam County Correctional Facility, 6.1% reported staff sexual misconduct – more than three times the national average. Given Sheriff Benedict's attitude, one can see why sexual abuse might be a problem at his jail.

Other corrections officials are unwilling to take even modest steps to address the issue of prisoner rape and sexual abuse, such as reporting what they are doing to mitigate such incidents. When *PLN* associate editor Alex Friedmann filed a shareholder resolution with Corrections Corporation of America that would require the company to issue biannual reports on its efforts to reduce prisoner rape and sexual abuse, including statistical data regarding such incidents at CCA facilities, CCA filed a formal objection with the Securities and Exchange Commission (SEC) seeking to exclude the resolution. After the SEC rejected the company's objections on February 10, 2012, CCA's Board of Directors said it would recommend that shareholders vote against the resolution. [See: *PLN*, March 2012, p.18].

Additionally, the consequences – or sometimes the lack thereof – when prison and jail employees sexually abuse prisoners may also contribute to the persistence of this problem. According to a Bureau of Justice Statistics report released in January 2011, concerning sexual victimization of prisoners reported by correctional authorities from 2007 to 2008, 85% of staff members who engaged in sexual misconduct with prisoners lost their jobs (they resigned or were terminated). This means that 15% of sexually abusive employees remained employed. Also, 51% of staff who engaged in sexual misconduct faced legal sanctions such as being arrested, charged, indicted or referred for prosecution. Thus, 49%, or almost half, did not face such sanctions.

One of those corrections employees who kept his job and did not face legal action was Mason Chibnick, a deputy with the Broward Sheriff's Office (BSO) in Florida. In August 2011, Chibnick was accused of inappropriate conduct with female prisoners at the Paul Rein Detention Facility, which included overseeing an "orgy-like" environment in which prisoners danced topless and played Truth or Dare. He allegedly watched prisoners perform sex acts with each other, had "inappropriate conversations" with them and was seen entering a closet with a female prisoner. Chibnick also tracked down a

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former prisoner on Facebook and texted a picture of his penis to another former prisoner's sister.

An internal investigation concluded that Chibnick had "violated the code of ethics, failed to use good judgment and engaged in conduct unbecoming of a BSO employee." Rather than being fired or charged with misconduct, however, he was counseled and transferred to an all-male facility. Chibnick denied any wrongdoing, saying he "would not do anything differently."

### Why Should the Public Care?

Prison walls do not only keep prisoners from getting out; they keep members of the public from looking in. Prisoner rape and sexual abuse endures because prisons and jails are closed, secretive institutions that are rarely exposed to public scrutiny. Not that the public is particularly interested in what happens inside prisons and jails, anyway – even when prisoners are sexually abused. This apathy and lack of public oversight, coupled with inadequate supervision by corrections officials and a "code of silence" that is typical among prison and jail staff, results in an environment conducive to prisoners being sexually victimized.

Beyond having a moral obligation to protect prisoners from rape and sexual assault by corrections staff, and the law-and-order interest of preventing prison and jail employees from committing sex crimes against prisoners, there is also a financial incentive for the public to care about the issue of prisoner rape and sexual abuse.

*PLN* has reported a number of cases in which prisoners have successfully sued after being sexually victimized by staff members, resulting in significant monetary awards. For example, sex abuse scandals at two Oklahoma jails resulted in recent settlements of \$10 million and \$13.5 million. [See: *PLN*, March 2012, p.24]. In July 2009, the State of Michigan agreed to pay \$100 million to settle a class-action lawsuit that involved the systemic sexual abuse of female prisoners by Department of Corrections employees. [See: *PLN*, Dec. 2009, p.30].

More recently, on February 16, 2012, a federal jury in New Mexico awarded \$3 million to three female prisoners who were sexually assaulted in 2007 by Anthony Townes, a guard at the Camino Nuevo Women's Correctional Facility, which at the time was operated by CCA. *PLN* will report details related to that case in an upcoming issue. Townes had previously been convicted of rape and sentenced to 18 years in prison. [See: *PLN*, Jan. 2010, p.50; Dec. 2007, p.42].

Such settlements and jury awards are usually paid with public – i.e., taxpayer – funds, which indicates there is in fact a price tag for failing to prevent prisoner rape and sexual abuse. This is another, often overlooked cost of our nation's criminal justice system: the monetary cost of lawsuits filed by prisoners who are raped and sexually abused, as well as the physical and emotional costs suffered by those prisoners.

However, the bureaucrats running detention facilities and their political masters seem to view the occasional payout as

being "the cost of doing business." And the reality is that prisoners who are raped by staff face substantial obstacles in getting their claims heard by the courts; given the prevalence of the problem, the relative paucity of verdicts and settlements proves the illusory nature of adequate legal remedies for prisoner rape victims. The Prison Litigation Reform Act (PLRA), with its administrative exhaustion requirement and limits on injunctions and attorney fees, severely restricts the ability of prisoner sexual assault victims to seek redress in the federal court system.

Plus there is a public safety factor. Sexually abusive prison and jail staff may also be inclined to commit sex crimes against non-prisoners; by failing to take action when corrections employees engage in sexual misconduct with prisoners, the public may be put at risk.

On October 27, 2011, an Ohio jury convicted former Cleveland House of Corrections (CHC) guard James Belle, 32, of forcing a transgender male prisoner to perform a sex act on him in March 2010. The prisoner, who was housed in a protective custody unit where Belle worked, reported the crime to CHC officials but was ignored. He then reported it to Highland Hills police and a rape kit was performed. Video surveillance supported the prisoner's accusations.

While awaiting trial, Belle was arrested for raping a 21-year-old woman he met on a phone chat line in April 2010. Had there been prompt action by CHC when Belle's sexual misconduct involving a prisoner was first reported, he might not have committed the rape – which occurred

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one month later.

Belle was subsequently convicted of sexual battery, rape, kidnapping and gross sexual imposition, and was sentenced in November 2011 to 11½ years in prison – ten years for sexually assaulting the CHC prisoner and 18 months for raping the woman he met on the chat line. He also will have to register as a sex offender.

Terrie Zornes, 47, a former guard at the McDonald County jail in Missouri, pleaded guilty in September 2011 to charges of sexual misconduct with a minor; he was accused of making sexual advances towards a 14-year-old girl, exposing himself, trying to molest her, and sending her pornographic pictures on her cell phone. As part of a plea agreement for a four-year sentence, charges of forcible rape of a prisoner were dropped.

Zornes had separately been charged with raping 17-year-old prisoner Sheena Eastburn in a property room at the county jail when he was employed at the facility in 1994. Although the sheriff was reportedly aware of the rape, Zornes was not prosecuted at the time. Had he been charged, convicted and required to register as a sex offender, the crimes he subsequently committed against his 14-year-old victim may have been avoided.

In March 2012, Chester, Pennsylvania constable Kevin Joseph Walker, who also served as a part-time police officer, was charged with sexually abusing a female prisoner he was transporting from court. Walker allegedly asked her to show him her breasts; in return, he said he would expedite her release paperwork. He later fondled her when removing a restraint chain. Walker had previously been charged in December 2011 with official oppression, rape by threat of forcible compulsion, sexual assault, aggravated indecent assault, indecent assault and stalking, for coercing sexual acts from two other women and harassing a third.

One of those three victims, who was pregnant, had been taken into custody and was held at a police station alone with Walker. He made her describe how she would perform oral sex on him, and required her to strip naked while he stood close to her. The other two women he was accused of sexually abusing and stalking were not prisoners; one was a witness in a domestic assault case, the other he had met during a traffic stop. Like Belle and

Zornes, Walker apparently was an equal-opportunity abuser who preyed on both prisoners and non-prisoners.

Sometimes prison and jail staff even sexually victimize their own colleagues. That was the case with Maurice Frazier, 45, a lieutenant in the jail division of the Marion County, Indiana sheriff's department. Frazier was arrested on May 6, 2011 and charged with sexual battery, official misconduct and criminal confinement, stemming from his sexual advances towards other sheriff's employees, which included groping and fondling them. "His victims happen to be other deputies, female deputy sheriffs," said Sheriff John Layton. Frazier, who was fired shortly after being charged, reportedly claimed he was a sex addict.

In North Carolina, Eric Lashawn Askew, 28, a sergeant at the Rivers Correctional Institution, a private prison operated by GEO Group that houses federal prisoners, turned himself in on March 9, 2011 to face charges of attempted second degree rape, sexual battery and assault on a female. Askew's alleged victim was a guard employed at the same facility. He was released on a \$25,000 secured bond. [See: *PLN*, July 2011, p.50].

And in March 2011, Craig J. Wilhelm, 30, a former Vanderburgh County, Indiana deputy jailer, was sentenced to two years probation for exposing himself to female co-workers and inappropriately touching one of his victims. As part of a plea agreement, six other charges were dropped. Wilhelm had resigned after the incident, which reportedly took place in an "employees only" area of the jail where there were no security cameras.

### Conclusion

Despite legal reforms that criminalize sexual activity between prison and jail employees and prisoners, such incidents continue to occur. The media and even some prosecutors still use terms like "consensual sexual relationship" to describe cases in which prisoners engage in sex acts with staff members – even though there can be no real consent due to the inherent power imbalance between the keepers and the kept.

One encouraging development is the creation of the National Resource Center for the Elimination of Prison Rape, a joint project of the National Council on Crime and Delinquency and the Bureau of Justice Assistance. Established on July 1, 2011, the Center serves as a national

source "for online and direct support, training, technical assistance, and research to assist adult and juvenile corrections, detention, and law enforcement professionals in their ongoing work to eliminate sexual assault in confinement."

However, until there is a substantial change in the way prisoner rape and sexual abuse is perceived and addressed by prison and jail officials, such incidents will persist. Public education regarding this issue, better training for corrections employees, greater oversight by prison and jail administrators, mandatory prosecution of staff members who engage in sexual misconduct, and promulgation of the long-delayed PREA standards and enforcement of those standards would result in much-needed improvements.

Another critical element is to repeal the PLRA so that prisoners who are victims of rape and sexual assault do not have to exhaust the grievance system before filing suit. This would also allow the courts to enjoin practices that contribute to prison rape, and would remove limits on attorney fees so lawyers would be willing to take prison rape cases and hold corrections officials accountable.

Further, independent data collection, audits and analysis of the number of reported sexual assaults in detention facilities would be a huge step forward over the current self-reporting process used to collect PREA data.

But this, perhaps, is asking too much. Consequently, in another three years *PLN* will likely be publishing another cover story with a compilation of news reports that document the continued problem of prisoner rape and sexual abuse by prison and jail staff. ■

Sources: *Associated Press*, [www.just-detention.org](http://www.just-detention.org), *Abilene Reporter-News*, *Atlanta Journal-Constitution*, [www.woio.com](http://www.woio.com), [www.wtvr.com](http://www.wtvr.com), *Salt Lake Tribune*, [www.certops.com](http://www.certops.com), *Hawaii News Now*, [www.valleycentral.com](http://www.valleycentral.com), [www.wboc.com](http://www.wboc.com), *Seattle Times*, [www.neitimes.com](http://www.neitimes.com), [www.krqe.com](http://www.krqe.com), [www.correctionsone.com](http://www.correctionsone.com), [www.kitsapsun.com](http://www.kitsapsun.com), [www.amestrib.com](http://www.amestrib.com), *The Capital-Journal*, [www.lakenewsonline.com](http://www.lakenewsonline.com), [www.wtov9.com](http://www.wtov9.com), [www.news-gazette.com](http://www.news-gazette.com), *Des Moines Register*, [www.boston.com](http://www.boston.com), [www2.newsvirginian.com](http://www2.newsvirginian.com), [www.theadvertiser.com](http://www.theadvertiser.com), [www.mlive.com](http://www.mlive.com), *Star-Telegram*, [www.laht.com](http://www.laht.com), [www.joplinglobe.com](http://www.joplinglobe.com), *South Florida Sun-Sentinel*, [www.omaha.com](http://www.omaha.com), [www.wmbfnews.com](http://www.wmbfnews.com), [www.koat.com](http://www.koat.com), [April 2012](http://http://</a></p></div><div data-bbox=)

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## Ohio Facility is Recycling Trash, Saving Money Thanks to Prisoners' Slave Labor

by Joe Watson

**R**ecycling was a foreign concept to Randy Cantebury, a training officer at the medium-security Marion Correctional Institute (MCI) in Marion, Ohio.

In early 2011, MCI prisoners told Cantebury, who runs the facility's gardening and aquatic programs, that they wanted to start a recycling program. But he had no idea where to begin.

"I didn't recycle myself," Cantebury told the *Marion Star*, "so they suggested I start." After reaping the benefits of recycling at home, where Cantebury estimated he saved hundreds of dollars every year, he applied his new skill set to MCI's population of 2,600 prisoners and 448 employees, who generate plenty of garbage.

A sorting center opened in April 2011 and began diverting 25 to 30 tons of trash from the prison each month. The center employs 23 prisoners who drive forklifts, load trailers and operate a compactor. According to MCI deputy warden Tim Milligan, because the prison pays to have its waste taken to a landfill, recycling is saving the facility over \$1,000 a month.

Now, Sims Brothers, a local recycling

company, is paying MCI to have prisoners sort, compact and prepare bulk loads of plastics for shipping. Along with a \$10,000 grant from the Ohio Department of Natural Resources, Cantebury said the additional revenue will be re-invested in the prison's recycling program.

Prisoners employed at the center earn from \$18 to \$25 a month, the same as other prison jobs, and occasionally receive free "hygiene bags" with deodorant and soap they'd otherwise have to purchase. But the payoff goes further than prisoner wages and anti-perspirant, according to Cantebury. "We want to create jobs that create a better quality of life for the inmates," he stated. Using prison slave labor to help private companies boost their profit margins is what passes for a successful jobs program in the United States these days. Does \$25 a month really create a better quality of life for prisoners?

Jeff Clark, an executive with Sims Brothers, said he would consider hiring prisoners who were employed at MCI's recycling center upon their release. But this begs the question of why should he hire

non-prisoners at even the minimum wage when he can get the same work done for \$25 a month? Why doesn't he pay the prisoners the same wages he pays non-prisoners?

The answer to that question is self-evident: It's more profitable to use cheap prison slave labor and to have a captive work force that is happy to sort trash for low wages. 🐻

Source: *Marion Star*

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# From the Editor

by Paul Wright

This month's cover story on the prevalence of prisoner rape and sexual abuse by prison and jail staff is the third major article of its type *PLN* has run since 2006. This is in addition to the dozens of articles we publish each year on other news reports and lawsuits related to prison and jail employees raping prisoners, plus the short write-ups we run in our News in Brief (NIB) section in each issue.

The genesis for these "round up" compilations came when we would save all the source articles for our News in Brief section. As I would compile materials for the NIB, I would seek a cross-section of reports, both geographic and news-wise. Since most NIB sections had at least 2-3 items about prisoners being raped by employees, I would put the excess reports aside, thinking I would use them in the next month's issue. Otherwise the NIB section would become the "Prisoners Raped by Employees" section of *PLN*.

Alas, by the time the next month's NIB section was ready there would be still more stories on the topic, and thus the pile of news articles on prisoner rape and sexual abuse would grow. After awhile the pile of articles was several inches high, hence the idea to run compilation cover stories – which also serve to demonstrate the widespread nature of the problem of prison and jail employees sexually assaulting the prisoners in their care and custody.

It is worth noting that for this month's cover story we limited the included news reports to those within the past one-year period, which was far from an exhaustive search. This is simply what comes across our desks in the ordinary course of *PLN*'s regular news gathering, and it includes the obvious caveat that the vast majority of sexual assaults committed by prison and jail employees are never reported, are not covered by the mainstream news media and do not result in legal action, whether civil or criminal.

Yet it is prisons in the Balkans, not the U.S., that are referred to as "rape camps." Further, the connection between human rights, the fundamental right to be free from rape and sexual abuse, and prison and jail officials carrying out such assaults is never raised in the mainstream media or addressed by the U.S. government. As this issue's cover story notes, nine years after its enactment the Prison Rape Elimination

Act's minimal standards have not been implemented, which indicates how low of a priority preventing prison rape is for government officials. In a future issue of *PLN* we will discuss the limitations and weaknesses of PREA itself, which does little to actually limit, stop or prevent the rape and sexual abuse of prisoners.

The saddest duty I have as editor of *PLN* is reporting the death of our friends and supporters. After almost 22 years of publishing this has been a regular and dreaded part of my job. In previous issues of *PLN* I had mentioned Nelly, our office mascot. Nelly was a 12-year-old golden retriever who belonged to Susan Schwartzkopf, our advertising director. Since Susan started working for *PLN* in 2007, Nelly came to work with her and was a joy to have in our office. Nelly liked everyone. When she met people who weren't dog friendly she was determined to win them over, and she always did. She had the UPS and FedEx delivery people well-trained to bring her treats whenever they delivered packages to our office.

On March 15, 2012, Nelly died in her sleep at home. She will be sorely missed by all of her friends and family members, and everyone who works at *PLN*. She came to the office until one week before she died, and was slow and lethargic, which was not like her. The veterinarian gave her only a short time to live. Susan brought Nelly home and over the next several days many of Nelly's friends came by to visit and say goodbye. She got to eat all of her favorite foods: steak, pizza crusts, crab rangoon and other goodies. Even as her health declined



**Nelly, 1999–2012**

she was happy to see everyone and did her best to make everyone around her happy.

I thought that as these things go, Nelly made a great exit from the stage of life: She was at home, surrounded by her friends and family, getting all the love and attention she needed and all her favorite treats. That is a far cry from the reality faced by the 5,000 prisoners, on average, who die in prisons and jails across the U.S. each year. Would that we should all be so lucky when our time comes to pass away.

The *PLN* office will be a much sadder and quieter place without Nelly, who will be greatly missed. She was buried in the yard of Susan's house next to the woods she loved to roam in, where she chased squirrels she never caught. We would like to thank the many people who have expressed their sorrow over Nelly's passing. 🐾

## Indiana Prosecutor Disciplined for Conflict of Interest

by Matt Clarke

Delaware County, Indiana prosecutor Mark R. McKinney was suspended from practicing law for 120 days beginning on July 28, 2011. He was disciplined for engaging in professional misconduct by handling criminal prosecutions and civil forfeiture cases involving the same defendants while working as a deputy prosecutor from 1995 until 2006. The reason this was deemed misconduct was that many prosecutors routinely keep most

or all of the forfeited money for "law enforcement expenses." Under the Indiana Constitution, however, such funds are supposed to be turned over to the state's Common School Fund.

Two other prosecutors have been strongly criticized for similar misconduct, but McKinney's case was especially egregious because he contracted with the prosecutor's office as a private attorney to handle forfeiture cases in return for keep-

ing 25% of the seized assets.

The Indiana Supreme Court's scathing disciplinary order said McKinney's dual role "created a conflict of interest between his duties as a public official and the private gain he realized in forfeiture proceedings." Further, "on numerous occasions when the ethics of asset forfeiture proceedings were called into question, [McKinney] turned a blind eye and acted to protect his private interest in his continued pursuit of forfeited property."

After an investigation by the state Supreme Court's disciplinary commission determined that McKinney's actions constituted misconduct, the judge at his disciplinary hearing recommended a public reprimand. The Supreme Court disagreed, opting for the stronger sanction of suspension, noting that "the public trust in [McKinney's] ability to faithfully and independently represent the interests of the state was compromised" by his actions.

Although the Court's order said there was no evidence McKinney had "explicitly agreed to offer favorable treatment to a criminal defendant in exchange for money transferred" to him in a forfeiture action, that certainly was a concern. Even if there was no explicit exchange of favors, "it would doubtlessly be evident to such a defendant, and to his or her attorney if represented, that prosecutorial discretion in how to proceed with the criminal case was held by one who stood to reap personal financial gain if the defendant agreed to the forfeiture of his assets." See: *In the Matter of Mark R. McKinney*, Indiana Supreme Court, No. 18S00-0905-DI-220.

Thus, McKinney could have agreed

to a lesser sentence or a lesser charge for a criminal defendant in exchange for an uncontested asset forfeiture, 25% of which would go into his own pocket, and none would be the wiser. This was especially true after 2002, when McKinney began using "Confidential Settlement Agreements" to obtain seized property and cash "without court supervision or public disclosure."

In 2009, McKinney was ordered by a circuit court to repay \$168,092 in attorney fees and funds obtained by civil forfeiture in drug-related cases. The court said the funds had been seized without a court order in violation of state law. Another prosecutor, Eric Hoffman, was ordered to return \$17,164.

"At the end of the day, civil forfeiture counsel McKinney and Hoffman had control of forfeited assets and directed where they went," said Circuit Court Judge Richard Dailey. "These two attorneys were willing to use the legitimacy and authority of the judicial system in pursuit of civil drug forfeitures, but they were unwilling to submit their actions in these agreements to judicial scrutiny."

Judge Dailey said the prosecutors' "handling of civil drug forfeitures amounts to fraud on the court."

However, McKinney's suspension was not a warning to all prosecutors engaging in similar conduct, according to University School of Law-Indianapolis professor Joel Schumm. That's because while McKinney's case was extreme, his punishment was fairly light. "Probably a lot of prosecutors aren't technically following the law," Prof. Schumm stated.

The Indiana Prosecuting Attorneys

Council and Indiana Attorney General Greg Zoeller have issued opinions supporting the actions of prosecutors who retain forfeited funds for law enforcement purposes rather than transfer them to the Common School Fund, despite criticism from the state Supreme Court and Governor Mitch Daniels.

State Senator Richard Bray introduced a bill (Senate Enrolled Act 215) in 2011 that would allow prosecutors and law enforcement agencies to keep 85% of forfeited assets and remit just 15% to the Common School Fund. The legislation passed, but was vetoed by Governor Daniels on May 13, 2011.

Alas, the Common School Fund, which pays for school construction, charters and technology, has no constituency and prosecutors are, after all, lawyers; thus, the money will most likely continue to pour into the pockets of law enforcement officials and not the state's schools. According to a 2010 investigation by the *Indianapolis Star*, only one Indiana county made any significant contributions from forfeited assets to the Common School Fund from August 2008 through July 2010.

"The money is just too great a motivation, and prosecutors and police are going to want to continue keeping basically all of it," said Indianapolis attorney Paul K. Ogden, who is challenging the constitutionality of the manner in which many state prosecutors handle civil forfeiture cases. ■

Sources: [www.indystar.com](http://www.indystar.com), [www.forfeitureform.com](http://www.forfeitureform.com), *Muncie Star Press*

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# HRDC, Other Organizations Send Joint Letter to Tennessee DOC Commissioner

by Alex Friedmann

On March 8, 2012, the Human Rights Defense Center (HRDC – the parent organization of *Prison Legal News*), in conjunction with three other organizations, sent a letter to Derrick Schofield, Commissioner of the Tennessee Dept. of Corrections (TDOC), regarding policy changes that Schofield had implemented.

Within months after being appointed TDOC Commissioner in January 2011, Schofield instituted a number of policies that were widely perceived as being punitive. They included:

- Requiring prisoners to walk in a single-file line under escort by prison staff, a specified distance apart. Prisoners are not allowed to talk while under escort.
- Forbidding prisoners from keeping their hands in their pockets while under escort, even during cold weather, although the TDOC had not issued gloves to all prisoners.
- Requiring prisoners to be neatly dressed, to keep their cells in an orderly condition with beds made, and to stand at attention during morning inspections without speaking, engaging in any other activity or making eye contact with the inspectors. This includes prisoners who work night shifts and do not get off work until early in the morning, yet must be out of bed for inspection.
- When prisoners are called to meals, they are required to line up and wait outside until it is their turn to go to the dining hall, even when it is raining.
- Requiring prisoners to keep their property in specific locations in their cells, while property storage rules were changed multiple times in an apparently arbitrary manner, leading to confusion and frustration among both prisoners and staff.
- Prisoners may no longer possess coat hangers, which makes it difficult to dry wet towels because nothing is allowed to be hung on cell walls. Permissible items on the property list were changed and rather than being grandfathered in, items no longer allowed were confiscated or had to be mailed out.
- Requiring prisoners to greet high-ranking staff members with designated phrases (such as “good morning warden”); staff members were likewise required to recite specific phrases when encountering certain administrative officials or visitors

(e.g., the institutional motto).

- Curtailing arts and crafts programs at some facilities, including in-cell arts and crafts, and restricting access to musical instruments.

HRDC and three Tennessee-based criminal justice organizations, Reconciliation Ministries, TN CURE (Citizens United for Rehabilitation of Errants) and the Tennessee Alliance for Reform, stated in their joint letter to Commissioner Schofield that the policy changes may have resulted in “significant unintended consequences.”

At least four TDOC wardens have resigned or retired since Schofield was appointed Commissioner, some due to the implementation of the new policies. Further, a number of TDOC staff, from the warden level down, contacted HRDC to comment on the adverse impact the policy changes have had on both prisoners and TDOC employees. Those staff members did not want to be identified due to fear of retaliation.

HRDC and the other organizations that wrote to Schofield expressed concern “that the militaristic policy changes ... are causing an increase in violence and misconduct among prisoners while failing to facilitate the rehabilitation of prisoners and negatively impacting the safety of both inmates and staff. Indeed, if some of the policy changes are intended to improve safety and security at TDOC facilities, they may be having the exact opposite effect.”

Months before the joint letter was sent to Commissioner Schofield, HRDC had filed public records requests with the TDOC for data related to prisoner-on-prisoner assaults, prisoner-on-staff assaults and institutional disturbances at state prisons for calendar years 2009, 2010 and 2011.

According to the data produced by the TDOC, Tennessee prisons experienced a higher average number and rate of violent incidents after Schofield was appointed Commissioner in January 2011. For example, in 2010 the average number of violent incidents per month system-wide at the 14 facilities housing Tennessee state prisoners (including three privately-operated prisons) was 310.4, with an

average of 22.17 incidents per facility per month. The average rate of violent incidents per 1,000 prisoner population in the TDOC was 15.57 in 2010.

From January 2011 to December 2011, during Schofield’s first year serving as TDOC Commissioner, the average number of violent incidents per month system-wide increased to 329.33; the average number of incidents per facility per month increased to 23.52; and the average rate of violent incidents per 1,000 prisoner population rose to 16.42. Significantly, the average number of prisoner-on-staff assaults, which was fairly stable from 2009 to 2010 at 54.75 and 55.0 incidents per month, respectively, jumped to an average 62.16 incidents per month during 2011.

In their joint letter to Schofield, HRDC and the other organizations remarked, “to the extent that the policy changes you have implemented are contributing to higher levels of violence, they are endangering both prisoners and staff members, which we believe is unacceptable and deserving of review. As just one example, in May 2011 a female TDOC guard at the Turney Center prison was stabbed over a dozen times by two prisoners and hospitalized – a very rare occurrence in the TDOC.”

Tennessee prison officials were aware of the increase in violent incidents under Schofield’s tenure. For example, an internal TDOC memo on “Class A & Selected Other Incidents” noted that “[d]uring June 2011, assaults on staff incidents rate increased by 11.9% from the previous month and is 60.2% greater than June 2010. June’s rate is also 59.0% higher than the FY 2010 monthly average.”

The punitive policy changes instituted by Schofield are similar to policies in Georgia’s prison system – where Schofield was employed prior to being appointed TDOC Commissioner. The joint letter sent to Schofield noted that “Georgia’s prison system is no panacea,” and that his policy changes, which are apparently intended to make Tennessee prisons more like Georgia’s, “ignore significant problems that have occurred in the Georgia DOC.”

For example, on November 25, 2011, Georgia prison officials lost control at Hancock State Prison; a dozen prisoners were injured and two were airlifted to local



hospitals. Prisoners set fires, broke into an administrative office and caused extensive property damage at the facility. That incident occurred just days after three prisoners were hospitalized and a guard was injured during a riot at Telfair State Prison. A prisoner was killed at Smith State Prison on November 28, 2011.

And on February 17, 2012, a federal lawsuit filed by prisoners who claimed they were beaten, kicked and knocked unconscious by guards at Hays State Prison settled for \$93,000. See: *Nwakanma v. Clark*, U.S.D.C. (N.D. Ga.), Case No. 4:11-cv-00199-HLM.

Previously, in December 2010, prisoners at seven Georgia prisons staged a coordinated protest seeking improved living conditions – including better food, more educational programs and various policy changes. The protest resulted in lockdowns at several facilities and retaliatory beatings by staff that led to the indictment and arrest of seven guards at Macon State Prison. [See: *PLN*, Jan. 2011, p.24].

The joint letter sent to Commissioner Schofield by HRDC, Reconciliation, TN CURE and the Tennessee Alliance for Reform concluded, “we do not want to see similar violent incidents occur in Tennessee’s prison system due to policy changes implemented by your administration that do not accomplish the goals of institutional safety and security or the rehabilitation of prisoners.”

Copies of the letter were delivered to Governor Bill Haslam and Tennessee state lawmakers, including the chairpersons of the House and Senate Judiciary Committees.

Sources: *Letter to TDOC Commissioner Derrick Schofield (March 8, 2012); Atlanta Journal-Constitution*

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## Fourth Circuit Remands Prisoner’s Equal Protection Claim

*by Mike Brodheim*

On March 17, 2011, in an unpublished *per curiam* decision, the Fourth Circuit remanded a prisoner’s equal protection claim that alleged black prisoners were routinely ordered to perform more degrading tasks than their white counterparts, and that such job assignment decisions were made on the basis of race “with the intent to humiliate and embarrass the black inmates.”

The district court had dismissed Cornell F. Daye’s § 1983 complaint at the initial screening stage pursuant to 28 U.S.C. § 1915A. Daye had sued West Virginia prison officials in 2009, alleging that the treatment he received at his prison job was unconstitutional.

Daye raised two claims: 1) that the treatment at his prison job was racially discriminatory, and 2) that he was fired for complaining about the discrimination in violation of the First Amendment.

While the Fourth Circuit vacated the district court’s dismissal on the equal protection claim, it affirmed the dismissal of Daye’s First Amendment claim, holding that his verbal complaints to prison officials were not constitutionally protected.

*PLN* readers should note that to

the extent Daye was complaining about racial discrimination, the latter holding may conflict with decisions of other circuit courts, where complaints concerning racial discrimination would likely receive constitutional protection. See: *Daye v. Rubenstein*, 417 Fed.Appx. 317 (4th Cir. 2011) (unpublished); 2011 WL 917248. ■

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# Court Grants Preliminary Injunction to *PLN* in Sacramento County Jail Censorship Suit

On March 8, 2012, U.S. District Court Judge John A. Mendez entered a preliminary injunction against the County of Sacramento, California in a lawsuit that alleges unconstitutional censorship of publications sent to prisoners at the county's jail.

*Prison Legal News* filed the lawsuit in federal court in April 2011. According to the complaint, Sacramento County jail officials refused to deliver *PLN*'s monthly publication to prisoners and failed to notify *PLN* of that censorship in violation of the First and Fourteenth Amendments to the U.S. Constitution.

The jail claimed that *PLN*'s publication was rejected because it contains small staples (used to hold the magazine together) and includes mailing labels or stickers. Jail officials said the staples and labels presented a security risk.

In his order granting *PLN*'s motion for a preliminary injunction, Judge Mendez rejected that rationale, finding the jail's censorship of publications sent to prisoners was "an exaggerated response to any security concerns posed by *PLN*."

The court further held that *PLN* "has demonstrated a likelihood of success on the merits of its First Amendment claim," and that the defendants' "policies and practices including refusing to deliver *PLN* publications and mailings to prisoners because they contained staples and/or a mailing label are not supported by a legitimate penological interest and do not leave open alternative means for *PLN* to exercise its First Amendment rights."

"The taxpayers of Sacramento County should be very concerned about their elected officials wasting their money defending violations of constitutional rights," said attorney Ernest Galvan, who represented *PLN* at the preliminary injunction hearing. "The alleged justification for these acts of censorship is literally paper thin."

Judge Mendez noted the jail could remove the staples and labels from *PLN*'s monthly publication, so long as the publications were delivered to prisoners. *PLN* recently prevailed in another censorship lawsuit involving a county jail in South Carolina, which had also cited staples as justification for refusing to deliver *PLN*'s publications.

That case settled in January 2012 with the county agreeing to make policy changes and paying \$100,000 in damages and \$499,900 in *PLN*'s attorney fees and costs. [See: *PLN*, Feb. 2012, p.14; Nov. 2010, p.38].

"Jail officials, including those in Sacramento County, cannot use pretexts such as staples or mailing labels to justify censorship of publications in violation of the First Amendment," said *PLN* editor Paul Wright. "This is particularly true when the jail allows other publications with staples to be delivered to prisoners, but not *PLN* – which evidences unconsti-

tutional content-based censorship."

*PLN*'s lawsuit against Sacramento County, which remains pending, also seeks declaratory relief, compensatory and punitive damages, and attorney fees and costs. *PLN* is represented by Sanford Jay Rosen, Ernest Galvan, Kenneth Walczak and Blake Thompson of Rosen, Bien & Galvan, LLP, a San Francisco law firm, as well as Human Rights Defense Center chief counsel Lance Weber.

We will report the eventual outcome in this case. See: *Prison Legal News v. County of Sacramento*, U.S.D.C. (E.D. Cal.), Case No. 2:11-cv-00907. ■

## Texas Harasses, Denies Compensation to Wrongly Convicted

by Matt Clarke

Texas has a generous compensation package for prisoners who are exonerated, which includes \$80,000 per year of wrongful incarceration, an annuity with annual payments in the same amount, free college tuition and free medical care. [See: *PLN*, July 2009, p.12]. However, some state officials are stingy with granting compensation and others have harassed wrongly convicted former prisoners for back child support.

Anthony Graves served 18 years for capital murder, including 12 on death row. He was released in October 2010 after prosecutors determined that he was innocent and had been unfairly targeted and convicted. However, because the court order that granted his freedom did not contain the words "released due to actual innocence," Texas State Comptroller Susan Combs said Graves didn't qualify for compensation, forcing him to sue the Attorney General's office (AG) for a declaration of innocence.

The AG, while acknowledging that Graves' case was "truly troubling and deeply compelling," said the law didn't allow for such a declaration. But the law did allow the AG to seek more than \$4,000 in back child support from Graves – child support that accrued while he was wrongly incarcerated. The AG's office began sending Graves monthly bills demanding payment.

Graves is not the only exoneree suf-

fering from Combs' strict interpretation of Texas' compensation law. Ronald Taylor spent over 14 years in prison for a rape he didn't commit. When he applied for compensation, Combs discounted all but three months of his prison time because he had been on parole when he was arrested for the rape, and the sentence for which he was on parole expired just three months before he was released. Of course, his parole would not have been violated but for his wrongful conviction. Instead of the \$1.14 million cash compensation and annuity that Taylor expected to receive, Combs offered him \$20,000. He declined.

"I really felt insulted when I went to prison for rape. That's probably the worst crime you could get convicted of," said Taylor. "But to offer me \$20,000 to rebuild my life, man? Yeah, that's an insult, too. It really is."

For similar reasons, Combs cut \$66,000 from the compensation payment for Billy James Smith, who spent 20 years in prison after being wrongly convicted, and reduced by almost \$145,000 the compensation for Gregory Wallis, who served 18 years for burglary with the intent to commit sexual assault before being exonerated by DNA evidence. Both had been on parole at the time they were arrested and wrongly convicted.

Another exoneree, Clarence Brandley, 59, spent 10 years on death row in Texas

for a murder he didn't commit. The judge who presided over his habeas corpus hearing said that in 30 years on the bench, "no case has presented a more shocking scenario of the effect of racial prejudice, perjured testimony, witness intimidation and an investigation the outcome of which has been predetermined." Brandley's release from prison predated the state's compensation law, so he sued for compensation and to halt child support payments – and lost.

Twenty-one years after his exoneration and release from prison, Brandley still receives monthly bills from the AG for back child support. His children are now 35 and 39 years old. A recent bill sought payment of \$260 on a balance of over \$12,600. Brandley can't pay because he lost his job during the economic downturn. Since then he has also lost his car and housing, forcing him to stay with relatives.

Brandley said he would not have fallen behind on his child support payments had the state not wrongly imprisoned him. What does he do with the monthly bills?

"I just tear them up," he said.

Taylor, Smith and Wallis appealed

directly to the Texas Supreme Court through petitions for a writ of mandamus. Complicating the state's position was the fact that compensation had already been granted to a man whose probation was revoked when he was prosecuted in the infamous 1999 Tulia drug sweep that resulted in hundreds of false arrests and convictions. [See: *PLN*, March 2003, p.24; Nov. 2005, p.21].

The state argued that probation and parole were different, but the Texas Supreme Court entered a ruling in favor of Smith on March 4, 2011, stating that freedom on parole was still freedom, and the Comptroller should compensate Smith at the full rate because he would have remained out on parole were it not for the wrongful conviction. "[The] restriction [on compensation] does not apply when the wrongful conviction is the cause of the person serving a concurrent sentence in prison," the Court wrote.

Smith was granted compensation in the amount of \$1,593,000. As a result of the ruling, Taylor and Wallis will receive their full compensation payments, too. See: *In re Smith*, 333 S.W.3d 582 (Tex. 2011).

Separately, Graves obtained relief

after the Texas legislature passed a bill (HB 417) to compensate him for his wrongful imprisonment regardless of the wording in the court order granting his release. Governor Rick Perry signed the legislation into law in June 2011, which will provide Graves with a \$1.4 million payment.

Brandley's request for compensation was denied by the Comptroller's office in May 2011 on the grounds that it did "not meet the requirements set in state law." Despite being exonerated, the court order granting Brandley's release did not say he was being freed "on the basis of actual innocence"; also, he had filed for compensation beyond the three-year statutory time period in which to do so.

As for the Texas AG's office dunning exonerees for back child support payments, a law enacted in 2007 makes the state responsible for child support for persons who are wrongly convicted and incarcerated. Apparently, however, that statute is not being applied retroactively.

Sources: *Austin American-Statesman*, *Houston Chronicle*, *Radio Station KPFT's Prison Show*, [www.yourhoustonnews.com](http://www.yourhoustonnews.com)

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# Rumsfeld, Military Officials Immune from Suit by Foreign Nationals Alleging Torture on Foreign Soil

by Mike Brodheim

On June 21, 2011, a divided D.C. Circuit Court of Appeals affirmed the judgment of a district court that dismissed claims for damages and declaratory relief brought by nine foreign nationals against Donald Rumsfeld, Secretary of the Department of Defense under former President George W. Bush, and three high-ranking Army officers, alleging that, in 2003-2004, while detained at U.S. military facilities in Iraq and Afghanistan, they were subjected to acts of torture and abuse.

The former detainees – four Afghan and five Iraqi citizens – had filed suit in U.S. District Court, raising claims under the Fifth and Eighth Amendments to the U.S. Constitution, the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Third and Fourth Geneva Conventions. Upon motion by the defendants, the district court dismissed all of the claims pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), “and on the ground that the defendants are entitled to qualified immunity.” See: *In re Iraq & Afghanistan Detainees Litigation*, 479 F.Supp.2d 85 (D.D.C. 2007). On appeal, the plaintiffs challenged only the dismissal of their constitutional and ATS claims.

As to the constitutional claims, the plaintiffs alleged that the defendants had formulated or implemented policies or practices that led to their torture in violation of their due process rights under the Fifth Amendment and their rights under the Eighth Amendment to be free of cruel and unusual punishment.

Declining to reach the question as to whether the alleged misconduct was unconstitutional on the ground (asserted by the plaintiffs) that it “has long been settled that the Constitution forbids the torture of any detainee,” the appellate court instead held that the defendants were entitled to qualified immunity. See: *Pearson v. Callahan*, 129 S.Ct. 808, 815-16, 818 (2009) (holding that a court can decide a constitutional right was not clearly established without first deciding whether the right exists) [*PLN*, Sept. 2009, p.42].

The Court of Appeals explained that, although in 2008 the U.S. Supreme Court had extended the right of habeas corpus to nonresident aliens detained

at Guantanamo Bay, “it plainly was not clearly established in 2004 that the Fifth and Eighth Amendments apply to aliens held in Iraq and Afghanistan – where no court has [ever] held any constitutional right applies.”

Noting there was a “danger of obstructing U.S. national security policy” if an alternative rule were adopted, the D.C. Circuit found that “even if the defendants were not shielded by qualified immunity and the plaintiffs could claim the protections of the Fifth and Eighth Amendments, [it] would decline to sanction a [Constitutional] cause of action because special factors counsel against doing so.”

As to the ATS claims, the appellate court held that in detaining and interrogating suspected enemy combatants, the defendants were acting within the scope of their employment and thus were immunized from suit by the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly referred to as the Westfall Act. See: 28 U.S.C. § 2679(d)(1). The dissent took issue with this holding.

In the dissent’s view, the ATS permitted a cause of action for “deliberate torture perpetrated under color of official authority, and the Westfall Act does not bar these claims.” See: *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), rehearing en banc denied. ■

## Texas Prisoner Health Care Underfunded

On average, Texas spends less on prisoner health care than other states – about half the amount that California spends. However, medical care for California prisoners was found to be unconstitutionally inadequate, leading a federal court to order reductions in the state’s prison population to the point that sufficient care can be provided. That order was upheld in 2011 by the U.S. Supreme Court. [See: *PLN*, July 2011, p.1].

During the last legislative session, both the University of Texas Medical Branch at Galveston (UTMB), which provides health care for about 80% of Texas prisoners, and the Texas Tech University Health Sciences Center, which provides or subcontracts health care services for the state’s remaining prisoners, complained that they were underfunded. UTMB claimed it had lost around \$45 million over two years by supplying medical care to prisoners.

A May 2011 financial analysis of UTMB’s cost of providing prisoner health care seemed to support the contention that insufficient funds were being appropriated. The report predicted prisoner medical care costs of between \$879.6 million and \$930 million over the next two years – up to 20% more than was appropriated by the state legislature.

Since 1993, Texas has used a Correctional Managed Health Care Committee (CMHCC), something like an HMO, to

regulate and control the cost of prisoner medical services. However, prisoners have complained that this system leads to the denial of health care by accountants rather than the practice of medicine by doctors.

At the same time, state officials have criticized spiraling prison medical costs. In February 2011, for example, the Texas State Auditor’s Office issued critical reports after examining the expenditures of UTMB and Texas Tech for prisoner health care. [See: *PLN*, Dec. 2011, p.10].

According to Allen Hightower, executive director of the CMHCC, an increasing number of older prisoners with age-related health problems, and the rising cost of drugs used to treat chronic illnesses such as HIV and Hepatitis C, are causing higher health care costs.

While the financial analysis report supported UTMB and Texas Tech’s claims of being underpaid for providing medical care to prisoners, it also stymied Governor Rick Perry’s attempt to privatize prisoner health care. Perry’s aides had been lobbying state lawmakers for months, claiming privatization would save money. Prison officials and legislators balked at the idea, however, citing inadequate care and lack of savings when other states had privatized prison medical services. The report gave them an additional argument against privatization.



"While it's possible that some of the functions of [prisoner health care] could be done more cheaply, I don't think this report is going to help the rush by some to privatize," said House Corrections Committee Chairman Jerry Madden. "Taxpayers are getting their money's worth right now, it appears."

Texas prisoners, however, apparently are not getting the medical care they need, and to make matters worse state lawmakers cut \$75 million from the prison system's health care budget during the last legislative session. The largest budgetary reduction was for hospital and clinical services, which were slashed 28%.

"We will have our work cut out for us in terms of developing levels of service, developing partnerships and rate structures so we can make these appropriation levels work," said Brad Livingston, director of the Texas Department of Criminal Justice (TDCJ).

"In addition, we're working hard to make certain hospital resources we have will be spread appropriately. We have a challenge making sure all this fits and works but we have an obligation to do so," he stated.

On February 10, 2012, the Texas

Board of Criminal Justice approved a contract to lease nine beds at Huntsville Memorial Hospital for prisoner medical care – the first time the prison system has sought such services outside UTMB and Texas Tech. The 3½-year contract with Huntsville Memorial, valued at \$46.8 million, also includes emergency room, surgical, physician and imaging services.

The TDCJ's health care contract with Texas Tech expires in 2013, while its \$430 million contract with UTMB has been extended through August 2012 as the state continues to negotiate future arrangements. UTMB, citing financial losses, has said it may transition out of providing prisoner health care.

Meanwhile, the legislature is considering a bill (HB 26) that would require Texas prisoners to pay an annual \$100 "health care services fee" if they seek medical care. The fee would replace the \$3.00-per-visit co-pay that prisoners currently must pay. This is in the context that Texas prisoners have no legal way to earn money while in prison, as they are not paid for working. ■

Sources: *Austin American-Statesman, Associated Press, Texas Tribune, www.msnbc.msn.com*



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# Challenge to BOP's Ban on Sexually Explicit Publications Dismissed

by *Brandon Sample*

The U.S. Court of Appeals for the Tenth Circuit dismissed an appeal challenging the Bureau of Prisons' (BOP) implementation of the Ensign Amendment, a law that prohibits the expenditure of federal funds "to distribute or make available to a prisoner any commercially published information or material that is sexually explicit or features nudity." 28 U.S.C. § 530C(b)(6)(D).

According to the appellate court's decision, prisoner Mark Jordan's appeal was rendered moot as a result of his subsequent transfers to other facilities.

When Jordan originally filed suit, he was incarcerated at the BOP's supermax prison in Florence, Colorado. He alleged that the Ensign Amendment, both facially and as applied to him, was unconstitutional. Jordan also challenged the BOP's implementing regulations. Following a two-day bench trial, the district court upheld the Ensign Amendment and the BOP's regulations. Jordan appealed.

While his appeal was pending, Jordan was transferred from the supermax in Colorado to the Special Housing Unit at the U.S. Penitentiary in Lee, Virginia. He was then transferred to the Special Management Unit in Lewisburg, Pennsylvania.

Due to the transfers, the Tenth Circuit directed the parties to submit supplemental briefing as to whether Jordan's appeal was moot.

Jordan argued that his appeal was not moot because he was seeking declaratory and injunctive relief concerning the BOP's regulations related to the Ensign Amendment, which were applied uniformly throughout the BOP. The Tenth Circuit disagreed.

The Court of Appeals acknowledged that when "a prisoner brings a lawsuit challenging policies that apply in a generally uniform fashion throughout a prison system, courts have been disinclined to conclude that the prisoner's declaratory or injunctive claims are moot, even after he has been transferred to another prison in that system."

This exception to the constitutional mootness doctrine was inapplicable in Jordan's case, however, because he "never sought relief on a system-wide basis against the BOP," the appellate court wrote. Instead, he "pursued injunctive and declaratory relief only with respect to individual BOP officials at a specific

penal institution." In other words, Jordan failed to sue the right defendant – such as the director of the BOP – that would have afforded him system-wide relief.

Further, even if Jordan's claims were not constitutionally moot, the Tenth Circuit indicated that it would decline to decide his appeal on grounds of prudential mootness. The doctrine of prudential mootness allows a court to withhold its power to grant relief where, among other things, the plaintiff's "continued susceptibility to injury" is speculative. Such was the situation with Jordan's case, the appellate court reasoned, based on the changes in his conditions of confinement as a result of the transfers.

Accordingly, Jordan's appeal was dismissed as moot. See: *Jordan v. Sosa*, 654 F.3d 1012 (10th Cir. 2011).

Ironically, Senator John Ensign, who

had sponsored the Ensign Amendment, resigned from the U.S. Senate in May 2011 following a sex scandal in which it was revealed that he had an extramarital affair with a campaign staffer, Cynthia Hampton. [See: *PLN*, Nov. 2009, p.24].

At the time of his resignation Ensign was being investigated by the Senate Select Committee on Ethics, which released its findings on May 12, 2011. The Committee found that Ensign had "aided and abetted violations of the one-year post-employment contact restriction; conspired to violate that restriction; made false statements to the Federal Election Commission; violated campaign finance laws; and obstructed the committee's preliminary inquiry."

Those findings were referred to the U.S. Department of Justice. ■

Additional source: [www.nymag.com](http://www.nymag.com)

## ACLU of Arizona Surveys Taser Use in Statewide Report

by *Joe Watson*

No one can claim that the ACLU of Arizona lacks ambition.

After poring over a decade's worth of investigations, lawsuits and public records, the ACLU of Arizona is attempting to persuade law enforcement officials in the Grand Canyon State to address their use of Tasers, as detailed in a June 2011 report.

The ACLU examined Taser use relative to other uses of force against criminal suspects, including pepper spray, batons and lethal firearms, against a backdrop of documented Taser policies for 20 law enforcement agencies across Arizona. And Taser opponents are certain to feel vindicated by the results of the analysis, which supports the long-held theory that the availability of Tasers doesn't dissuade police officers from drawing, and using, their guns.

After three of Maricopa County's largest police forces – Phoenix, Mesa and Glendale – deployed Tasers agency-wide between 2001 and 2003, data indicates that officers continued to use lethal force against combative subjects just as often as they had before the advent of Tasers. In fact, it was the use of pepper spray and batons that declined, not firearms.

"The information provided by depart-

ments thus suggests that Tasers have been deployed in situations where lethal force would not be allowed," the ACLU reports, "and where less-severe uses of force are available."

Considering the potentially fatal effects of Tasers, including cardiac arrest and head injuries resulting from Taser-induced falls, police in Maricopa County have apparently increased the risks posed to suspects by resorting to Tasers in lieu of pepper spray and other, less dangerous, options.

In 2004, the *Arizona Republic* published its own analysis of 377 incidents in which Phoenix police had deployed Tasers. "In nearly nine out of 10 cases," according to the ACLU, "the subjects had not threatened officers with any weapon before a Taser was used."

Since then officers have become increasingly Taser-shy, fearing blemishes on their records or potential lawsuits. And while Taser use has declined somewhat as officers return to using batons and pepper spray, the number of gunshots fired has remained virtually unchanged.

Liability concerns, though, haven't slowed the demand for Tasers. Earlier this year the Arizona Department of Public

Safety ordered 1,000 more of the devices from Scottsdale-based TASER International, whose M26 and X26 models are the most popular among Arizona's law enforcement agencies.

The ACLU report didn't merely rehash Arizona's misadventures with Tasers as earlier documented by the *Republic*, or harp on Maricopa County's dubious distinction as the nation's capital of Taser-related deaths. After all, past criticism has done little to spark measurable reform.

"Tasers are often promoted to the public on the ground that they can save lives in situations where police would otherwise use deadly force, however, the information we collected reveals serious issues with the use of Tasers in Arizona, including a lack of adequate training and accountability that endangers the public and could expose the police to expensive lawsuits," said ACLU of Arizona Executive Director Alessandra Soler Meetze.

Nearly half the agencies surveyed, including the Maricopa County Sheriff's Office (MCSO), still rely solely on Arizona-based TASER International to train their officers, which is disconcerting due to the company's prior assertions that Tasers should be used on suspects to achieve "pain compliance."

"Law enforcement agencies cannot depend on the company to always present the facts about Tasers," the ACLU of Arizona noted in its report. "After all, it has a product to sell and will continue to be motivated first and foremost by its 'bottom line.'"

The ACLU also called on police agencies to reposition Tasers "closer to the firearms end" of the use-of-force continuum, and advocated the formation of a "statewide task force to monitor trends in Taser use in Arizona."

PLN has reported numerous cases

involving the use of Tasers on both prisoners and non-prisoners that have resulted in injury or death – and, increasingly, that have resulted in jury awards and settlements against TASER International and law enforcement agencies that rely on the company's products. [See, e.g.: *PLN*, Jan. 2012, p.42; Oct. 2011, p.40; Oct. 2006, p.1].

## New York City DOC Jail Official Resigns Amid Corruption Probe

An alleged abuse of authority, in the form of favoritism, has led to the resignation of the second-highest ranked jail official with the New York City Department of Corrections (NYCDOC), Chief Larry Davis, Sr. An investigation into Davis resulted from questions raised by the *New York Daily News* regarding his relationship with guard Dale Reyes.

Assigned to the NYCDOC's transportation division, Reyes had a base salary of approximately \$79,000, but earned \$124,000 in 2010 due to working hundreds of hours of overtime. He also drove a NYCDOC-owned Ford SUV when he wasn't on the job. When he couldn't explain to investigators why he was driving the vehicle, Reyes was suspended.

"I have no idea why I was suspended," he stated. "I did no favors for Larry Davis, that is number one. Larry Davis is chief of the department and I am an employee." But a source close to the probe said that prior to the investigation, Reyes repeat-

The ACLU report is available on PLN's website along with extensive other information on Tasers and similar devices. ■

Sources: "A Force to Be Reckoned With: Taser Use and Policies in 20 Arizona Law Enforcement Agencies," *ACLU of Arizona* (June 2011); [www.acluaz.org](http://www.acluaz.org)

edly bragged to co-workers that Davis was "in his pocket," and that he was not required to wear a uniform. "Nobody knows what he did," said the source.

Davis was already under investigation at the time he resigned in August 2011, for allegedly taking vacations to the Dominican Republic that were paid by his subordinates. While Davis denied the charge, sources alleged he collected money from subordinates for an informal vacation fund.

NYCDOC Commissioner Dora B. Schiri said the department maintains "extremely high standards" within its workforce. "And when there is the occasional person who works contrary to [those standards] and the organization, there are consequences," she stated, "and we are not shy or slow to bring about those consequences." ■

Sources: *New York Daily News*, [www.wnyc.org](http://www.wnyc.org), *New York Times*


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# Thousands Referred but Very Few Qualify for Commitment as Sexually Violent Predators in California

Responding to a legislative request, California's Bureau of State Audits reviewed the process used by the California Department of Corrections and Rehabilitation (CDCR) to refer sex offenders to the Department of Mental Health (DMH) and, in turn, the process used by DMH to determine whether those offenders qualify for civil commitment as sexually violent predators (SVPs). The result, a July 2011 report, found that although DMH evaluates thousands of sex offenders each year, only a tiny percentage are civilly committed as SVPs.

The audit report determined, moreover, that the process used by the CDCR to identify potential SVPs is inefficient and results in DMH being overloaded with unnecessary work.

In 1996, the California legislature enacted the Sex Offender Commitment Program to target a narrow subpopulation of sex offenders – those it believed posed a continuing threat to public safety due to mental disorders that predisposed them to engage in sexually violent criminal behavior. To qualify for civil commitment as an SVP, an offender must have been convicted of a qualifying sex crime and diagnosed with a mental disorder that renders him (or her) likely to engage in sexually violent behavior in the future if not retained in custody and given appropriate treatment.

In 2006, the passage of Jessica's Law, in addition to imposing strict residency restrictions on sex offenders, added more crimes to the list of sexually violent offenses that qualify an offender for SVP designation. Also under Jessica's Law, the length of an SVP commitment term, which was formerly two years, has now become indeterminate; an annual evaluation, however, allows for periodic assessment of an SVP's eligibility for release.

As of May 2011 there were 521 male SVPs and one female SVP committed to California state hospitals; another eight had been granted conditional release and were being treated and supervised by DMH in the community.

The audit report found that CDCR refers all offenders convicted of specified sexual offenses to DMH without considering (as the law requires) whether an offender committed a predatory act or is otherwise likely to be an SVP. Addition-

ally, 45% of the CDCR referrals involved offenders that DMH had previously concluded were not SVPs, despite the fact that the re-referrals had not committed new offenses suggesting that their non-SVP status should be reconsidered. The result, in the auditor's view, was a significant, unnecessary increase in DMH's workload.

Responding to the implicit criticism that CDCR referred more sex offenders to DMH for SVP evaluation than the law intended, CDCR Undersecretary for Operations Scott Kernan said the department would "always err on the side of caution in regards to public safety when making sex offender referrals" to DMH.

The audit further found that, while the number of SVP referrals DMH received dramatically increased from 1,850 in 2006 to 8,871 in 2007, the first full year that Jessica's Law was in effect, and then declined somewhat to 6,675 in 2009, DMH recommended about the same number of cases for SVP commitment proceedings in 2009 (50) as it did in 2005, before Jes-

sica's Law was enacted. Additionally, the report found that since 2005 the number of sex offenders committed as SVPs had declined, both as a percentage of all referrals (dipping below 1% in every year since 2007) and as a percentage of DMH's commitment recommendations (averaging just 20% between 2005 and 2010).

The audit report also determined that while 59% of the 13,512 offenders who had been referred for SVP evaluation between 2005 and 2010 but did not meet SVP criteria later violated the conditions of their parole, only 133 were convicted of a new felony, and, of those, only one was convicted of a sexually violent offense.

"Although higher numbers of offenders were subsequently convicted of felonies that were not sexually violent offenses, even those numbers were relatively low," the report concluded. ■

Sources: *California State Auditor, Sex Offender Commitment Program, Report 2010-116 (July 2011)*; *Los Angeles Times*

## Ninth Circuit Holds Prisoners May be Compelled to Provide Blood Samples Under California DNA Act

The Ninth Circuit has held that prison officials may forcibly extract a blood sample from a California prisoner for purposes of compliance with California's DNA and Forensic Identification and Data Bank Act of 1998 (codified in sections 295-300.3 of the California Penal Code).

George Hamilton, a California state prisoner serving a sentence of 39 years to life, filed suit in federal court alleging that Corcoran prison officials violated his rights under the Fourth, Eighth and Fourteenth Amendments when, in 2003, they forcibly extracted a blood sample from him for DNA identification.

The district court dismissed the suit at the screening stage (28 U.S.C. § 1915A) for failure to state a claim upon which relief can be granted. On appeal, the Ninth Circuit noted that California's DNA Act was adopted for the purpose of assisting law enforcement agencies in identifying and prosecuting individuals responsible for committing crimes, as well as for excluding individuals errone-

ously deemed to be suspects.

Based on overwhelming precedent, including the plurality opinion in *United States v. Kincaid*, 379 F.3d 813 (9th Cir. 2004) (en banc) [*PLN*, Jan. 2005, p.22], the Court of Appeals had little trouble characterizing as "minimal" the degree of intrusion on individual privacy resulting from the non-consensual collection of blood samples from convicted felons. Concurrently, it found that the governmental interest in prosecuting crimes accurately was sufficiently compelling that it outweighed the minimal privacy intrusion. Hence, Hamilton's Fourth Amendment challenge failed.

As the use of force was not intended to cause harm, his Eighth Amendment claim also failed. And, because the DNA Act applies to all convicted felons, "there would be little of substance to contest" by way of a Fourteenth Amendment due process challenge, the appellate court concluded. See: *Hamilton v. Brown*, 630 F.3d 889 (9th Cir. 2011). ■

# California Prison Doctors Accused of Misconduct

## Get Paid to Shuffle Paperwork, Deliver Mail

Unable to take decisive action due to state civil service protections, California's prison system is saddled with the expense of paying the salaries of dozens of physicians who have been deemed unfit to treat patients. Such doctors typically receive base salaries of more than \$200,000; unwilling to accept the risk of allowing them to provide medical care, however, supervisors relegate them to desk duty where, according to a July 2011 *Los Angeles Times* article, they are paid for doing little or no work.

One of those physicians, Dr. Jeffrey Rohlfling, 65, employed at the High Desert State Prison, took home \$777,423 in 2010, making him the highest-paid state employee in California. A surgeon with a history of mental illness who reportedly engaged in "bizarre, irrational and delusional communications," Rohlfling has not been allowed to treat patients since July 2005, following the death of a prisoner under his care that led to the revocation of his clinical privileges.

Dr. Rohlfling was fired in 2007 after a review of his cases led a supervisor to conclude that he had provided "significantly substandard" medical treatment to two other prisoners. After appealing his termination to the state's Personnel Board, Rohlfling was reinstated in 2009.

Now pulling "mailroom duty," Dr. Rohlfling has been assigned to a retraining program. Roughly two-thirds of his 2010 take-home salary was back pay for the

more than two years he spent fighting his termination.

Nancy Kincaid, spokeswoman for the court-appointed federal Receiver in charge of California's prisoner medical care, said, "If you are ordered to bring somebody back to work, and you can't trust them with patients, you have to find something for them to do." But, she hastened to add, "We want taxpayers to know we had no choice in this."

The Receiver was appointed in 2006 after a federal judge found that "20-50% of physicians at the prisons provided poor quality of care" and, as a consequence, a prisoner died due to "preventable" causes every five to six days. [See: *PLN*, Sept. 2008, p.18; March 2006, p.1]. A three-judge court ultimately concluded that the level of medical care provided to California prisoners violated the Eighth Amendment's prohibition against cruel and unusual punishment, and that the Receiver would be unable to raise the level of care to constitutional standards unless prison overcrowding was first reduced.

That conclusion, in turn, was appealed by California state officials to the U.S. Supreme Court, where it was upheld by a 5-4 majority in *Brown v. Plata*, 131 S.Ct. 1910 (2011) [*PLN*, July 2011, p.1].

Judging from Kincaid's comments, there is some tension between the Receiver's mission to increase the quality of medical care provided to California prisoners on the one hand, and the prison

system's track record of hiring less-than-qualified doctors (such as Rohlfling) on the other. This tension is exacerbated by Personnel Board decisions, which, in the Receiver's view, do not adequately take into account the best interests of the prisoner-patients. The result is that dozens of prison doctors whose clinical skills can no longer be trusted – but who cannot be fired – are earning large salaries by sitting behind desks shuffling paperwork.

*PLN* previously reported on one of those physicians, Dr. Allan J.T. Yin, whose negligence led to the deaths of two prisoners. [See: *PLN*, May 2011, p.28]. Yin was fired, placed on probation for 35 months by the state Medical Board, reinstated and paid over \$193,000 in back pay while delivering mail at the facility where he was assigned.

In another case, Dr. Radu Mischiu, a prison psychiatrist, was put on desk duty in February 2006 after he allegedly failed to keep notes of interviews with his patients, including a prisoner who committed suicide. Fired and then reinstated, he is paid more than \$268,000 a year to sort mail at CSP Solano.

According to the *Los Angeles Times*, California prison officials have paid at least 30 doctors and mental health professionals accused of misconduct an estimated \$8.7 million since 2006, while prohibiting them from providing medical care to prisoners. ■

Sources: *Los Angeles Times*, *Daily Pilot*



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# Murderer Registry Becomes Law in Illinois

by Joe Watson

For ex-prisoners hoping for a fresh start upon their release, the slope is becoming increasingly slippery.

A bill signed by Illinois Governor Pat Quinn on July 21, 2011 has established the state's first registry for convicted murderers. Also known as "Andrea's Law," the legislation requires offenders convicted of the first-degree murder of an adult to have their personal information posted in an online database for 10 years after their release from prison. The law went into effect on January 1, 2012 and will be applied retroactively to offenders released since 2002.

Andrea's Law was spearheaded by Illinois State Rep. Dennis Reboletti on behalf of the family of 18-year-old murder victim Andrea Will.

Justin Boulay, who was then 20 years old, strangled Will with a telephone cord in 1998 when they were both students at Eastern Illinois University. Boulay was sentenced to 24 years, but was released in November 2010 because state law granted him one day of earned credit for each day he served without disciplinary problems.

For Will's mother, Patricia Rosenberg, the legislation that created a registry of first-degree murderers allowed her to exact a measure of revenge. "This is my way of fighting back," she told the *Chicago Tribune*. "If you know who is living next door to you, you have more power – power to protect your family."

Opponents of the law, however, were disturbed by what appears to be a nationwide trend to brand all sorts of ex-prisoners in online databases, dismissing any privacy rights they might have after they've served their sentences.

"You've sacrificed your right of privacy once you've committed an offense in this community," argued Illinois State Senator Dave Syverson.

Sex offender registries are ubiquitous. Illinois' new registry for murderers joins one the state already maintains for arsonists. Convicted meth users are listed on registries in Tennessee, Georgia, Oklahoma, Washington, Minnesota, Montana, Oregon and West Virginia. A registry for DUI offenders was recently considered in Maine.

Several other states require the registration of violent offenders, including Indiana, Oklahoma, Montana and Kan-

sas. The Kansas registry also lists certain drug offenders.

"These [registries] catch on like wildfire," said Wayne Logan, a Florida State University law professor and author of a book on notification and registration laws. "Politicians don't want to look like they are soft on crime or disparaging the legacy of the victims." He compared the political attraction of offender registries to "legislative catnip."

Since the U.S. Supreme Court has given states the green light to enact sex offender registries, similar registries for other crimes likely would be upheld if challenged.

"We want to arm citizens with information, so they can protect themselves

and their communities," said Brian McClung, a spokesman for Minnesota Governor Tim Pawlenty.

Rather than keeping members of the public safe, though, online registries mainly serve to brand certain ex-offenders with the equivalent of a modern-day scarlet letter, making it difficult for them to obtain housing and employment.

Ironically, Illinois' new murderer registry will not inconvenience Boulay, whose crime served as the impetus for the legislation. Following his release from prison, he promptly moved to another state. ■

Sources: *Chicago Tribune*, *USA Today*, [www.accesskansas.org](http://www.accesskansas.org), [www.in.gov](http://www.in.gov), [www.ctga.org](http://www.ctga.org)

## Court Finds Pennsylvania Jail's Phone Bidding Process was Rigged; Contract Awarded to Another Company

The bidding process used to select the telephone contractor for Pennsylvania's Allegheny County Jail (ACJ) was rigged by an official previously accused of improperly influencing a prior phone contract at the jail. That was the basis of a lawsuit filed by a local taxpayer, Matthew E. D'Eramo, in an effort to void the contract.

Previously, Common Pleas Judge Judith Friedman ruled in May 2006 that ACJ's former Internal Affairs Chief, Capt. Thomas R. Leicht, Jr., conspired with other county employees to rig the bids on the jail's telephone contract the last time it was put out for bid. See: *Lemansky v. Allegheny County*, Court of Common Pleas of Allegheny County (PA), Case No. GD 06-3583.

An appellate court ordered the 2006 contract bid to be reopened, and Securus Technologies subsequently won the jail's phone contract after Leicht was prohibited from participating in the re-bid process. See: *Lemansky v. Allegheny County*, 926 A.2d 1003 (Pa.Cmwlt. 2007). However, Leicht was again assigned to evaluate bids when the phone contract was up for renewal in 2009, and he gave a low score to Securus based on a failed system test.

"Despite Judge Friedman's opinion and past finding[s] of Capt. Leicht's corruption, the county unbelievably desig-

nated Capt. Leicht as one of four decision makers to evaluate and score the proposals received in response to the [2009 phone contract bids]," the lawsuit states.

Leicht was fired in Sept. 2010 for allegedly falsifying his work history and falsely stating he was a police officer in an unrelated federal court hearing. His termination was upheld by the county's personnel board.

"This is a case of déjà vu all over again," observed D'Eramo's attorney, Jason L. Richey. In his argument to the court, Richey said county officials never informed Securus in advance that they wanted a system demonstration, and that Leicht had designed the test so Securus would fail.

County officials and Public Communications Services (PCS), the company that won the ACJ phone contract, which also is named as a defendant in the lawsuit, refuted that contention. PCS is a subsidiary of Global Tel\*Link.

Test scores admitted into evidence indicated that Securus's system finished third while PCS finished first. Although Securus offered to pay ACJ higher commissions (kickbacks) from the phone rates charged to prisoners' families and loved ones, the company's poor test scores cost it the contract.

"It was a major concern," Allegh-



eny County Chief Purchasing Officer John Deighan noted during nearly two-and-a-half hours of testimony. "If the system didn't function, there wasn't any value in it."

However, it was later learned that Leicht and another bid evaluator "took it upon themselves to access a working site of Securus at a Florida prison" rather than use a test site provided by Securus, and did not give the company advance notice they would be running the test, which involved retrieving 68,000 phone records. The court found that this appeared "to be a conscious effort to make the [Securus] system fail."

The taxpayer suit filed by D'Eramo claimed that Leicht "damaged the integrity of the public contracting process" by rigging the jail's phone bid system.

In late June 2011, the Court of Common Pleas issued a preliminary injunction that reversed the award of the 2009 ACJ phone contract to PCS and ordered that the contract revert to Securus until it was rebid. The court also criticized the county for allowing Leicht to participate in the 2009 bidding process after he had been linked to rigging the prior 2006 phone contract, calling that decision "exceedingly unwise." See: *D'Eramo v. Allegheny County*, Court of Common Pleas of Allegheny County (PA), Case No. GD 10-022334.

According to whistleblower William Mistick, 49, Leicht tried to steer the phone contract to a friend of former ACJ warden Ramon Rustin. Leicht failed to appear and testify in the D'Eramo lawsuit, while Rustin had resigned in December 2010 to

take another job.

The county and PCS appealed the preliminary injunction order, and on January 12, 2012 the Commonwealth Court issued an unpublished ruling that affirmed the trial court's decision. See: *D'Eramo v. Allegheny County*, Commonwealth Court of Pennsylvania, Case Nos. 1282 C.D. 2011 and 1283 C.D. 2011 (Pa. Cmwlth. 2012).

Neglected in the various legal challenges to the jail's phone contract is the fact that regardless of which company wins the bid, prisoners' families and friends still must pay inflated phone rates. Currently, Securus's phone charges at ACJ include \$2.00 plus \$.07/minute for a local collect call, \$2.00 plus \$.20/minute for an intrastate collect call and \$3.00 plus \$.59/minute for an interstate (long distance) collect call. Such price gouging is typical of prison and jail phone services. [See: *PLN*, April 2011, p.1].

According to a November 2011 report by Allegheny County's Office of the Controller, Securus pays the county a 57.2% kickback commission on phone revenue, which totaled over \$1.2 million from Sept. 1, 2009 through Aug. 31, 2010. The report also found "the Jail was not effectively monitoring the Securus contract," "Securus did not provide [] contracted enhancements to the Jail's inmate telephone system," and there were "discrepancies with Securus's call rates." ■

Sources: *Pittsburgh Tribune-Review*, [www.alleghenycounty.us](http://www.alleghenycounty.us)

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# Rehabilitation Finding Eliminates 30-Year Minimum Sentence for Aggravated Murder, but Oregon Parole Board Balks

by Mark Wilson

In Oregon, a rehabilitation finding under ORS 163.105(3) eliminates the 30-year mandatory minimum sentence for state prisoners convicted of aggravated murder and requires the Board of Parole (Board) to immediately set a parole release date, according to two unanimous en banc decisions by Oregon's Supreme Court.

In 1977 the Oregon legislature created the crime of aggravated murder, the state's most serious offense. Offenders convicted of aggravated murder may be sentenced to death, life without parole or life imprisonment with a 30-year mandatory minimum.

Prisoners sentenced to a 30-year minimum are not eligible for a release date under the Board's parole matrix system. After serving 20 years, however, they are entitled to receive a "rehabilitation hearing" – referred to by the Board as a "Murder Review hearing" – to determine whether they are likely to be rehabilitated within a reasonable period of time. The timing of that hearing was increased to 25 years in 1995, then 30 years in 1999. The law in effect at the time of the prisoner's commitment offense determines when the hearing is held.

"The sole issue" at the hearing "shall be whether or not the prisoner is likely to be rehabilitated within a reasonable period of time." ORS 163.105(2). "That determination pertains only to personal characteristics of the prisoner," the Oregon Supreme Court explained. "It does not focus ... on the offenses that the prisoner committed." Prisoners bear the burden of proving the likelihood of rehabilitation by a preponderance of the evidence. ORS 163.105(2)(a).

If the Board finds that a prisoner has failed to satisfy this burden, the prisoner may petition for another hearing at two-year intervals. In 2009, however, the Board was granted the authority to make a prisoner wait up to 10 years for subsequent hearings.

Should the Board find that a prisoner has satisfied the burden of proving a likelihood of rehabilitation, "it shall enter an order to that effect and the order shall convert the terms of the prisoner's confinement to life imprisonment with the possibility of parole or work release." ORS 163.105(3).

The Board first argued in the 1990s

that a rehabilitation finding authorized, but did not require, the Board to override the 30-year minimum and set a parole release date for prisoners convicted of aggravated murder. The Oregon Supreme Court rejected that argument. See: *Norris v. Board of Parole*, 152 Or.App 57, 952 P.2d 1037 (1998), *affirmed*, 331 Or. 194, 13 P.3d 104 (2000), *cert. denied*.

The Board then took the position that it did not have the authority to override the 30-year judicially-imposed minimum sentence irrespective of a rehabilitation finding.

After dodging the issue for 12 years, the Oregon Supreme Court finally explained the effect of a rehabilitation finding under ORS 163.105. Applying a statutory construction analysis, the Court made several important conclusions.

First, ORS 163.105(2) "gives prisoners a right to a hearing after 20 years," the state Supreme Court observed. "The timing of that hearing – the fact that such a hearing is to occur 10 years before the expiration of the 30-year minimum term – indicates that the legislature thought that some legal consequence would flow from a 'likely to be rehabilitated' determination." Therefore, "the legislature intended a likely-to-be rehabilitated finding to have a substantive and practical legal effect at the time it was made."

"If doubt remains, subsection (3) settles it," the Court continued. In requiring conversion from a prohibition on parole to the possibility of parole, ORS 163.105(3)(1985) necessarily eliminates the 30-year minimum sentence. The "mandatory directive to the [B]oard implies that the conversion is to take place immediately, rather than 10 years in the future," the Supreme Court found. "Once the conversion ... occurs, the prisoner ... is eligible for parole at that point." A parole release date is then required to be set "in accordance with the parole matrix in place when the prisoner committed his offense," the Court concluded.

Given that the petitioners' applicable parole matrix range had expired several years earlier in the cases under consideration by the Supreme Court, the Court ordered the Board to "conduct a hearing in the immediate future" to set the petitioners' parole release dates. See: *Janowski*

*v. Board of Parole*, 349 Or. 432, 245 P.3d 1270 (Or. 2010) (en banc).

For prisoners with multiple aggravated murder convictions, the Board's longstanding position was that only the first conviction was considered at the rehabilitation hearing. If the Board found the prisoner capable of rehabilitation, he or she was then required to serve another 20 years before petitioning for a second rehabilitation hearing, and so on, depending on the number of convictions.

This ridiculous process was finally put to rest in a ruling in a companion case issued jointly with *Janowski/Fleming*. In "cases in which the prisoner simultaneously was ordered to serve more than one consecutive 30-year mandatory minimum sentence ... the prisoner is entitled to a rehabilitation hearing on the combined sentences – his entire 'minimum period of confinement' – after he has served 20 years in prison," the Supreme Court stated. "It defies logic to conclude that the legislature intended the [B]oard to require the offender to make that precise showing again 20 years later." See: *Severy/Wilson v. Board of Parole*, 349 Or. 461, 245 P.3d 119 (Or. 2010) (en banc).

In an unrelated case, the Ninth Circuit Court of Appeals found that Oregon's aggravated murder statute creates a protected liberty interest in parole eligibility. That January 2011 ruling came less than a month after the Oregon Supreme Court's decisions in *Janowski/Fleming* and *Severy/Wilson*. [See: *PLN*, Oct. 2011, p.26].

Three months following the Supreme Court's unanimous en banc decisions, however, the Board continued to drag its feet, telling prisoners and their families that it was discussing its options with legal counsel.

On March 25, 2011 the Board held a public meeting to discuss the Supreme Court's decisions related to parole eligibility for prisoners convicted of aggravated murder. The Board members candidly admitted that they "disagree[d] with the ruling," and noted the Board had always intended that aggravated murderers serve their entire 30-year minimum sentence before becoming eligible for a rehabilitation hearing.

The Board members informed pris-

oners and their families that paroling aggravated murderers was not imminent. The Board noted that it had the authority to defer parole release on the basis of a finding that the prisoner suffers from a severe emotional disturbance – a finding that runs counter to the rehabilitation finding. Board members also observed that a 2009 law allows them to defer release on parole for up to ten years at a time.

Despite being told by the Oregon Supreme Court to establish prisoner release dates pursuant to Board rules and statutes that were in effect at the time of the prisoners' offenses, the Board members declared they would not see any of the prisoners affected by the December 2010 state Supreme Court rulings until the Board adopted new rules.

Salem attorney Andy Simrin attended the March 25, 2011 hearing, and offered to write the new rules for the Board. Of course they declined.

The Supreme Court had suggested that its decisions may affect around 75 offenders. During the March 25, 2011 hearing, however, the Board claimed that only 31 prisoners had received the requisite rehabilitation finding and would be affected by the ruling. On April 25, 2011, the Board reported that two of those 31 prisoners had since died.

As the Board expresses its disagreement with the state Supreme Court and ignores its own statutory mandate, prisoners convicted of aggravated murder continue to sit in prison. On April 12, 2011 the Board posted a notice about the Supreme Court's decisions on its website, which made its feelings and intentions abundantly clear.

"It has been the Board's position, historically, that it does not have the authority to override the minimum sentence and that

the intent of the trial courts as well as the legislature was that the prisoner should serve the minimum 30 year term before being considered for a parole even if they have been found capable of rehabilitation after 20 years," the Board stated.

"The court concluded that upon finding a prisoner capable of rehabilitation, the Board was simultaneously overriding the minimum sentence and declaring him a candidate for release prior to the expiration of his minimum sentence," wrote the Board. "It cannot be emphasized strongly enough that such a result has never been the intent or the practice of the Board."

The Board acknowledged that it was required to hold a rehabilitation hearing for each of the affected prisoners convicted of aggravated murder, but defiantly said it may choose to deny parole to those prisoners rather than set a parole release date.

"In sum, the Supreme Court did not order any prisoner to be released," the Board noted, accurately. "However, the court has allowed certain prisoners, convicted of aggravated murder, to be considered for release into the community sooner than many – including the Board – anticipated."

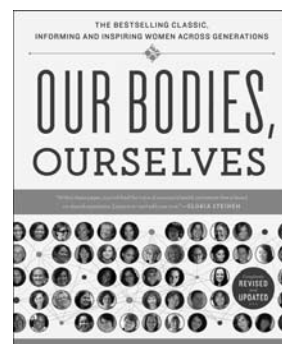
The Board members further stated that they had "never delayed anything purposefully and wanted to ensure the public and the inmates that they are moving forward as fast as they can while being consistent with public safety and their responsibility to the public and the inmates."

While it may be true that the Board is "moving forward" to comply with the mandate of the Oregon Supreme Court, it is doing so only with great reluctance. 🐢

Additional sources: [www.oregon.gov](http://www.oregon.gov); *Oregon Board of Parole, Board Business Meeting Minutes (March 25, 2011)*

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# Withdrawal of Approval of New Mexico Jail Class Action Settlement Not Appealable Order

The Tenth Circuit Court of Appeals has held that an order withdrawing approval of a class action settlement does not qualify as a “final order” subject to appeal under 28 U.S.C. § 1291. The appellate ruling declared that such an order “simply presses the reset button, vacates any prior final decision, and marks the case for renewed litigation.”

This case has a “long and complex” history that began in 1995, with two classes certified. The first class covered all prisoners who are presently, or will be, confined at New Mexico’s Bernalillo County Detention Center (BCDC). A sub-class included “persons with mental and/or developmental disabilities who are now, or in the future will be, detained at BCDC.” It was alleged that the conditions at BCDC were unconstitutional due in large part to overcrowding. [See: *PLN*, March 2003, p.38; Sept. 1999, p.18].

The parties reached a settlement in 1997. The settlement agreement was modified due to the opening of the Metropolitan Detention Center (MDC) in 2003. By their terms, the two new settlements, reached in 2005, governed conditions only at MDC. The county had signed an Inter-Governmental Agreement with the federal government that allowed federal detainees to be housed at BCDC, which was operated by private prison firm Cornell Corporation (which has since been acquired by GEO Group).

The plaintiffs, however, argued that “the County misrepresented this arrangement to them by suggesting that Cornell alone bore contractual duties to the federal government.” This misrepresentation led the plaintiffs to agree to restrict the terms of the settlement agreements to MDC rather than both facilities. The district court agreed and withdrew approval of the settlements in 2009. The defendants appealed.

A final decision, the Tenth Circuit held, is one by which the district court “disassociates itself from a case,” which does not normally occur “until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment.”

The Court of Appeals rejected the defendants’ argument that *any* post-judgment order is automatically subject to appellate

review. The previous settlement approval orders were final orders, but the order under appeal “effectively undid them.” The order at issue does not “end the litigation on the merits,” the appellate court wrote. Rather, it “ensures litigation on the merits will continue in the District Court.”

The Tenth Circuit noted parallel contexts. An “order granting a motion under Fed.R.Civ.P. 60(b) reopening a judgment and an order declining to enter a proposed consent decree are not appealable under § 1291,” the Court of Appeals stated.

## Washington State Prisoner Granted Preliminary Injunction to Treat Neuroma; Case Settles for \$120,000

On Sept. 17, 2010, a federal district court in Washington State granted a preliminary injunction to a state prisoner, requiring prison officials to provide necessary medical treatment.

The preliminary injunction was issued in a civil rights action brought by Jean Rhea, incarcerated at the Washington Corrections Center for Women (WCCW). The injunction requires treatment of Rhea’s neuroma – a painful mass of nerve tissue at the end of an amputated stump.

After being involved in a 1993 motorcycle accident, Rhea’s right leg was removed at the knee. She used crutches for the first nine years after the amputation, but obtained a prosthesis when she began experiencing severe pain in her shoulders and left knee in 2002.

Prior to being imprisoned at WCCW in May 2008, Rhea had an appointment to have her prosthesis evaluated because it was not fitting well. Weight loss and broken parts in the prosthesis caused additional problems, which resulted in Rhea falling about once a week.

The Care Review Committee (CRC) of the Washington Dept. of Corrections (WDOC) decided on March 18, 2009 that it would repair the prosthesis, but after four examining physicians determined Rhea required a new prosthesis, with one doctor saying the neuroma required surgery, the CRC decided the prosthesis was “not clearly medically necessary” because Rhea was not in “intractable pain.”

The district court found that although

“Likewise, we have long held that a District Court’s post-judgment order granting a new trial under Fed.R.Civ.P. 59 isn’t an appealable final decision for the same reason,” because it ensures the case will continue.

As the district court’s order was not final and thus failed to invoke the appellate court’s jurisdiction, the defendants’ other arguments were not considered and their appeal was dismissed. See: *McClendon v. City of Albuquerque*, 630 F.3d 1288 (10<sup>th</sup> Cir. 2011). ■

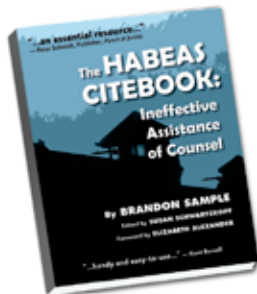
WDOC’s Offender Health Plan requires prisoners to prove “intractable pain” or pain that “dominates [their] existence and precludes [them] from normal activities,” the Eighth Amendment requires only a showing that the failure to treat a serious medical condition can lead to further injury or the “unnecessary and wanton infliction of pain.”

The evidence indicated that Rhea’s neuroma caused her extreme pain and a “feeling like a million needles are poking” her. One physician testified that “[d]elay in treatment of the neuroma will cause continued difficulties with distal weight bearing, gait abnormalities, and worsening biomechanics across the hip, pelvis, low back and left leg.” The WDOC presented no evidence to the contrary.

Even if not required to provide a new prosthesis, the WDOC must provide care for Rhea’s neuroma because it is causing her chronic and substantial pain, the district court held when granting the motion for a preliminary injunction.

The case subsequently settled on February 3, 2011, with the WDOC agreeing to pay Rhea \$120,000. Prison officials further agreed to provide Rhea with assistance in adapting to a new fitting for her prosthesis, including physical therapy if required, and to have her left knee evaluated by a medical provider. Rhea was represented by the Public Interest Law Group, PLLC. See: *Rhea v. Washington State Department of Corrections*, U.S.D.C. (W.D. Wash.), Case No. 2:10-cv-0254-BHS-KLS. ■





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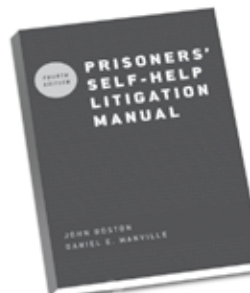
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# Illinois Governor Signs Bill Banning Death Penalty, Commutes All Death Sentences

by Matt Clarke

On March 9, 2011, Illinois Governor Pat Quinn signed legislation banning the death penalty for state crimes in Illinois. He also commuted the sentences of the state's 15 death row prisoners to life without the possibility of parole. All but one of those prisoners have since been moved to maximum-security facilities. One is in a medium-security prison that includes a mental health facility. Meanwhile, death row has been converted into a special maximum-security unit for prisoners leaving the supermax Tamms Correctional Center.

Before signing the legislation banning capital punishment in Illinois, Quinn debated the issue at length. "For me, it was a difficult decision, quite literally the choice between life and death," he wrote in his signing statement. "This was not a decision to be made lightly, or a decision that I came to without deep personal reflection.

"Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it. With our broken system, we cannot ensure that justice is achieved in every case.

"For the same reason, I have also decided to commute the sentences of those currently on death row to natural life imprisonment, without the possibility of parole or release." Governor Quinn further established a trust fund to support families of murder victims and assist local police departments in preventing murders.

Surrounding Quinn in his Capitol office when he signed the legislation were long-term opponents of the death penalty. They included the bill's lead sponsors, Rep. Karen Yarbrough and Sen. Kwame Raoul, as well as Senate President John Cullerton, House Majority Leader Barbara Flynn and Lt. Governor Sheila Simon (a former prosecutor), all Democrats. Anti-death penalty luminaries such as Sister Helen Prejean, Archbishop Desmond Tutu and the Pope had encouraged Quinn to sign the legislation. Prosecutors, the state Attorney General and some family members of murder victims had urged the governor not to sign. One state attorney called the

ban on capital punishment a "victory for murderers."

The fatal flaws in Illinois' capital punishment system were exposed over a decade ago when then-Governor George Ryan declared a moratorium on executions after thirteen death row prisoners were found to be actually innocent. [See: *PLN*, July 2003, p.25]. Since then, another 7 prisoners sentenced to death in Illinois have been exonerated. The moratorium was honored by Ryan's successors, Governors Rod Blagojevich and Quinn, even as prosecutors voiced their opposition and scrambled to refill the empty cells on death row.

An investigative series by the *Chicago Tribune* published in 1999 examined 300 death penalty cases in Illinois and exposed incompetence, error and bias in many capital cases. The series noted that at least 46 death row prisoners were sentenced to death based on the testimony of jailhouse informants, at least 33 had been represented by attorneys who were suspended or disbarred, and at least 35 were blacks whose cases were decided by all-white juries. Such inequities prompted Governor Ryan to commute the sentences

of 167 death row prisoners to life and issue four pardons shortly before leaving office in January 2003.

The capital punishment debacle also prompted President Barack Obama, then an Illinois state senator, to work on legislation to reform certain procedures in death penalty cases such as mandating the taping of police interrogations. Governor Quinn had been elected under a campaign promise to continue the moratorium on the death penalty, while voicing support for capital punishment for the most heinous crimes.

"No state had tried harder to fix its death penalty system, but after 10 years it became patently clear that it was broken beyond repair," said Larry Cox, executive director of Amnesty International USA.

The legislation ending capital punishment in Illinois took effect on July 1, 2011; the last execution in the state occurred in 1999. Illinois joins 15 other states that do not have the death penalty, plus the District of Columbia. ■

Sources: *Associated Press*, *Chicago Tribune*, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), [www.reuters.com](http://www.reuters.com), *Huffington Post*, *CBS Chicago*

## Mississippi Oversight Committee Finds Fault in Operation of Prison Canteens

by David M. Reutter

In June 2011, the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER) issued a report to the Mississippi legislature concerning the state's prison canteen contract, the operation and oversight of that contract, and the disposition of its profits. The report provided 15 recommendations to address eight problem areas.

The Mississippi Department of Corrections (MDOC) contracted its canteen services out for the first time in November 2007 to G.T. Enterprises. G.T. assigned the contract to Centric Group, doing business as Keefe Commissary, the following year.

PEER took issue with how the MDOC procured the contract, because rather than using a competitive process to

locate a commissary provider, the department negotiated with the company from which it had previously purchased goods. When renewing the contract it should be put out to competitive bid "to select a commissary services provider to make goods of acceptable quality available for purchase while maximizing commissary revenues at least cost," PEER stated.

The MDOC replied it was "not opposed" to this recommendation and would "consider requesting proposals for these services ... with several specifications."

The department also agreed the contract should have quality assurances as a contract performance requirement, and that it needed to improve survey methods to determine fair product pricing. The contract requires Keefe to set the prices

of prison canteen items based on “the average of convenience store prices.” To determine those prices, Keefe is to survey convenience stores twice a year and request approval for price increases from the MDOC’s commissioner.

For the period from November 2007 to November 2010, the MDOC’s canteens generated \$24,087,428 in gross revenue. Of that amount, the MDOC retained 29.4% in commissions from public prisons and 24% from private prisons. For items purchased by families during visitation, the MDOC received 10%. In total the MDOC received \$7.6 million in canteen commissions during the time period reviewed.

The department used \$4.7 million for canteen operating expenses, which included approximately \$956,630 for reimbursement of salaries for canteen employees. PEER questioned the methods and uses of those profits, as the profits are supposed to go to the Inmate Welfare Fund (IWF). State law requires that the IWF be used “for the benefit and welfare of inmates in custody of the department.”

While PEER did not describe the MDOC’s actions as violating the law, it did find five problematic issues with respect to the department’s use of canteen profits. The first concerned the MDOC improperly reducing funds available to the IWF.

PEER also found that the use of \$855,661 from the canteen fund for OffenderTrak software maintenance was an administrative expense rather than a cost related to the MDOC’s commissary services. Although the legislature had authorized the purchase of OffenderTrak software from the IWF, it did not approve annual maintenance costs. The MDOC disagreed with PEER on this point.

The MDOC also failed to follow state law by having seven members on the IWF committee. The department agreed to remedy that shortcoming, but did not agree that a “person to represent the interests of inmates’ families” should be included as a committee member.

The MDOC further said it would follow PEER’s recommendation to implement expenditure guidelines. Those are required, PEER stated, due to several questionable expenditures by the department. While the MDOC includes administrative overhead costs for canteen employees in its “salaries, wages and contracts” category, it also “appears to be relying on the Inmate Welfare Fund to cover general operating costs of the

department that PEER believes should be paid from appropriated funds.”

Additionally, in January 2011 the MDOC requested \$28,062 in IWF funds to purchase two state vehicles, one for the Director of Religious Programs and one for the Director of Treatment Programs. It made another request that same month to buy a \$14,031 vehicle for “the Director of Fiscal Affairs to provide assistance to the Deputy Commissioner of Administration and Finance.” PEER questioned whether the requested vehicle purchases were an appropriate use of IWF funds.

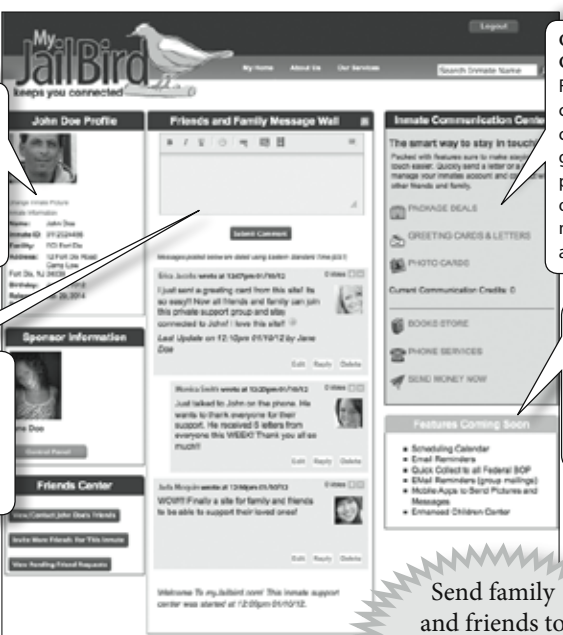
Lastly, PEER found the MDOC was not sending required financial reports concerning the IWF to lawmakers. The MDOC agreed to make improvements in that regard, including expanding the list of persons to whom the reports are sent.

The PEER report is available on PLN’s website. 

Source: “*The Department of Corrections’ Management of Commissary Services and the Inmate Welfare Fund*,” PEER Report to the Mississippi Legislature (June 14, 2011)

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## Florida Senate Rejects Privatization of 27 State Prisons – but Just Barely

*PLN*'s February 2012 cover story described how the Florida legislature tried to privatize almost thirty state prisons, work camps and work release centers in 2011 by slipping proviso language into the state's budget appropriations bill. That wholesale attempt at prison privatization was widely perceived as benefiting Boca Raton, Florida-based GEO Group, the nation's second-largest private prison firm.

The backdoor proviso attempt failed, however, after the Florida Police Benevolent Association (PBA), which at the time represented Florida Department of Corrections (FDOC) employees, filed suit challenging the prison privatization plan enacted as part of the budget bill. A circuit court judge ruled in the PBA's favor in September 2011, finding the proviso language was "illegal without authority in violation of law." The legislature's appeal of that decision remains pending.

*PLN*'s February cover story concluded with the Republican-dominated Florida Senate considering two bills introduced in January 2012 – SB 2036 and SB 2038 – that would accomplish the same goal as the proviso language; i.e., privatizing 27 correctional facilities in South Florida, known as Region IV, that house approximately 16,000 state prisoners.

SB 2038 required the privatization of almost all FDOC Region IV facilities, with "actual cost savings to the state of at least 7 percent" and specified performance measures for the privatized prisons.

The companion bill, SB 2036, provided that cost-benefit and business case analyses submitted by state agencies in support of their legislative budget requests would not apply "to the outsourcing or privatization of agency functions expressly required by the General Appropriation Act or any other law" until *after* the agencies had already entered into such outsourcing or privatization contracts.

Further, SB 2036 specified that existing statutory requirements applicable to prison privatization contracts in 944.105, Florida Statutes would "not apply to a contract for the outsourcing or privatization of the operation and maintenance of correctional facilities expressly directed to be outsourced or privatized by the General Appropriation Act or any other law."

SB 2038 and SB 2036 were introduced as committee bills and fast-tracked by the

Senate leadership – Senate President Mike Haridopolos, who strongly supported the bills, assigned them to only two committees, which were chaired by other prison privatization proponents: Senators John Thrasher and J.D. Alexander. Introduced on January 13, 2012, the bills were considered by the Rules Committee just ten days later.

Meanwhile a number of organizations mounted opposition to the bills, including organized labor groups such as AFSCME, SEIU and the Teamsters. In November 2011, FDOC employees had voted to oust the PBA and have the Teamsters represent them instead.

The Teamsters quickly issued a press release condemning the prison privatization bills, which would cost an estimated 3,800 FDOC employees their jobs. Of course they could be re-hired by the private prison companies contracted to operate Region IV facilities, but at lower wages and without state employee benefits. The Teamsters also flooded the Senate with calls expressing opposition to the bills, and ensured that FDOC employees were present to attend hearings and meet with lawmakers.

Another organization that took quick action to oppose the prison privatization effort was the Private Corrections Institute (PCI). *PLN* associate editor Alex Friedmann, who serves as PCI's president, issued a press release on January 17, 2012.

"The renewed legislative effort to privatize [27] state prison facilities reeks of special interest peddling and a giveaway of taxpayer funds to the private prison industry," the press release stated. "Considering there is scant evidence that private prisons in Florida have saved the state money, and the documented scandals and problems involving private prisons in the past, the repeated efforts by the legislature to privatize Region IV can best be explained as political payback."

According to the National Institute on Money in State Politics, in 2010 GEO Group and its executives gave more than \$705,000 to political candidates and parties in Florida, while Corrections Corporation of America (CCA) donated \$138,994 – primarily to Republican causes. Further, both CCA and GEO Group made contributions to Florida Governor Rick Scott's inaugural fund in the amounts of \$5,000 and \$25,000,

respectively. Since 2004, GEO has given \$1.8 million to Florida political candidates, parties and committees. Since government contracts are the main source of income for GEO and CCA, this is equivalent to laundering tax dollars through the companies to lawmakers, who then award or renew such contracts. [See: *PLN*, Aug. 2007, p. 13].

"Basically, this recently-introduced legislation that proposes the wholesale privatization of an unprecedented number of state prisons could have been drafted by CCA or GEO Group to the extent the bills benefit private prison firms at the expense of Florida taxpayers," Friedmann said.

PCI also issued a policy brief in January 2012 that detailed past problems with privately-run prisons, including corruption in the Correctional Privatization Commission, the agency formerly responsible for overseeing private prisons in Florida.

In a letter to state senators, PCI further noted that while the Rules Committee write-up for SB 2038 had cited "research by the Reason Foundation in support of cost savings through prison privatization, the Committee failed to note that Reason Foundation is the recipient of funding from private prison companies, including GEO Group and CCA." In fact, according to Reason's 2009 donor list, GEO was listed as a Platinum Level supporter while CCA was listed as a Gold Level supporter.

Despite testimony against SB 2036 and SB 2038 from a number of speakers, including private prison expert Judy Greene with Justice Strategies, as well as opposition from several Republican state senators – notably Senator Mike Fasano and Senator Paula Dockery – the Rules Committee voted in favor of the bills, which were then scheduled to be heard by the Budget Committee two days later on January 25, 2012.

Senators Fasano and Dockery questioned the estimated cost savings that might be achieved through prison privatization. Dockery obtained records from the FDOC that indicated some private prisons in Florida actually cost more to operate than state prisons – including the CCA-operated Bay Correctional Facility and Moore Haven Correctional Facility, and the GEO Group-managed South Bay Correctional Facility.

Senator Don Gaetz, who strongly supported the private prison bills, said savings of 7% would be guaranteed by law. However, that is what existing state law requires, and as noted by Senator Dockery, some privately-operated prisons in Florida are not realizing such savings.

Additionally, in another letter sent to all Florida senators, PCI wrote that "Such savings ... are entirely dependant upon the accuracy of the baseline used to calculate the state's comparable operating costs. If the baseline is not accurate because it fails to consider all relevant factors, then the savings would be illusory."

For example, the *Orlando Sentinel* reported on January 23, 2012 that the FDOC had removed all "close management" prisoners from Region IV in 2011. Close management prisoners are more expensive to incarcerate. By removing such prisoners from Region IV facilities (the ones slated for privatization), the cost to operate those facilities was artificially skewed downward for purposes of comparing per diem operating expenses at private versus public prisons.

Other senators expressed concern that if the door was opened wide for prison privatization, other state functions might

be privatized. "Are we a government that is composed of for-profit corporations, that we will sell our prisons to the highest bidder for companies that make money from it?" asked Senator Maria Sachs. "It's a slippery slope, as you've heard before, we could have the prison and correctional officers today, tomorrow it'll be other folks."

Despite vocal opposition the Senate Budget Committee passed SB 2038, the main prison privatization bill, which was placed on the Senate's special order calendar for January 31, 2012. Unable to marshal sufficient votes to pass the legislation, however, the Senate leadership pulled it back but retained it on the special order calendar, which meant it could be brought up again at any time.

The vote breakdown was reportedly 20 for and 20 against, and a tie vote would defeat the bill. "All 20 of our votes are solid, 100 percent, don't-want-thisto-happen opponents of the bill," said Senator Dockery.

Senator Jack Latvala had Senate President Haridopolos promise to provide a 24-hour notice before SB 2038 was brought back to the Senate floor, which was designed to prevent the bill from being returned on short notice when opponents

were not present to vote against it.

This prompted a columnist for the *Tampa Bay Times* to remark "that Haridopolos had managed to acquire a Tallahassee reputation as the sort of chap who, if you found him sitting at the next barstool, you wouldn't leave your change unattended while you hit the men's room."

Governor Scott, also a proponent of the prison privatization bills, met with two senators, Charles Dean and Steve Oelrich, both former sheriffs, in an effort to get them to drop their opposition to the legislation, without success.

"I'm not a big government guy, but there's some things we ought to do and taking custody and control of the people we imprison is one of them," said Oelrich, a former sheriff for Alachua County. "We investigate the cases. We arrest them and take away their freedom. We prosecute them and sentence them and now we're going to turn them over to a private company to save money. I don't believe in that."

He wasn't alone. As SB 2036 and SB 2038 advanced in the Florida Senate, a newly-formed coalition of organizations opposed to prison privatization rallied support against the bills, accompanied by extensive media coverage statewide.

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## Florida Rejects Privatization (cont.)

The coalition, which included labor unions, criminal justice groups and faith-based organizations, sent a letter to Senate President Haridopolos on January 31, 2012, writing in “strong opposition to SB 2036 and SB 2038 because the bills would lead to an unprecedented expansion of prison privatization.” The letter, which advocated criminal justice reform efforts to reduce the state’s prison population rather than privatization, was signed by 17 organizations, including the Sentencing Project, the Florida Justice Institute, the Southern Center for Human Rights and the Human Rights Defense Center (the parent organization of Prison Legal News).

Separately, the NAACP and the Tea Party also issued statements that condemned the prison privatization bills. The Tea Party had doubts that the privatization plan would save money and expressed concerns about “crony capitalism and deals that ultimately turn out bad for taxpayers,” while Dale R. Landry, president of the Tallahassee branch of the NAACP, stated that “Privatization of prisons under a corporate structure is about profit and not about safety and security.”

PCI issued another press release on February 1, 2012, noting that the prison privatization plan proposed by SB 2038 would result in potential savings of less than 1% of Florida’s total corrections budget. An analysis by the Senate Budget Committee had estimated savings of \$16.5 million per year, based on the 7% cost savings mandated by the legislation. However, even if such savings were achieved they would amount to only a tiny fraction of the FDOC’s \$2.2 billion annual budget.

“With an unemployment rate in Florida of almost 10 percent, putting 3,800 state employees out of work to achieve less than 1% budgetary cost savings is a poor trade-off,” observed PCI president Friedmann, who also said the estimated savings assumed there were “no cost increases at the privatized prisons in future years,” and would be “at the expense of terminating around 3,800 state employees and privatizing state prisons on a scale never before attempted in the history of the United States.”

On February 1, 2012, Senate President Haridopolos stripped Senator Fasano of his chairmanship of a budget subcommittee in retaliation for Fasano’s opposition

to the private prison bills. Haridopolos justified his actions by saying Senator Fasano was not “rowing in the right direction.” Fasano, who had introduced an unsuccessful amendment that would have killed SB 2038, responded by saying, “if the loss of a chairmanship is the result of taking a stand for what is right, I wear that loss as a badge of honor.”

The pressure by Senate leaders to pass the prison privatization bills became so intense that some senators had to act as “escorts” for one of their colleagues, Senator Larcenia Bullard, who, according to the *Tampa Bay Times*, had been “seriously ill with a recurring heart condition” and “had been in tears after days of pressure from Senate leaders and lobbyists who wanted her to be the deciding vote” on the bills.

“It was straight out of a gangster movie,” said Senator Audrey Gibson, who stayed with Bullard to protect her from other lawmakers intent on influencing her to switch her vote. Gibson remarked that proponents of the private prison plan were “dead-set to get it through at whatever cost.” And they almost did.

SB 2038 went up for a final vote before the Florida Senate on February 14, 2012. In a last-ditch effort to pass the bill, Senate President Haridopolos postponed the vote from the morning to the afternoon, when two of the senators opposing the legislation were scheduled to be away from the Senate. Once that subterfuge became known, those senators canceled their other appointments so they could be present.

Then, following two hours of debate,

the Senate voted 21 to 19 against SB 2038, killing the bill in what was described as a “rare defeat” for the Senate leadership. Senator Gary Siplin switched sides to provide the extra vote in opposition; both Republicans and Democrats voted against the legislation. “A bad bill, dressed with flimsy facts, went down to defeat,” Senator Dockery declared in victory.

“I accept the verdict of the Senate,” said Senate President Haridopolos. SB 2036 later quietly died in committee. GEO Group’s stock dropped almost 5% within one day after SB 2038 was defeated.

Although the sweeping prison privatization plan failed to pass in the Senate (no action was taken on corresponding bills in the House), Governor Scott still has the ability to expand prison privatization in Florida through an executive order. Following the defeat of SB 2036 and SB 2038, however, he has not expressed interest in doing so.

“This was not one of Governor Scott’s top priorities, but he did something where he thought we could find some significant savings. He’s disappointed to see it fail like this,” said Lane Wright, a spokesman for the governor’s office.

Opponents of Florida’s ill-advised attempt to privatize an unprecedented number of state prison facilities, however, were elated. ■

Sources: *PCI letters and press releases*, [www.tampabay.com](http://www.tampabay.com), *Sun Sentinel*, [www.tallahassee.com](http://www.tallahassee.com), *Palm Beach Post*, [www2.hernandotoday.com](http://www2.hernandotoday.com), [www.wjhg.com](http://www.wjhg.com), [www.floridaindependent.com](http://www.floridaindependent.com), [www.firstcoast-news.com](http://www.firstcoast-news.com), [www.inthepublicinterest.org](http://www.inthepublicinterest.org)

## Connecticut District Court Finds ICE Agents Not Shielded from *Bivens* Liability; Suit Settles for \$350,000

by Derek Gilna

In a lawsuit brought by the Yale Law Clinic on behalf of Hispanics swept up in an Immigration and Customs Enforcement (ICE) raid in New Haven in June 2007, the U.S. District Court for the District of Connecticut held that ICE officials are not immune from liability for federal civil rights violations. The plaintiffs had argued that ICE instituted policies and practices that violated the Fourth Amendment rights of 11 Hispanic plaintiffs when ICE agents entered their homes without search warrants or consent during the

raid, sometimes with guns drawn.

A motion to dismiss filed on behalf of ICE was denied in part and granted in part, but the core of the lawsuit was allowed to proceed, according to Muneer Ahmad, director of the Yale Law Clinic. Yale law student Mark Pedulla, one of six students working on the case, stated, “Everyone was pleased with the decision. It’s an important step.” Pro-bono attorneys from the firm of Cleary Gottlieb Steen & Hamilton also represent some of the plaintiffs.

According to the complaint, ICE of-

ficers “allegedly entered private residences without search warrants or consent, and arrested persons therein without arrest warrants or probable cause ... defendants detained all of the plaintiffs before learning about their immigration status ... did not inform the plaintiffs of their rights or why they were being seized ... [and] coerced them into signing English forms with no or minimal translation.”

The plaintiffs also alleged that “the raid was planned and executed in order to ‘punish’ the City of New Haven for immigrant-friendly policies. The raid came shortly after the New Haven Board of Alderman voted to approve the Elm City Resident Card program, which was designed to provide persons – including immigrants – with identification cards to enable them more easily to open bank accounts.”

The defendants had argued in their motion to dismiss that the Immigration and Nationality Act (INA) deprived the district court of subject matter jurisdiction over the plaintiffs’ constitutional claims, quoting INA sections 1252(b)(9), 1252(g) and 1252(a)(2)(B)(ii). In a December 16, 2010 ruling, the court found that those provisions only prevent district courts from directly reviewing final orders

of removal, distinguishing *Heck v. Humphrey*, 512 U.S. 477 (1994) and finding the Second Circuit’s decision in *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001) more persuasive.

The district court also held that individual ICE agents and supervisors could be held liable under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and cited the case of *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995) to demonstrate that ICE staff were previously apprised of alleged constitutional violations and therefore not protected by the doctrine of qualified immunity. “[A] failure to train [ICE staff] can be an active violation on the part of a supervisor who has willfully chosen to allow [problems] resulting from a lack of training,” the court wrote.

The district court concluded that “it was clearly established that law enforcement officers could not act with discriminatory animus on the basis of race or ethnic origin when making arrests.... The question whether the officers were actually so motivated is a classic issue of fact. As a result, genuine issues of material fact preclude a determination at this stage whether the individual defendants are entitled to qualified immunity with

respect to ... equal protection claims.” See: *Diaz-Bernal v. Myers*, U.S.D.C. (D. Conn.), Case No. 3:09-cv-01734-SRU.

The case subsequently settled in December 2011, with the defendants agreeing to pay \$350,000, inclusive of attorney fees and costs, and ICE agreeing to provide certain “immigration-related benefits” to the plaintiffs. Those benefits included ICE granting three of the plaintiffs “deferred-action status” on their immigration proceedings for a period of four years. ICE officials further agreed to “move to terminate with prejudice” removal proceedings against four of the plaintiffs.

“Today’s settlement is a victory of law, but the real case yet to be tried is a matter of the character and temperament of this nation as it relates to immigration, and how we as a nation, a state and a people view our legacy as a nation of immigrants,” said New Haven Mayor John DeStefano, Jr.

“Everybody has rights in this country,” noted Alderman Ernie Santiago. “It doesn’t matter if you are legal or illegal – you have rights.”

Additional sources: *National Law Journal*, *Yale Daily News*

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# Eighth Circuit Revisits Muslim Prisoner's Settlement with Nebraska DOC; \$74,000 in Attorney Fees Awarded

by Derek Gilna

In a detailed ruling, the U.S. Court of Appeals for the Eighth Circuit rejected an attempt by a Muslim prisoner to obtain additional attorney fees for alleged violations of an agreed injunctive order, and remanded for further proceedings. Following remand, the district court awarded over \$74,000 in fees and costs.

In 2004, Mohamed A. El-Tabech, serving consecutive life sentences at Nebraska's Tecumseh State Correctional Institution (TSCI), filed a 42 U.S.C. § 1983 complaint alleging violations of his religious rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, et seq.

The parties reached a settlement whereby the defendants agreed to implement a stipulated "Kosher Equipment and Meal Preparation Process," and fees and costs were awarded to El-Tabech's attorneys in 2007.

In 2008, after his lawyers alleged violations of the agreement under Rules 69(a) and 70 of the Federal Rules of Civil Procedure, the district court awarded additional attorney fees and a punitive increase in the post-judgment interest rate payable on the original award to 14%. The state appealed that order, and in a later proceeding the district court modified the stipulated injunction to require that El-Tabech only be provided prepackaged kosher meals.

The district court further awarded additional fees in the amount of \$73,360.20 plus \$271.20 in costs, which the state also appealed. [See: *PLN*, Oct. 2009, p.22].

The Eighth Circuit considered whether the district court's order requiring state officials "to immediately issue a warrant payable to plaintiff's counsel" was contrary to the well-established rule "that property of a State is exempt from execution unless a statute otherwise provides." El-Tabech argued that Section 1988, empowering private enforcement of civil rights laws, indicated that Congress had intended to preempt state statutes. However, the appellate court concluded "the answer is no," as Section 1988 did not operate to preempt state laws related to the enforcement of judgments.

As to the issue of supplemental attorney fees, the Court of Appeals held that

"the time sheets belatedly submitted by El-Tabech's attorneys reveal lack of candor and excessive time spent in submitting his motion to enforce the original fee award. Even more to the point, the motion was entirely unsuccessful.... Therefore, the award of fees ... is reversed." The appellate court also determined that the district court's punitive increase in the post-judgment interest rate was an abuse of discretion, as there were no extraordinary circumstances in the case that justified such an action.

The Eighth Circuit then examined the issue of post-judgment monitoring and the issue of contempt, and found that most of the monitoring work was "work on a new, unsuccessful lawsuit." As to the contempt motion, the appellate court ruled in favor of El-Tabech after he alleged that a kosher meal prepared by staff at the prison included "feces wrapped in plastic in a vegan entree prepared and delivered by TSCI staff...."

In conclusion, the appellate court noted that when "a fee award is not upheld, the appropriate disposition of the appeal is usually to remand.... This is appropriate

in this case, particularly because other fee and fee payment issues may not be entirely resolved." See: *El-Tabech v. Clarke*, 616 F.3d 834 (8th Cir. 2010), *rehearing and rehearing en banc denied*.

Following remand, on May 20, 2011 the district court once again considered El-Tabech's amended motion for attorney fees and costs, in a reduced amount. The district court granted an award of \$73,209.67 in fees and \$935.40 in costs.

"The court has reviewed the time sheets and billing descriptions submitted by the plaintiff and finds them sufficiently detailed. The time records show that the plaintiff seeks remuneration only for work that directly relates to the claims upheld by the Eighth Circuit. Further, based on its familiarity with the litigation, the court finds there was little or no 'excessive lawyering' by the plaintiff's counsel," the district court stated.

The award was made directly to El-Tabech's attorneys, as El-Tabech had died during the lengthy course of the litigation. See: *El-Tabech v. Clarke*, U.S.D.C. (D. Neb.), Case No. 4:04-cv-03231; 2011 WL 1979847. ■

## Texas Prison Guard Gets Five Years for Scalding Child

by Alex Friedmann

On February 29, 2012, former Texas Department of Criminal Justice prison guard Henry Benson III, 31, was convicted by a state court jury of "recklessly" burning a child he was babysitting.

Benson, formerly employed at the Connally Unit in Kenedy, was looking after 3-year-old Emilio Taylor in October 2009 when the incident occurred. Benson was accused of holding Emilio in scalding-hot water after the child soiled himself. Emilio suffered burns on his feet.

According to prosecutors, Benson told several stories to investigators as to how the injuries occurred. "Lies are really hard to keep straight ... but the truth is really easy," said prosecutor Jessica Frazier.

Benson's ex-wife, Roxanne, refused to testify to a number of prior incidents that indicated Benson had previously engaged in abusive conduct. Those incidents included

a domestic violence call in which Roxanne told police that Benson had choked her, and an incident when Benson allegedly slammed their son's head to the ground.

"I was still going through a divorce and if I said anything I might have exaggerated," Roxanne stated.

Prosecutors accused Benson of manipulating his ex-wife to retract her previous complaints about him, including that he "treat[ed] his family like inmates," according to a news report. Roxanne claimed she didn't remember saying that.

On March 23, 2012, Benson was sentenced to five years in prison; he was initially taken into custody but then released on an appeal bond. ■

Sources: [www.mysanantonio.com](http://www.mysanantonio.com), *Houston Chronicle*



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# BOP Staff at FMC Lexington Recover Monetary Damages and Attorney Fees for Privacy Act Violations

by Derek Gilna

In a lengthy decision, the Court of Appeals for the Sixth Circuit held that approximately 100 employees of the Bureau of Prisons (BOP) could recover damages under the Federal Tort Claims Act for violations of the Privacy Act at the Federal Medical Center (FMC) in Lexington, Kentucky. The defendants in the case included the U.S. Department of Justice, the BOP, the U.S. Attorney General, the head of the BOP, various FMC officials and the United States of America.

The district court had found that “the responsible employee’s actions resulted in a disclosure actionable under 5 U.S.C. Sec. 552a(b) and (g)(1)(D) of the Privacy Act, and that the actions were ‘intentional or willful’ within the meaning of 5 U.S.C. Sec. 552a(g)(4) such that Plaintiffs were entitled to damages.” This finding was reached even though the district court had held the privacy disclosure was “inadvertent.”

The case arose out of an internal investigation into unauthorized computer usage by prisoners at a UNICOR program at FMC Lexington, during which one of the investigators assigned to the case, Special Investigative Agent Walter Clint Jones, “left behind a green file folder on a civilian employee’s desk that included a roster of all FMC Lexington employees’ names, addresses, Social Security numbers, home telephone numbers, pay grades, and other personal information.” Despite BOP directives to the contrary, the folder was not marked “Limited Official Use” (LOU-Sensitive) or marked with any other indication of its sensitive contents.

At about 3:00 a.m. on March 30, 2001, Jones left the unmarked folder on a desk, and shortly thereafter several prisoners employed in the UNICOR program were admitted to the same area. About two hours after the first prisoner arrived, FMC employee Susan Moore discovered the folder and turned it over to her supervisors. At trial, three prisoners testified that prisoner Charles Kinnard was at Moore’s desk prior to her arrival, despite the fact that prisoners are not supposed to be unsupervised during their work periods.

Acting manager James Jones reported

the incident to Associate Warden Ann Mary Carter, who, after meeting with Moore and another supervisor, Mark Barnes, told them “that the folder had been properly secured, [and] asked them to submit memoranda explaining the incident.” She also asked them to keep quiet about the unattended folder. FMC Lexington Warden Maryellen Thoms later elected to consider Jones’ act to be a performance violation and, therefore, the matter was not reported to the BOP’s Office of Internal Affairs.

Regardless, Moore contacted the Union Steward, which resulted in the union filing an official grievance alleging that prison management had violated the Freedom of Information Act and the Privacy Act. The BOP’s Regional Director denied the grievance, and the union invoked arbitration on May 29, 2001. Thoms denied all requests for information, stating there was no evidence of any disclosure of privacy information.

Thoms then issued two memos to FMC staff that contained several factual inaccuracies, including that the file had been properly marked as “LOU-Sensitive” and misstating the amount of time the folder was left unattended. Before the arbitration date, Thoms instructed her Human Resources Manager, Scott Murchie, to destroy the folder.

The Sixth Circuit agreed with the analysis of the district court that Jones’ conduct had resulted in a disclosure under the Privacy Act, specifically 5 U.S.C. §§ 552a(b) and (g)(1)(D), and that “his actions were ‘intentional or willful’ within the meaning of Sec. 552a(g)(4), although his final act of leaving the folder unsecured was ‘inadvertent.’” The appellate court noted that the analysis of Sec. 552a(g)(4) was reviewed de novo as a matter of first impression. Although it found no case directly on point, the Court of Appeals did find “instructive” the case of *Doe v. Chao*, 540 U.S. 614 (2004).

In *Doe*, the Sixth Circuit found that “subsection g(1)(D) is intended to ‘deal with derelictions having consequences beyond the statutory violations per se,’ and ‘speaks of a violation when someone suffers an ‘adverse effect’ from any other failure [not covered under subsections

(g)(1)(A)-(C)] to hew to the terms of the Act.” The Court of Appeals noted that the Privacy Act attempted to “strike a balance between the government’s need to collect and maintain information and the privacy interests of the persons to whom such information pertains.”

The appellate court then reviewed the legislative history of the Privacy Act, and found the Senate had said one of the purposes of the Act was “to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens ... or the wrongful disclosure and use ... of personal files held by Federal agencies.”

The Sixth Circuit wrote, “The analysis explains the compromise reached for including the ‘intentional or willful’ standard of conduct rather than a greater standard of ‘willful, arbitrary, or capricious’ action or a lesser standard of ‘negligent’ action ... we conclude that a court may consider the entire course of conduct that resulted in the disclosure in making its required finding under Sec. 552a(g)(4). Such an interpretation will allow recovery under circumstances similar to those here, where an agency’s actions, although inadvertent at the last step, were in flagrant disregard of the plaintiff’s rights under the Privacy Act at other steps along the way and afterward.” Specifically, “a review of the facts in the instant case supports the district court’s conclusion ... [that] Jones carried the folder ... into an inmate-accessible work area ... [and the folder was] not properly marked LOU-Sensitive...”

The Court of Appeals further failed to find persuasive the defendants’ argument that destruction of the folder in question was excusable, and held “the district court here did not abuse its broad discretion in finding that an adverse inference was appropriate here as a spoliation sanction ...” for the destruction of the folder.

The Sixth Circuit affirmed the district court’s finding that the contents of the folder had been disclosed, based upon the testimony of prisoner witnesses, and discounted the testimony of the defendants to the contrary.

Finally, as to the issue of damages, the appellate court found that all of the plaintiffs were “entitled to recover the

\$1,000 statutory minimum because the cost of ... prophylactic measures each took to prevent harm from the disclosure constituted actual damages.” They were not, however, entitled to damages for future protective measures. See: *Beaven v. U.S. Department of Justice*, 622 F.3d 540

(6th Cir. 2010).

Following remand, on February 4, 2011 the district court entered partial judgment to around 88 of the plaintiffs in the amount of \$1,000 each. Then, on April 19, 2011, the court granted damages ranging from \$1,574 to \$9,284.76 to the

remaining ten plaintiffs. Finally, attorney fees of \$1,454,824 plus costs of \$77,305.40 and \$36,004.13 in expert witness expenses were awarded to the plaintiffs on February 7, 2012. See: *Beaven v. U.S. Department of Justice*, U.S.D.C. (E.D. Ky.), Case No. 5:03-cv-00084-JBC-REW. ■

## No Qualified Immunity for Guard Who Failed to Protect Prisoner from Sexual Abuse

by Brandon Sample

On February 1, 2011, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court’s denial of qualified immunity to a guard accused of failing to protect a vulnerable prisoner from sexual assault, but reversed as to the denial of qualified immunity to three other guards.

Russell Bishop, a small 19-year-old with a slight build, was arrested and placed in the Mental Health Step-Down unit at a jail in Macomb County, Michigan on December 1, 2004. Bishop had a history of mental problems. His cellmate, Charlie Floyd, was a sexual predator.

Floyd sexually assaulted Bishop for nine days. Bishop allegedly informed guards about the assaults, but no action was taken until he told a jail psychologist what was happening.

According to Bishop, Floyd forced him to touch his penis, laid in bed with him, forced his pants down, tried to have sex with him and masturbated on him. Floyd also attempted to force Bishop to perform oral sex.

After Bishop was released from jail, he filed a 42 U.S.C. § 1983 suit against Macomb County Sheriff Mark Hackel and numerous jail employees.

Bishop alleged that the defendants failed to protect him from sexual assault. He put forth two theories to support his claims of deliberate indifference: 1) guards should have known not to put Floyd, a known sex offender, in the same cell with Bishop due to Bishop’s slight build, youth and mental problems, and 2) the small size of the Mental Health Step-Down unit allowed guards to hear the sexual abuse.

The district court denied qualified immunity to four guards, holding that Bishop’s claim that the guards had ignored his complaints was sufficient to preclude summary judgment. The guards filed an interlocutory appeal.

Turning first to the objective component of the deliberate indifference analysis,

the Sixth Circuit held that Bishop had presented enough evidence of a “sufficiently serious” risk of harm, citing his youth, size, mental illness, lack of mental functioning and Floyd’s history of sexual abuse.

The subjective component is where the Sixth Circuit parted from the district court’s analysis. The Court of Appeals held the district court had erred in denying qualified immunity based on Bishop’s claim that he told guards at the jail about the assaults. During Bishop’s deposition, he could not identify or describe the guards he had complained to. This, according to the appellate court, made Bishop’s uncorroborated allegations of sexual abuse “demonstrably false.”

For three of the guards, there was insufficient evidence that they were subjectively aware of the risk Floyd posed to Bishop, the Court of Appeals concluded. Accordingly, the district court’s denial of qualified immunity to

those defendants was reversed.

Only one of the guards, James Stanley, was properly denied qualified immunity, the appellate court reasoned, because he had “substantially more interaction with Bishop than the other deputies.”

“Stanley was aware of Bishop’s personal characteristics because he testified that he talked to Bishop quite often on his rounds,” the Sixth Circuit wrote.

“Furthermore, Bishop present[ed] evidence from which a fact finder could conclude that Stanley was aware that Bishop belong[ed] to a class of prisoners particularly vulnerable to sexual assault.”

The judgment of the district court was accordingly affirmed in part and reversed in part. See: *Bishop v. Hackel*, 636 F.3d 757 (6th Cir. 2011). ■

Additional source: [www.courthousenews.com](http://www.courthousenews.com)

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# Incarcerated Veterans Help Other Incarcerated Vets Obtain Disability Benefits

by Mike Brodheim

Ed Munis and Michael “Doc” Piper, two Vietnam vets incarcerated at the Correctional Training Facility (CTF) in Soledad, California, have quietly been working over the past six years to ensure that other imprisoned veterans, now numbering roughly 200,000 in the United States, receive the disability benefits to which they are entitled.

To date, Munis and Piper have helped collect more than \$5 million in disability benefits, with the bulk of those funds going to the dependents of incarcerated veterans.

Between the bureaucracy of the U.S. Department of Veterans Affairs and their disabilities, veterans often remain unaware of their entitlement to benefits;

others don’t know how to navigate the paperwork. That’s the need that Piper and Munis identified and have been attempting to address.

They managed to win enough support from prison staff to set up a small office at CTF to assist other imprisoned veterans; it is, apparently, the only office of its kind in the nation. According to Munis, they use the Freedom of Information Act to research and file claims on behalf of veterans in prisons in 17 states, and hope to expand their services in the future.

For Munis and Piper, serving a life term and 74 years, respectively, donating their services in this manner is a way to give back to the veteran community. “The reaction has been overwhelming,” said

Munis. “For them to break down in tears saying no one’s ever offered to do this for me before is a reward in itself.”

The two men now also assist veterans who are preparing for parole or facing the parole board. They were also instrumental in bringing the Wall that Heals, a traveling half-scale replica of the Vietnam Veterans Memorial, to CTF in June 2011. The Wall that Heals had never before been displayed on prison grounds.

Munis and Piper are accredited by the Monterey County Military & Veterans Affairs Office to represent approximately 17,000 incarcerated veterans in California. ■

Sources: [www.kionrightnow.com](http://www.kionrightnow.com), [www.vva.org](http://www.vva.org)

## *The Trials of Eroy Brown: The Murder Case that Shook the Texas Prison System*, by Michael Berryhill (University of Texas Press, 2011). 244 pages, \$29.95

Book review by Mel Motel

*The Trials of Eroy Brown: The Murder Case that Shook the Texas Prison System* opens with a Tony Judt quote about how truthfully embracing history is an uncomfortable process. Michael Berryhill’s engaging account of one man’s journey through the then-named Texas Department of Corrections (TDC) exposes Texas-style criminal justice during a time of revolution in the U.S. and its prisons. Berryhill’s true tale of a prisoner accused of killing two prison officials, and the three jury trials that resulted, reveals a history that is indeed uncomfortable – a history of resistance, reform and retaliation in Texas’ prison system.

The action of *The Trials of Eroy Brown* occurs on the heels of the pivotal 1980 *Ruiz v. Estelle* ruling, in which a federal judge (aptly named Judge William Justice) declared Texas prisons unconstitutional due to terrible and brutal conditions. *Ruiz* vindicated both prisoners and their advocates who had grieved systemic abuse and overcrowding in the TDC; the case also fueled prisoner activism and increased the public’s sympathy for the plight of the incarcerated.

It is shortly after the *Ruiz* ruling that

Berryhill introduces 30-year-old Eroy Brown. Brown had arrived in prison in 1977 for the third time as an accessory to an armed robbery. Most of Brown’s adulthood had been spent as an addict and petty thief – a poor black man entangled in the criminal justice system since his teenage years. Brown’s rap sheet included convictions such as the one for which he served his second prison stint: burglarizing a department store for \$27 worth of socks.

By 1981, Brown was a “trustee,” one of a cadre of prisoners who had “earned the confidence of authorities by their good behavior.” He was doing time at the Ellis Unit, a/k/a “The end of the road,” a prison stuffed with death row prisoners and men serving long sentences. Built in the 1960s, the Ellis Unit sits on the land of a former slave plantation, like many of the other prison units that cover the Texas landscape.

Most people involved can agree that on April 4, 1981, Ellis Unit Warden Wallace Pack and farm manager Billy Moore were killed by drowning and a gunshot to the head, respectively, after Moore brought Eroy Brown to speak with Pack regarding a

comment Brown had made about furlough. Beyond that, what happened – and why – depends on whom you ask.

Brown’s attorney, Craig Washington, argues that “Brown was in fear of being thrown in the river because he had threatened to expose the thefts of ‘Master Moore.’” Reflects Michael Hinton, a prosecutor in Brown’s first trial, “The case seemed simple: a drug-crazed Negro had gone out of his mind,” a trope reminiscent of racial stereotypes from slave times. Both arguments alluded to the lasting legacy of the plantation-ruled South.

The author draws from diverse sources to reconstruct Brown’s three trials: a mistrial for the drowning of Pack (Berryhill calls it “a trial of a black field slave against the white master, with the house slaves testifying against him”); an acquittal for Pack’s murder at the second trial; and finally an acquittal for Billy Moore’s murder. Berryhill uses witness testimony, interviews with jurors and newspaper articles to reveal the perspectives of the many parties involved in the trials.

Interviews and testimonies detail the TDC’s enforcement of a dangerous hierarchy of prisoners. In addition to

“trusties,” witnesses explain the “building tender” system, whereby prisoners acted as guards to keep other prisoners in line through violence and threats of violence. During Brown’s third trial, eighteen out of 21 witnesses testified that their lives had been threatened in prison, usually by building tenders. Not surprisingly, for every prisoner and former prisoner who mentioned the building tender system, a TDC official denied its existence or claimed ignorance.

Berryhill depicts his subjects as neither sinners nor saints, though he appears critical of the brutal Texas prison system and sympathetic to Brown’s defense. The author does not hide Brown’s follies, the bumbling prisoner witnesses or Brown’s lawyers – for example, the reader is privy to Washington breaking down in tears more than once during the proceedings.

Berryhill claims that Brown’s acquittals marked the “end of Jim Crow justice in Texas.” Yet *The Trials of Eroy Brown* was published within a year of Michele Alexander’s book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, which is well known within criminal justice activist circles. [See: *PLN*, Sept. 2010, p.44].

So is Jim Crow justice really over in Texas, or does it persist? What impact did Brown’s trials have on Texas’ criminal justice system? What legacy did Judge Justice’s *Ruiz* ruling create for future prisoners?

Brown’s acquittal was a victory for both him and other Texas prisoners, and provided a spark for prison activists. But when 1 in 15 black men eighteen and

older in the U.S. are in prison or jail today (compared with 1 in 106 white men eighteen and older), any claim that Jim Crow justice has collapsed should be viewed with skepticism. More than 2.3 million people are incarcerated in the U.S. – many of them victims of a Drug War that targets communities of color, or, more generally, victims of a system that strives to keep people poor and powerless (including

other people of color and poor whites), to the benefit of the ruling class.

Even if using the term “Jim Crow” to describe today’s situation risks devaluing the history of the racist legal system that kept blacks exploited for almost a century after emancipation, our justice system is no more colorblind today than when Eroy Brown was serving time in Texas prisons in the 1970s. ■

## Ohio Jails Find Loophole to Again Charge Booking Fees

Lockups in suburban Cincinnati just aren’t as profitable as they once were. So sheriff’s offices in southwestern Ohio’s Hamilton and Butler counties are charging prisoners for the time they’re forced to spend in jail.

More than 10 years ago, a federal judge ruled that the “reception fees” jail prisoners were paying to both counties were unconstitutional. [See: *PLN*, Sept. 2010, p.30; Aug. 2003, p.21]. According to Butler County Chief Deputy Anthony Dwyer, the jails have since found a loophole: Only convicted prisoners will be required to pay the fees.

“Any revenue stream out there is worth going after,” Dwyer told the *Cincinnati Enquirer*.

In July 2011, Butler County began collecting \$20 booking fees, which presumably will be applied to the jail’s annual operating expenses of \$5 million.

Hamilton County resumed charging fees (\$40 per convicted prisoner) in 2008. County data indicates the fees amount to

almost \$200,000 annually.

After losing in court a decade ago, Hamilton County was ordered to reimburse jail prisoners approximately \$1 million and spend another \$150,000 for prisoner education. Butler County, which detains fewer prisoners, had to refund \$64,000 and donate \$5,000 to the Legal Aid Society of Greater Cincinnati.

Like so many schemes designed to generate more money for county jails, booking or “reception” fees were popularized by Maricopa County, Arizona Sheriff Joe Arpaio, who as recently as 2009 charged prisoners a short-lived “per diem” fee of \$1.25 for meals.

Ohio has allowed counties to charge prisoners a processing fee, and make them pay for room and board, as well as medical and dental visits, since 1996. However, the reception fees can only be charged to convicted prisoners, not pre-trial detainees. ■

Sources: *Associated Press*, *Cincinnati Enquirer*



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# Pennsylvania Parole Board May Not Condition Parole of Sex Offender on Admission of Guilt Due to Ex Post Facto Violation

The Third Circuit Court of Appeals has held that in denying parole to convicted sex offender Louis Mickens-Thomas for his refusal to participate in a sex offender program that required he admit his guilt, the Pennsylvania Board of Probation and Parole retrospectively subjected him to a statutory requirement that did not exist at the time of his conviction, in violation of the constitutional proscription against ex post facto laws. In an unpublished opinion, the Court of Appeals granted Mickens-Thomas, now 82, unconditional habeas corpus relief.

Mickens-Thomas was convicted of the rape and murder of a 12-year-old girl in 1966, a crime for which he has steadfastly maintained his innocence. His life sentence was commuted in 1995 and he became eligible for parole a year later. His parole applications were repeatedly denied by the Board, however, with each denial predicated on pre-1996 statutory requirements enacted after Mickens-Thomas' conviction; namely, that before being granted parole he must complete a treatment program and in the process admit his guilt.

In December 1999, Mickens-Thomas filed a habeas corpus petition alleging that his parole applications had been denied in violation of the ex post facto clause of the U.S. Constitution. The district court granted his petition in 2002 and the Third Circuit affirmed that decision, remanding the matter to the Board to conduct parole proceedings consistent with pre-1996 policies and guidelines. See: *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003).

However, the Board defied the appellate court's instruction to discontinue its "manipulation of hitherto insignificant factors," and after Mickens-Thomas filed a second habeas petition the Third Circuit granted him unconditional relief. See: *Mickens-Thomas v. Vaughn*, 355 F.3d 294 (3d Cir. 2004) [*PLN*, June 2004, p.24].

For more than a year after his release Mickens-Thomas complied with the terms of his parole, which included participation in a treatment program. In June 2004, he self-reported that he had kissed a woman at church against her will – misconduct that resulted in his discharge from the treatment program and subsequent arrest as a technical parole violator.

The Board ordered Mickens-Thomas to serve nine months of "backtime" in prison.

He did so, but then was repeatedly denied re-parole – as before, due to his failure to successfully complete a sex offender program that required him to admit guilt to his original conviction. He filed a motion asking the district court to enforce the previous habeas corpus judgment, or alternatively for habeas corpus relief, which was denied.

On appeal, the Third Circuit found the Board's refusal to re-parole Mickens-Thomas was "in direct contravention" of the appellate court's 2004 decision, and ordered that he be released on parole "forthwith." See: *Mickens-Thomas v. Vaughn*, 407 Fed.Appx. 597 (3d Cir. 2011) (unpublished). ■

## Oklahoma City Not Liable for Wrongful Conviction Resulting from Falsified Forensic Evidence

by Matt Clarke

The Tenth Circuit Court of Appeals has held that Oklahoma City can not be held liable for the actions of disgraced forensic chemist Joyce A. Gilchrist, who was employed in the city's police crime lab for over two decades, and that a man who served 17 years in prison for a rape he did not commit due to forensic evidence falsified by Gilchrist could not force the city to indemnify her.

Gilchrist testified at David Johns Bryson's 1983 trial, stating that hair and semen found at the crime scene were consistent with samples taken from Bryson. Seventeen years later DNA test results proved that he didn't commit the crime, and Bryson was released from prison. It took another 3½ years before the charges against him were finally dismissed. Subsequent retesting of the forensic evidence used by Gilchrist indicated that the evidence should have excluded Bryson, and that contrary to Gilchrist's testimony at trial, Bryson could not have been the semen donor.

Bryson filed a civil rights suit against Gilchrist and Oklahoma City in federal district court pursuant to 42 U.S.C. § 1983. He agreed to settle with Gilchrist for \$16.5 million in 2009, but the court granted summary judgment to the city after finding that Bryson had failed to prove municipal liability. [See: *PLN*, Dec. 2009, p.44].

While the lawsuit was pending, Gilchrist filed an indemnification cross-claim against the city which, without participation by Bryson, settled for \$23,364.29 on June 23, 2009. Bryson then filed a motion seeking indemnification directly from the city, which was denied by the district court. Bryson appealed.

The Tenth Circuit noted that Bryson principally based his appeal on his argument that the city should be held liable for Gilchrist's misconduct because it had failed to adequately train and supervise her. The appellate court found the "evidence suggests the City may well have been deficient in training and supervising Ms. Gilchrist," but that did not prove the city's policymakers were deliberately indifferent to the need for further supervision and training.

At the time of Bryson's criminal trial in 1983, the city had not received any complaints about or criticisms of Gilchrist's work. The Court of Appeals determined that her actions in concealing exculpatory evidence and falsifying test reports were not a predictable or obvious result of her possibly inadequate training, which consisted of nine months on-the-job training with no subsequent supervision. Although better training and management practices were adopted at forensic labs in the U.S. beginning in the 1970s and early 1980s, those reforms were not universal by 1983, and thus the lack of such improvements at the city's lab was not predictive of Gilchrist violating Bryson's rights.

The appellate court further held the city could not be held liable for the time Bryson spent in prison after Gilchrist's wrongdoings began to come to light in 1986, as no city decision-maker learned of the problems with Bryson's case until 2001, and Gilchrist was terminated when they became known. Also, it had not been proven that the city had a custom or practice of encouraging its forensic chemists to falsify evidence.

Thus, Bryson could not sustain his

claim against the city, nor was he entitled to indemnification by the city of his \$16.5 million settlement with Gilchrist. In a previous unpublished opinion, the Tenth Circuit had rejected the concept that “an injured party can be substituted for a tortfeasor employee as the real party in interest under [the Oklahoma indemnification] statute,” Okla. Stat. Title 51 § 162(A). Therefore, Bryson had “no standing to pursue the employee’s indemnification on his own behalf.”

While expressing sympathy to Bryson’s plight, the Tenth Circuit affirmed the district court’s rulings and judgment on December 6, 2010. Bryson was represented by Norman, Oklahoma attorney Michael Salem.

Bryson filed a petition for a writ of certiorari with the U.S. Supreme Court, which was denied on June 20, 2011. See: *Bryson v. City of Oklahoma City and Gilchrist*, 627 F.3d 784 (10th Cir. 2010), cert. denied.

Hence, after spending 17 years in prison for a crime he did not commit, Bryson obtained a \$16.5 million settlement he could not collect – demonstrating the complete absence of justice in our nation’s justice system relative to his case. *PLN* has previously reported extensive problems at forensics crime labs across the nation that have resulted in wrongful convictions. [See: *PLN*, Oct. 2010, p.1]. ■

Additional source: *Oklahoma Gazette*

## California: State Settles Prisoner’s Lawsuit for \$10,000, then Delays Payment

In June 2010, Cion Adonis Peralta signed a Full Release of All Claims in a federal lawsuit he filed in 2005, alleging that officials at CSP-Lancaster had violated his rights under the Eighth and Fourteenth Amendments. In exchange for agreeing to voluntarily dismiss his complaint pursuant to Federal Rule of Civil Procedure 41(a)(1), Peralta received consideration in the amount of \$10,000.

Peralta had filed suit pursuant to 42 U.S.C. § 1983, alleging that beginning in August 2000, while housed at the California State Prison in Los Angeles County, he was repeatedly assigned an upper bunk on an upper tier despite having a medical condition requiring that he be placed in a lower bunk on a lower tier.

In his complaint, Peralta documented his repeated requests to be moved to medically-appropriate housing, which were ignored. He further documented that he sustained injuries in falls which

resulted from his being inappropriately housed, and that he consequently wound up first on crutches and later, for a time, in a wheelchair.

Peralta sought \$500,000 in compensatory and punitive damages, claiming that prison officials were deliberately indifferent to his serious medical needs, had subjected him to cruel and unusual punishment, and had violated his due process rights.

After settling the case, however, Peralta had difficulty in getting the state to pay up. He filed a motion to enforce the settlement on November 29, 2010. An attorney for the state responded, saying the California Department of Corrections and Rehabilitation “had a back log of settlements that it was processing due to the late passage of the State’s budget.” While the payment was supposed to be made by February 2011, it was further delayed “because an individual within the State Controller’s office responsible

for issuing the check had to leave work to attend an emergency funeral.”

A year later, in February 2012, there is no indication on the district court’s docket that the state had paid the \$10,000 settlement to Peralta. See: *Peralta v. Caire*, U.S.D.C. (C.D. Cal.), Case No. 2:05-cv-03662-GHK-PLA. ■



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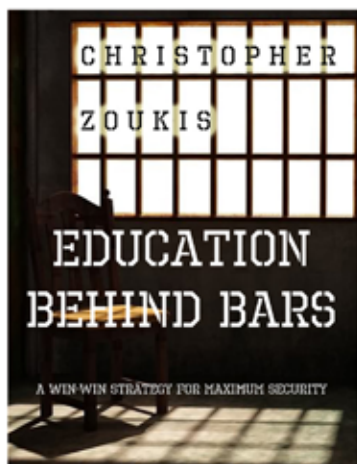
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## News in Brief:

**California:** Former San Quentin prison guard Robert Alioto, 48, pleaded guilty on December 5, 2011 to smuggling drugs into the facility. Alioto was a warehouse supervisor at the prison when he was found with six cell phones and marijuana during a search of his vehicle as he arrived for work. He has not yet been sentenced.

**Colorado:** A prison transport van crashed in Lincoln County on December 19, 2011, killing a 22-year-old female guard and a prisoner. The van, owned by Corrections Corp. of America (CCA), was en route from the Kit Carson Correctional Center to the Limon Correctional Facility when it rolled at least twice. Speeding and an inexperienced driver were cited as factors that contributed to the crash. The guard who was killed was identified as Grace Cortez; the prisoner who died was Andres Valdez, 57. Eight other prisoners and one guard who survived the accident were treated for injuries.

**Congo:** Nine prisoners were killed and 50 injured during an escape attempt at a prison in the city of Bukavu. As part of the escape, one prisoner tried to use a hand grenade. "The [prisoner] did not know how to use a grenade, he pulled the pin out but didn't throw it," said provincial chief of police General Gaston Luzembo. Officials are investigating how a grenade was brought into the prison. In September 2011, over 965 prisoners escaped from the Kassapa prison near Lubumbashi after gunmen opened fire on police and military guards. That raid freed a top Mai-Mai militia leader held at the facility who had been sentenced to death.

**Cuba:** On December 23, 2011, the Cuban government announced it would release 2,900 prisoners in advance of a 2012 visit by Pope Benedict XVI. The pardons were granted for humanitarian reasons, according to the Council of State, and will include elderly prisoners, prisoners with medical conditions, women and young prisoners with no prior criminal records. The mass release does not include prisoners held for political reasons.

**District of Columbia:** Fourteen people were arrested on January 17, 2012 for staging a protest in front of the U.S. Supreme Court building. The demonstrators were protesting the 35<sup>th</sup> anniversary of the execution of Gary Gilmore, who was the first prisoner put to death after the Supreme Court reinstated capital punish-

ment in 1976. Since then there have been 1,283 executions in the U.S., according to the Death Penalty Information Center. It is illegal to protest in the plaza that faces the Capitol.

**Florida:** Richard Demetric Mays, 26, a state prison guard at the Levy Forestry Camp, was one of two men arrested in December 2011 after deputies pulled over their car to check the window tint. As a result of the traffic stop, a half-kilo of cocaine worth over \$12,000 was found in the vehicle. Mays was charged with possession and trafficking cocaine, and held at the Alachua County jail.

**Japan:** Over 1,000 prisoners at the Osaka Prison in Sakai became sick due to food poisoning in December 2011. The facility's kitchen was closed for three days and prisoners were given preserved food from emergency stores while the incident was investigated.

**Kyrgyzstan:** Government officials announced on December 13, 2011 that prisoners at several facilities in this central Asian nation were participating in a hunger strike. The protest was related to a change in visitation rules that barred prisoners from receiving visits from prostitutes. "Prisoners at seven prisons have refused to take their meals," said Joldochbek Bouzourmankoulov, a spokesman for the prison system. "Prisoners had the right for visits from their families and 'other' people," he stated. "But under the label for 'others,' they were bringing prostitutes to the prison."

**Minnesota:** On December 5, 2011, Dakota County jail deputy Phillip Mycal Simpson, 40, was found guilty of illegally releasing medical information about a prisoner. Simpson was convicted at a bench trial of one misdemeanor charge of violating government data practices, and fined \$180; he was acquitted of another, similar charge. He had released medical information about prisoner Jason Olson-Skweres during a child-custody hearing, including information related to Olson-Skweres' medication, medical history and jail records. Olson-Skweres was the boyfriend of a former jail deputy, Emily Bonniwell, who had had a child with Simpson.

**Missouri:** Police responded to the Jackson County juvenile detention center on December 12, 2011 to quell a disturbance among offenders at the facility, including four who had escaped from their rooms. There were no reported injuries. Another incident had occurred

the previous month when juveniles barricaded themselves in a room and caused property damage, resulting in a response from dozens of police officers and a tactical squad.

**Nevada:** On January 10, 2012, the Nevada Board of Examiners approved a contract with California Prison Industries for the purchase of shoes for Nevada prisoners. The contract, valued at \$200,000, will supply black-and-white sneakers made by California prisoners at around \$4.25 per pair – less than half the cost Nevada was paying other vendors.

**New Mexico:** Five guards at the Bernalillo County Metropolitan Detention Center (MDC) were arrested following a December 21, 2011 altercation involving Christopher Shields, who was being booked into the jail on a DUI charge. Shields, who was uncooperative, was reportedly choked and kicked by MDC guard Demetrio Gonzales. Gonzales then took Shields into a shower area, where they were joined by guards Kevin Casaus, Manuel Marquez and Matthew Pendley. The guards allegedly assaulted Shields; a fifth guard in the booking area when the incident occurred, Pricilla Sieben, also was charged. All of the MDC guards were placed on paid administrative leave.

**New York:** On December 12, 2011, the state's first same-sex marriage involving a prisoner took place at the Auburn Correctional Facility. Former prisoner Marc Rodriguez, 34, wed prisoner Ronald Cook, 31, in a civil ceremony; they had met while incarcerated. The couple will have the same right to participate in conjugal visits as other married prisoners. New York enacted legislation to allow same-sex marriage in June 2011.

**Pennsylvania:** The ACLU has filed suit on behalf of the NAACP against the City of Philadelphia and Clear Channel, an advertising company. The complaint alleges that Clear Channel and the city refused to post an NAACP ad at Philadelphia International Airport that stated, "Welcome to America, home to 5% of the world's people & 25% of the world's prisoners. Let's build a better America together." The NAACP claims the refusal to run the ad constituted an unconstitutional prior restraint on free speech. "The advertisement at issue discusses the high level of and cost of incarceration in America's prisons, a subject of immense national and local interest. There is no legitimate

justification for the defendants' refusal to accept this advertisement," states the lawsuit, which was filed in October 2011.

**Pennsylvania:** Gregory Moon, 22, picked a poor Halloween costume considering that he was wanted on an outstanding warrant for possession of a stolen gun. Moon was dressed as a convict in a black-and-white striped outfit when he yelled at police who had responded to a disturbance and were arresting his friend on October 31, 2011. Moon was arrested too, and traded his costume for an orange jumpsuit at the Washington County Jail.

**South Carolina:** On January 18, 2012,

a special operations team entered the Lieber Correctional Institution and ended a riot in which prisoners had overpowered and injured guards at the facility and took their keys. Approximately 200 law enforcement officers responded to the disturbance. The guards were released by the prisoners after they took control; three guards suffered minor injuries. The riot started in Ashley A and B dorms, a high-security section of the facility.

**Tennessee:** Bruce Tuck, 38, a former jailer for the Collierville Police Department, pleaded guilty on December 16, 2011 and was sentenced to 20 years for

numerous crimes committed in Shelby County in 2009, including aggravated rape, aggravated kidnapping, aggravated robbery, aggravated sexual battery and other charges. He was already serving a 60-year sentence for a series of rapes in Weakley County. Tuck, who weighed around 275 pounds, said he had confessed in the earlier case in exchange for potato chips and a soft drink after the jail kept him on a diet of lettuce. Criminal Court Judge Chris Craft found that claim "less than credible," noting the jail's menu included chicken sandwiches and pancakes.

**Tennessee:** A Coffee County jail

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## News in Brief (cont.)

guard, Susan D. Winters, 53, was arrested on January 2, 2012 and charged with bribery, official misconduct and manufacture, sale or delivery of a controlled substance. She is accused of meeting with an informant and accepting approximately 11 grams of marijuana and 1 gram of cocaine to smuggle into the jail. She was held on a \$225,000 bond.

**Texas:** Shiva Daniels, 26, a guard at the CCA-operated Dawson State Jail, was critically injured by her estranged boyfriend on January 10, 2012. Walter Moore, 29, who had two children with

Daniels, shot her twice with a shotgun after she left work; she was hit in the neck and shoulder. Moore was arrested on a charge of aggravated assault/family violence. Daniels, who survived the shooting, was listed in serious condition.

**Washington:** On December 12, 2011, Yakima County prosecutor Jim Hagarty pleaded guilty to reckless driving. He had been arrested in November and accused of DUI after rear-ending another car. Hagarty was sentenced to one year on probation plus 24 hours of community service, restitution and a \$500 fine. He also had his driver's license suspended for 30 days.

**Zimbabwe:** A guard at the Bulawayo

Prison has been accused of helping a prisoner escape as payment for a debt equivalent to \$120. Skint Thulani Mhlanga, who worked as a guard at the prison, owed the money to Tauya Shepherd Maguwu. On October 20, 2011, Mhlanga, one of the guards who escorted Maguwu to a court hearing, allegedly gave him street clothes and let him walk free. "Mhlanga did this as a way of paying back Maguwu his \$120 that he had borrowed. He had failed to raise the money on his last pay day," said prosecuting attorney Malvern Nzombe. Maguwu was captured a day after he escaped, while Mhlanga claimed he had been assaulted by detectives who investigated the incident. ■

## Criminal Justice Resources

### *ACLU National Prison Project*

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### *Amnesty International*

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### *Center for Health Justice*

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### *Critical Resistance*

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### *Family & Corrections Network*

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### *FAMM*

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### *The Fortune Society*

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### *Innocence Project*

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### *Just Detention International*

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### *Justice Denied*

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### *National CURE*

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### *November Coalition*

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### *Partnership for Safety and Justice*

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### *The Sentencing Project*

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)



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**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada**, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, PLN Publishing, 221 pages. **\$49.95.** Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, para-legal and college correspondence courses. 1071 ☐

**The Criminal Law Handbook: Know Your Rights, Survive the System**, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038 ☐

**Represent Yourself in Court: How to Prepare & Try a Winning Case**, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 528 pages. **\$39.99.** Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say in court, how to say it, etc. 1037 ☐

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**Finding the Right Lawyer**, by Jay Foonberg, ABA, 256 pages. **\$19.95.** Explains how to determine your legal needs, how to evaluate a lawyer's qualifications, fee payments, and more. 1015 ☐

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# PRISON Legal News

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VOL. 23 No. 5

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

May 2012

## Prison Slave Labor Replaces Freeworld Workers in Down Economy

*by David M. Reutter*

The fact that prison slave labor can cut costs and generate revenue has never been a secret. Private businesses nationwide are vying to exploit prisoner workers to reduce operating expenses and gain a competitive advantage, while government agencies are increasingly using prisoners for jobs that otherwise would go to public employees or contractors. Even farmers have turned to prison labor to harvest their crops.

### Expansion of Prison Labor

For as long as there have been prisons there have been prisoner work crews. The only class of people who may be forced into slave labor under the U.S. Constitu-

tion are prisoners, as the 13<sup>th</sup> Amendment expressly permits and forever enshrines slavery “as a punishment for crime whereof the party shall have been duly convicted.” As the American penal system has evolved since the demise of the convict leasing system in the early 1900s, the use of prison labor has been mostly confined to making license plates, manufacturing office furniture, landscaping, maintenance of government buildings, and picking up trash and cutting grass along roadsides.

With state and local governments facing budget deficits due to the continuing economic downturn, however, they are looking for ways to reduce costs and fulfill government obligations in the face of hiring freezes and layoffs of public employees. For some government officials, prison slave labor is viewed as a partial solution.

“The old county work camps were great. There just aren’t enough of them anymore,” said Georgia state Rep. Alan Powell. “The state gets better results out of a prisoner in 12 months hard labor than sitting in a cell. If the taxpayers pay to fight fires and build roads or pick up trash, then let the prisoners do it.”

In keeping with that philosophy, Georgia’s Department of Transportation is using parole violators to clean up trash on highways statewide. “It costs the department millions of dollars every year to pick up litter along Georgia’s 20,000 miles of state and federal roads,” remarked Eric Pitts, a state maintenance engineer for the Transportation Department. “And frankly, we don’t have enough funding or manpower to do the job as well as we would like. The parolees’ help

is invaluable.”

In October 2011, Camden County, Georgia considered a proposal to place two prisoners in each of the county’s three firehouses. The prisoners would respond to calls alongside firefighters, who would be responsible for supervising them. It was hoped that using prisoners convicted of non-violent offenses rather than hiring more firemen would save the county \$500,000 annually. The prisoners would not receive any pay but would be eligible to be hired as firefighters – five years after their release.

Despite criticism, particularly from firefighters who didn’t want to add “prison guard” to their public service duties, a similar program in another Georgia county has been successful. “It worked out quite well,” said Sumter County Administrator Lynn Taylor. “This is a measure that governments are looking into to provide the same high level of service in the most economic way possible.”

In California, due to a massive budget deficit, state parks have been neglected. “They’re all in need of sprucing up, fixing up, repainting and bringing up to standards. So the need here was pretty great,” said Folsom Lake State Recreation Area Superintendent Ted Jackson.

To solve that problem, the California Department of Parks and Recreation and the California Prison Industry Authority (PIA) collaborated to have prisoners perform clean-up and maintenance work at state parks. “For the PIA to offer up this labor for us to get work done that we otherwise wouldn’t be able to get done, it’s fabulous,” Jackson stated.

Officials in Green Bay, Wisconsin are

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## **Prison Slave Labor (cont.)**

expanding the concept of “chain gangs” beyond the traditional role of roadside maintenance. “Having them sweeping and picking up leaves, cleaning off bird droppings. Shoveling the walkways this winter, things are going to be done quicker and at no cost. It’s a win-win for this community,” said Mary Scanlan, supervisor of Green Bay’s Department of Public Works.

The expansion of prison labor comes with an incentive for the prisoner workers and benefits for taxpayers. In August 2011, judges in Brown County, Wisconsin signed off on a deal to reduce a prisoner’s sentence by one day for each 24 hours worked. Every day shaved off a sentence saves the county \$67 in incarceration costs.

“We’ve actually managed now, in the last month, to shut down a housing unit, which has been big for us because it allows us to use that manpower in other areas of the jail, relieving overtime, which is a big help to us,” said Lt. John Mitchell, who oversees the prisoner work program for the Brown County Sheriff’s Office. Of course, reducing sentences would accomplish the same thing minus the slavery component.

The increase in the use of prison labor in Wisconsin came after Governor Scott Walker signed legislation that gutted collective bargaining rights for public employees and allowed the use of non-union workers.

Soon after the law was enacted in June 2011, Racine County announced that it would have prisoners add shoveling, painting and landscaping to their job duties. As in Brown County, prisoners will receive time off their sentences in lieu of pay. Previously, public employees or contractors performed such work.

### **Prison Slave Labor Costly**

Although using unpaid prison labor seemingly appears to be free, there are associated costs that must be considered. The greatest expense is for the guards who have to supervise the prisoner workers – a significant cost that is borne by the government agency responsible for providing prison work crews. Other costs include transportation, training and the provision of meals, tools and safety equipment.

This has resulted in some states eliminating or scaling back “free” prison labor

programs. “We actually stopped all but one work crew (which the requester fully funded) in September 2010,” said Michigan Department of Corrections (MDOC) spokesman John Cordell.

The MDOC wants to continue the crews, but with a \$10 million price tag for the department’s 2010 prison labor operations amid a budget crunch, something had to change. “We will have to charge the entities that use the crews,” Cordell said. “We just can’t subsidize the program anymore.”

North Carolina cut \$4.78 million in funding for all 127 of its prison work crews in 2009. It added back 39 crews the following year but budget reductions have again shut them down, according to Keith Acree, the public affairs director for the North Carolina Department of Corrections.

In March 2012, officials in Sutter County, California discussed ending prison work crews for a different reason. For decades, prisoners have been used to feed dogs and cats, clean their cages and even assess their health at the county’s animal shelter. Over the past five years multiple reports have cited shortcomings with the use of prison labor because prisoners, who are not trained in veterinarian care, have caused problems at the shelter by making mistakes and distracting employees.

A 2007 grand jury report found that prisoners were partially responsible for an “abnormally” high number of animal deaths at the shelter. “The utilization of inmate labor remains and will continue to pose serious and detrimental effects on shelter operations,” a more recent report stated in November 2011.

Prison slave labor also comes with another cost – the cost of freeworld jobs that are lost to prisoners, both in the public and private sectors.

In Florida, a \$24 million cut in the 2010-11 budget for the state’s Department of Corrections (FDOC) resulted in the elimination of 71 of the prison system’s 184 work squads. However, an agreement between the FDOC and the Florida Department of Transportation (DOT) will keep many prison work crews operational for the next year. [See: *PLN*, Feb. 2012, p.38].

The agreement puts more than \$19 million into FDOC’s coffers for providing prison labor for virtually any kind of work that DOT requires. FDOC guards or DOT employees will supervise prisoners while they repair roads, signs, bridges and

## Prison Slave Labor (cont.)

fences. In all, there are 94 different types of DOT jobs that prisoners will perform at a rate of \$10.45 per hour – none of which the prisoners will receive.

The \$19 million appropriated for Florida prisoners to perform work for DOT could have employed almost 900 non-prisoner workers for a year at the same hourly wage. The unemployment rate in Florida was 9.4% in February 2012, according to the U.S. Bureau of Labor Statistics, which is not helped when jobs that could go to citizens instead go to prisoners.

One Florida city decided to forgo prison labor in order to preserve freeworld jobs. The Ocala City Council voted in 2010 to hire a private company to mow the grass on city property, though using prisoners would have saved \$1.1 million. “Our area has been really hard hit by unemployment,” said Council member Suzy Heinbockel. “There was a belief that the private company would bring local jobs, rather than giving those jobs to prisoners.”

In Georgia, the city of Augusta has become reliant on prisoner workers, who collect trash and maintain and clean schools and other government buildings. However, the cost of housing those prisoners in a city-owned correctional facility far exceeds the value of their labor – with \$3.23 million in annual incarceration

expenses versus an estimated \$1.25 million in savings through the use of prison work crews (see related article in this issue of *PLN*).

During a forum on labor rights in Columbus, Georgia on April 4, 2012, Richard Jessie, second vice president of the Columbus NAACP, noted that “Our prison workforce is an enslaved workforce basically.” Commenting on the money the city saves by using prisoner work crews, which is reportedly \$9 million to \$17 million annually, he added, “We use slave labor to do much of the work that could and should be paid jobs.”

At the same forum, Ben Speight, organizing director for Teamsters Local 728, asked a good question: “If we’re saving \$17 million, where’s that money going?” In fact, the “savings” achieved through prison slave labor are often fictitious; they do not represent actual cost reductions, but rather money that otherwise would be spent if freeworld workers were hired to do the same jobs that prisoners perform.

### Down on the Farm

Since at least 2005, immigration has loomed large in the political spotlight. Conservative lawmakers and pundits argue that illegal immigrants burden the health care and welfare systems and take jobs from U.S. citizens. Those who advocate on behalf of undocumented immigrants say they are largely law-abiding and are trying to provide a living wage for their families while performing work

that most Americans refuse to do, such as picking crops.

As part of a crackdown on illegal immigration, the federal government has increased enforcement efforts and border security, including the construction of a partial fence along the U.S.-Mexico border. Arizona was the first state to pass its own illegal immigration enforcement law with the enactment of SB1070 in April 2010, and several other states have since followed suit.

A harsh anti-illegal immigrant law in Georgia that went into effect in July 2011 (HB87) caused an estimated 11,000 undocumented migrant workers to leave the state. As those workers had performed the majority of farm labor, crops worth millions of dollars began to rot in the fields. Farmers appealed to lawmakers for help.

Governor Nathan Deal ordered prisoners to fill open jobs in the state’s \$68.8 billion agriculture industry. “Governor Deal is interested in having an organized system to match a group that needs employment with employers who need labor,” said Stephanie Mayfield, the governor’s spokeswoman. “It’s not a cure-all, but it allows two groups with fixable needs to help each other.”

As a result, around 2,700 work release prisoners held in Georgia DOC transitional centers were subject to being sent to farms to pick crops. Probationers, who are required to maintain employment as a condition of their supervision, also were

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encouraged to apply for agricultural jobs.

However, farmers were not enthused with the quality of work performed by prisoners and probationers. The summer heat, long hours and grueling field labor were more than many could bear, resulting in many refusing the jobs or quickly quitting.

"There were some obvious challenges with using probation labor," admitted Agricultural Commissioner Gary Black. "And the two [farm] producers found that the probationers were unable to harvest at the same rate as the other workers. At the end of the day, both producers agreed that the program had potential to meet the niche need for farmers desperate for workers."

At least one Georgia organization questioned the use of prison labor where "the prisoners come from a private prison, such as the one CCA (Corrections Corporation of America) and the Valdosta-Lowndes County Industrial Authority want to build in Lowndes County." Prisoner workers receive a small portion of their wages and the remainder goes to cover the cost of their incarceration. For public prisons such funds go to the state treasury, but for a private prison it results in "[y]our tax dollars profiting a private corporation for slave labor," according to a blog entry on the website of the Lowndes Area Knowledge Exchange.

Alabama, like Georgia, turned to prison labor after a harsh anti-illegal immigrant law that went into effect in September 2011 (HB56) caused undocumented workers to flee the state. Tomato farmers complained their crops were going unpicked and said they risked losing their farms. In response, Alabama Department of Agriculture and Industries Commissioner John McMillan proposed using prisoners to provide field labor, and

met with farmers in December 2011 to discuss the idea.

"The suggestion to use prisoners who are eligible for work release programs was made as a way to help farmers fill the gap and find sufficient labor," said Department of Agriculture and Industries spokeswoman Amy Belcher.

The Alabama Department of Corrections opposed the use of prisoners to pick crops, saying the prison system isn't a solution to worker shortages caused by the state's anti-illegal immigrant legislation, and that most prisoners on work

release already have jobs. Of course, it is somewhat ironic that government officials are offering prisoners – who have been convicted of committing illegal acts – as a replacement for the illegal immigrants who typically perform migrant farm work.

In Washington, with a \$1.5 billion apple crop at risk, state officials ordered prisoners into the orchards in November 2011. A late harvest and fewer farm workers made the crop more difficult to bring in. According to Grandview harvester Alberto Morales, the word on the picker

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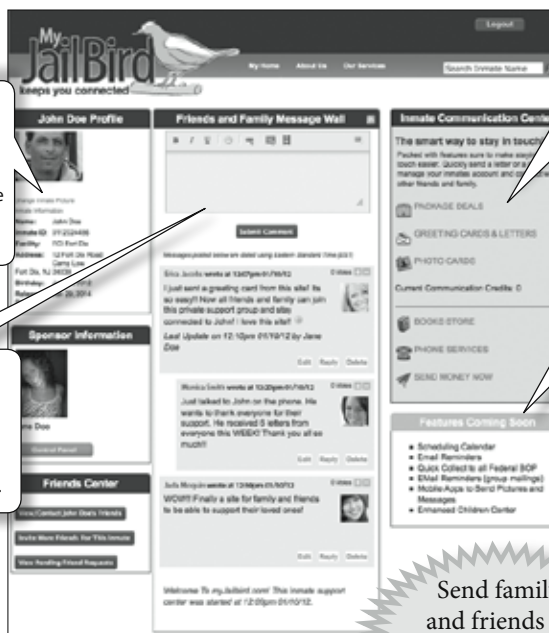
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## Prison Slave Labor (cont.)

grapevine was that some apples in upper Yakima valley and upper central Washington would not be picked due to a worker shortage.

To assure it could bring in its apples, the McDougall & Sons Orchard in Grant County agreed to pay \$22 an hour for prison labor from the Olympic Corrections Center. Most of those wages went to the state; prisoners received minimum wage less deductions for incarceration costs, restitution, victim compensation, child support and other financial obligations. The prisoners' net pay was between \$1.00 and \$2.00 an hour.

For the first several days, 105 prisoner workers were housed in tents. "We took field kitchens and port-a-potties over there," said Danielle Wiles, assistant director of Washington state's Correctional Industries. She noted that five hours into the workday, one prisoner had picked four apple bins while many had filled only one. An experienced picker can pick up to ten bins a day.

An outcry ensued when the prisoners' \$22-per-hour wage rate was publicized, since the apple growers had offered to pay much less to freeworld employees. "It's really hard work and this isn't right for the inmates to be paid \$22 an hour and we're not even going on breaks," said farm worker Jose Patino, who said McDougall & Sons refused to pay him and his wife

more than minimum wage.

The Washington Department of Corrections claimed prisoners did not take jobs away from freeworld workers, as there was a labor shortage. "They were desperate to get the crop off before it gets too cold," said Wiles.

In Idaho, state prisoners have long been used on farms to sort and pack potatoes; in 2011, prisoners were used for the first time to pick spuds in the fields, reportedly due to a shortage of farm workers. Idaho companies that use prison labor to process potatoes include SunGlo of Idaho, Inc.; Walters Produce, Inc.; High Country Potato, Inc. and Floyd Wilcox & Sons, Inc.

Colorado has used prison labor on private farms since 2005, when the state enacted stricter immigration laws. Around 100 female prisoners from the La Vista Correctional Facility, for example, are employed weeding, picking and packing onions and pumpkins under the supervision of prison guards. The prisoners receive \$9.60 an hour, of which about \$5.60 goes to the state. At least ten Colorado farmers use prison labor.

In Arizona, Wilcox-based Eurofresh Farms employs around 400 prisoners through an Arizona Corrections Industries program. The prisoners are paid close to minimum wage. "We're fortunate, we're near a prison here," said Eurofresh chief operating officer Frank van Straalen.

Florida is another state that has put its prisoners to work on farms, including

a program that began in 2009 which uses work crews from the Berrydale Forestry Camp on a 650-acre publicly-funded farm at the University of Florida's West Florida Research and Education Center. The prisoners grow collards, cabbage and turnips in the winter, while the spring crop yields snap peas, corn and tomatoes.

The arrangement provides the University with agricultural research and supplies vegetables for prisoners' meals. In 2010 the farm program resulted in \$192,000 in food cost savings at the prison and saved the University \$75,000 – money that otherwise would have been spent on paid staff.

### Who Benefits? Who Doesn't?

Claims that prisoner work programs reduce costs and provide rehabilitative job training are typical among advocates of prison slave labor.

Some proponents also point to the eagerness of prisoners to work. "They want to get out of the cell and move around," stated Steve Fisher, administrator of Texas' Walker County Jail. "They enjoy getting out. It makes their time go faster and it encourages good behavior. Our goal with the jail is to give back to the community as much as we can."

Dwight Hamrick, warden at the Muscogee County Prison in Columbus, Georgia, concurred. "So they enjoy getting out, one to alleviate the boredom, they enjoy having meaningful work and some really do take pride in what they do. To have work and a job is important to them," he said.

Then again, given the alternative of sitting in a jail or prison cell all day, being able to leave – even to do manual labor for little or no pay – is seen by many prisoners to be an improvement. Corrections officials rarely mention the monotonous and sometimes onerous conditions of confinement that contribute to prisoners' "eagerness" to participate in work programs.

Further, critics note that prison slave labor often takes jobs away from freeworld workers. For example, the Prison Industry Enhancement (PIE) program, which is authorized by federal law, allows prisoners to work for private companies to produce goods and services that are sold on the open market. [See: *PLN*, March 2010, p.1].

Typically, businesses involved in PIE partnership programs set up shop in prisons where they benefit from a captive,



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inexpensive work force and low overhead. They thus have a significant competitive advantage over other companies that do not use prison labor. While prisoners employed in PIE programs are supposed to earn “prevailing” wages, they usually only receive minimum wage – and up to 80% of their pay can be withheld for restitution, victim compensation, incarceration costs and mandatory savings.

“These partnerships are causing problems with labor and competition with non-PIE companies trying to stay in the market,” said Robert Sloan, a prison industry expert and consultant. “For example, Escod Industries manufactures wiring harnesses and cabling for HP, IBM, Dell and other companies. They are using inmate labor for that manufacturing at a South Carolina plant. The use of inmate labor gives them an edge over their competitors.”

Although PIE has been hailed as a “training” program that provides prisoners with job skills they can use following their release, it is questionable whether such skills actually translate to job opportunities for former prisoners. One PIE program involving Wilson Sports, for example, consisted of prisoners inflating

basketballs – a “skill” with limited utility in the outside job market.

“What good is the [PIE] program if the very companies taking advantage of it by claiming they’re ‘training’ inmates for employment upon release don’t hire those inmates after they get out?” asked Sloan. “The program is simply being abused by all involved – as is the practice of using inmates to replace public sector workers at the state, county and municipal levels.”

In April 2012, the Alabama legislature passed a bill (SB63) that would allow private businesses to partner with the state’s Department of Corrections and use prison labor through PIE programs. Thirty-eight other state prison systems authorize PIE programs, which employ approximately 5,000 prisoners nationwide.

While prison slave labor is usually touted as saving money, it may actually harm the local economy. “When a prisoner gets a job performing work in the community or in a prison industry program, they’re taking a job from someone else,” said *PLN* editor Paul Wright.

“[E]stimate how many civilian workers could be employed by each state participating in this kind of ‘partnership’ using prison labor,” added Sloan.

“Inmates are working in their place all across the country, displacing those who need jobs to feed their families and [put] a roof over their heads.”

As one example, when Brown County, Wisconsin began using prisoners to cut the lawn at Sheriff’s Office properties, the company previously contracted to do that work, Lizer Lawn Care, lost a \$13,000 annual contract.

“Obviously, we’d like the work, but I know just like any other business, if there’s a chance of saving money, it would be a smart business move,” stated Lizer Lawn Care’s owner, John Calewarts.

And in December 2011, a Tennessee-based company, Tennier Industries, learned that it had lost a \$45 million contract to produce clothing for the Department of Defense (DOD). Who won the contract? Federal Prison Industries, better known as UNICOR – which operates industry programs for the Bureau of Prisons. Prisoners employed with UNICOR earn from \$.23 to \$1.15 per hour, and it’s hard for freeworld businesses to compete with such low prison labor costs. Tennier had to lay off around 100 workers after losing the DOD contract.

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yells how the rest of the world is using prisoners or slave labor to manufacture items, and here we take the items right out of the mouths of people who need it,” said Steven Eisen, Tennier’s chief financial officer.

In our nation’s free market economy, however, where both the supply of prisoners and the demand for cheap labor are high, the use of prison slave labor at the expense of freeworld workers is only likely to expand. However, prison slavery has its limits and there are sound reasons that slavery is no longer the dominant mode of production in the world today. Slaves are not efficient workers and represent an investment for the slave owner, whether the state or an individual. Given the massive need for farm workers, it is doubtful that prisoners will be able to meet that need anytime soon. The other option, decent working conditions and a living wage, which might entice Americans back into the fields a la *Grapes of Wrath* days, appears to be unlikely. ❏

Sources: *Atlanta Journal-Constitution*, *USA Today*, [www.lake.typepad.com](http://www.lake.typepad.com), [fox11online.com](http://fox11online.com), *The Huntsville Item*, [www.news10.net](http://www.news10.net), *CNN*, *Seattle Times*, [www.columbiabasinherald.com](http://www.columbiabasinherald.com), *Yakima Herald-Republic*, [www.q13fox.com](http://www.q13fox.com), [www.kimatv.com](http://www.kimatv.com), [www.wlsam.com](http://www.wlsam.com), [www.host.madison.com](http://www.host.madison.com), [www.bls.gov](http://www.bls.gov), [www.allgov.com](http://www.allgov.com), [www.mediafreedominternational.org](http://www.mediafreedominternational.org), [www.thinkprogress.org](http://www.thinkprogress.org), [www.blog.al.com](http://www.blog.al.com), [www.wenatcheeworld.com](http://www.wenatcheeworld.com), *Wall Street Journal*, [www.jacksonville.com](http://www.jacksonville.com), [www.ledger-enquirer.com](http://www.ledger-enquirer.com), *New York Times*, [www.whnt.com](http://www.whnt.com), [www.cbs42.com](http://www.cbs42.com), [www.appeal-democrat.com](http://www.appeal-democrat.com), [http://vegetable-growersnews.com](http://http://vegetable-growersnews.com), [www.nationalcia.org](http://www.nationalcia.org)

## Work Crews Salvage Georgia Prison Contract

by David M. Reutter

The Augusta City Commission voted in July 2011 to extend a contract with the Georgia Department of Corrections to house state prisoners at the city-owned Richmond County Correctional Institution (RCCI), despite the city facing a \$9 million budget deficit and the contract costing local taxpayers almost \$3.23 million annually.

In July 2011, 181 state prisoners were housed at RCCI; while the state provides reimbursement payments to the city, they are not enough to cover operating expenses at the prison. From 2006 to 2011, it cost Augusta residents nearly \$16.4 million to house prisoners at RCCI.

It would seem that due to that high cost and the city’s budget deficit, the contract to house state prisoners would be canceled – yet the Commission voted to renew the contract. Why? The allure of prison labor.

Most, but not all, of the state prisoners are assigned to county work squads. The *Augusta Chronicle* estimated that 126 prisoners are on such squads, but RCCI warden Joseph Evans said up to 180 are assigned. The *Chronicle* asked Augusta’s eight city departments to provide the number of hours prisoners worked. Only the Department of License and Inspection could supply hard numbers; the others had to estimate.

It was apparent the city has become

dependent on prison labor. Some prisoners perform cooking, cleaning, maintenance, laundry and landscaping at RCCI, while those on community work squads are so in demand they have more job requests than they can handle.

The state Department of Transportation (DOT) uses two RCCI work crews to pick up trash in Richmond, Columbia, Lincoln and McDuffie counties. According to DOT spokeswoman Gazell McNure, prisoners worked 4,315 hours and filled 2,780 trash bags from January through July 2011.

The Board of Education decided in December 2010 to use prison labor to perform landscaping services and maintenance at retention ponds, to move school items, and to clean sports complexes and 40 schools. Benton O. Starks, the senior Facilities Director, estimated that RCCI prisoners worked over 5,000 hours.

The *Chronicle* calculated the beneficial cost of prison labor at minimum wage, \$7.25 per hour, for a 35-hour work week in 2010, assuming prisoners worked half the rain days and subtracting an hour for each day the temperature rose above 90 degrees. The paper concluded that prison work crews saved taxpayers about \$1.25 million – less than half the \$3.23 million it costs the city to house state prisoners at RCCI. ❏

Source: *Augusta Chronicle*

## Report Deconstructs Urban Legend of 100,000 Missing Sex Offenders

by David M. Reutter

“Like dormitory gossip or the childhood game Whisper-Down-the-Lane,” the assertion that “over 100,000 sex offenders [are] ‘missing’ from registries across the country has galvanized the urban legend that over years of telling, took on a life of its own,” states a July 14, 2011 report published by *Criminal Justice Policy Review*.

The number of “missing” sex offenders has been cited as an unassailable fact without attribution. While research on the national sex offender population is hindered by the independent operation of individual state registries, the National Center for Missing and Exploited Chil-

dren estimates there are around 730,000 registered sex offenders (RSOs) in the United States. The oft-cited figure of 100,000 missing sex offenders was most likely derived from a 2003 survey by an organization called Parents for Megan’s Law (PFML), which relied mainly on data from California.

“Ever since that alarming statistic was quoted in the media, it permeated the public discourse about what is ‘known’ about sex offenders,” the report states. “The fallacy, however, might be the problem of ‘missing’ sex offenders was more a reflection of failures in the operation and administration of registries than of



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noncompliance by individual RSOs.”

The 100,000 number has been called into question due to definitional ambiguities in what constitutes missing. That terminology “may denote lack of a permanent address (homeless or transient), a technical failure to comply with registration (in violation or noncompliant), and official designations of fugitive status (absconded, address unknown, or whereabouts unknown).”

California, Florida, Texas, Michigan and New York are home to nearly half the nation’s sex offenders. Tracking RSOs in larger states is more difficult, and California has historically been an outlier with higher reports of noncompliance than other states.

“PFML’s strategy of extrapolating a national estimate from a single state such as California is a flawed methodology; national averages cannot be inferred from single states,” according to the report. “We further suggest that a more refined definition of ‘missing’ sex offenders might produce more accurate rates of registrants whose whereabouts are truly unknown.”

The terms used to describe missing RSOs have been used interchangeably with the assumption they are deliberately eluding authorities and represent a higher risk of sexual offending. Studies of offenders who fail to register, however, indicate they do not appear to have an increased risk of committing more crimes, and that “sex offenders are among those least likely to abscond.” Some RSOs may be motivated to flee to avoid a perceived inability to comply with an overwhelming, complex and rigid set of rules specific to sex offenders.

Another fallacy associated with risk is deliberate evasion, as in some cases offenders mistakenly fail to register but still report to their parole officers and remain at their known location. Those who do not register are often assumed to be evading authorities and committing new sex offenses, but some avoid reporting in order to evade the unemployment, housing restrictions, harassment and social alienation inherent in complying with sex offender registration laws.

In determining how many sex offenders are really missing from state registries, the report relied upon two studies that used 2010 data. The first study analyzed data on 445,127 RSOs from 49 states. Of those, around 10,700 were designated as absconded, missing or unable to be located (2.5%), while another 7,000 were listed as homeless or transient (1.5%). A second study using data from 29 jurisdictions found 29,678 RSOs were reported missing or absconded, although some states, including California, may have incorrectly reported offenders as missing who were in noncompliance with the registry but whose locations were known.

Either way, the urban legend of 100,000 missing sex offenders disseminated by victims’ rights groups and dutifully repeated by the mainstream media has altered both the public conversation and decisions by lawmakers in promulgating sex offender policy.

The authors of the *Criminal Justice Policy Review* report expounded on their research in a separate study co-authored by University of Washington Tacoma Professor Alissa R. Ackerman and released

in March 2012. That study found that sex offender registries in five states (Florida, Georgia, Illinois, New York and Texas) overestimated the number of RSO’s actually living in local communities by up to 60 percent.

“Registries are helpful if they are properly and accurately maintained and include only those individuals living in the community,” said Ackerman. “Then we are able to discern risk in our communities and the public can be better aware of offenders living near them.”

Although sex offenders may be included on registries, in many cases they are incarcerated, have died, or have been deported or moved out of state.

In Florida, for example, the state’s registry included 56,784 sex offenders when only 22,877 were actually living in Florida communities. In New York, the registry listed 32,930 sex offenders, though only 15,950 non-incarcerated offenders were living in the state. And in Texas, of the 66,121 RSO’s on the registry, just 49,786 resided in local communities. The study will be published in a future issue of the *Journal of Crime and Justice*.

If states can’t keep track of which registered sex offenders are actually living in their communities, how can they determine how many of them are “missing”? ■

Sources: “100,000 Sex Offenders Missing...or Are They? Deconstruction of an Urban Legend,” by Jill S. Levenson and Andrew J. Harris, *Criminal Justice Policy Review* (July 14, 2011); [www.oncefallen.com](http://www.oncefallen.com); [www.newswise.com](http://www.newswise.com)



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# From the Editor

by Paul Wright

This month celebrates PLN's 22nd year of publication. One constant in our news coverage for the duration of our existence has been the exploitation of prison slave labor. Some things change, others do not. Until fairly recently most farm work in the U.S. was done by ruthlessly exploited American laborers as chronicled by such classics as John Steinbeck's *Grapes of Wrath* and Edward Murrow's TV documentary "Harvest of Shame." But the days when American-born workers would voluntarily pick crops for a pittance are long gone, and farm labor has been replaced extensively – if not exclusively – by immigrants, many of them undocumented.

As this month's cover story notes, despite the popularity of racist anti-immigrant laws that have caused farm labor shortages, the fact remains that absent decent wages, Americans will not voluntarily harvest crops and growers show absolutely no inclination to pay more for field workers. So the old standby of prison slave labor has been trotted out to fill the labor gap, which illustrates how prison slave labor is used to depress wages for all workers. Deprived of illegal immigrant laborers and without prisoners to fall back on, growers would, in the mythical magic marketplace, be forced to raise wages high enough to attract Americans willing to do hard manual labor in the fields. That, of course, is unlikely to happen in the real world.

We expect that eventually the use of prison slave labor on commercial farms will fade, because the number of prisoners is insufficient to meet the demand, and one or two incidents where prisoners escape and commit crimes will raise the question of whether public safety is being sacrificed for private profit. Also, the other issue that has historically stunted the use of slavery of all kinds, chattel and prison alike, is the fact that slaves make poor employees as they are not vested in the work they perform. Unlike wage slaves who are free to starve if they fail to earn a living, the prisoner laborer has a guaranteed bed and meals regardless of how little or much they work, and their wages are miniscule or non-existent.

As reported in this issue of *PLN*, we recently won a public records lawsuit against the Washington DC DOC. Censorship and public records litigation keep

our two staff attorneys, Lance Weber and Alissa Hull, increasingly busy. Despite our considerable success in challenging unconstitutional censorship, prisons and jails across the country continue to censor *PLN* and withhold public records. The lack of transparency and accountability in detention facilities are among the leading causes of abuse. Restricting media access to and from prisons and jails is another. If you are a *PLN* subscriber and your subscription to *PLN* or any books you have ordered from us have been censored, please let us know so we can take appropriate steps.

Each year we spend a great deal of time and money finding new subscribers, mainly through sample mailings. One way we can save money on our outreach efforts is when you, our existing subscribers, let others know about *PLN* and recommend that they subscribe. The higher our number of subscribers, the lower our per-issue costs. For the past five years, law libraries at all California Department of Correc-

tions and Rehabilitation facilities have subscribed to *PLN*. Those subscriptions expire with this issue, which means California prisoners will now have to either buy their own subscriptions or receive gift subscriptions to continue reading *PLN*.

We have continued to receive reports of *PLN* and our books being censored in California state prisons. If you are a current or former *PLN* subscriber who has had your *PLN* subscription or *PLN* book order censored or denied by CDCR officials, please contact us with details and send us copies of all supporting documentation, such as grievance responses.

Lastly, we have received many letters and e-mails expressing condolences for the loss of Nelly, our office mascot. I would like to thank everyone who has contacted us. Nelly is sorely missed but lives on in our memories, even if our office is lonelier without her.

Enjoy this issue of *PLN* and please encourage others to subscribe. 🐾

## Eighth Circuit Affirms No First Amendment Right to Lower Prison Phone Rates

by Matt Clarke

On January 21, 2011, a U.S. District Court held that state prisoners in Arkansas have no First Amendment right to less expensive phone rates, a decision that was subsequently affirmed by the Eighth Circuit Court of Appeals.

Arkansas state prisoners Winston Holloway and Joseph Breault filed a civil rights action in federal court pursuant to 42 U.S.C. § 1983, alleging that excessive contractual kickbacks resulted in high telephone rates for prisoners in the Arkansas Department of Corrections (ADC), which infringed on their First Amendment rights.

The magistrate judge assigned to the case issued a report recommending that a First Amendment violation be found and that the ADC's phone service provider, Global Tel\*Link (GLT), be enjoined from paying any "commission" kickbacks to the ADC. The district judge rejected that part of the report and dismissed the suit on the defendants' motion for summary judgment.

The ADC established telephone ser-

vices for prisoners in 2006 by contracting with GTL. Under the contract, GTL pays for all costs of equipment, installation and phone service, and gives the ADC a 45% "commission" on the income the company receives from prisoner phone calls. The phone rates include a \$3.00 surcharge plus \$0.12/minute for local and intrastate calls, and a \$3.95 surcharge plus \$0.45/minute for interstate calls.

The calls can be collect or prepaid; however, persons who prepay for calls are charged an additional fee of up to 19% for prepayment. This means that a ten-minute interstate collect call costs \$8.45, while a similar prepaid call costs around \$10.06.

Approximately \$2 million worth of "commissions" are paid to the ADC each year from the GTL phone contract, and such funds are used for the operation of the state's prison system.

The district court rejected the defendants' assertion of primary jurisdiction and filed rate doctrines. The magistrate judge found that any restriction on prisoners' communication implicates their



First Amendment rights; the district court judge rejected that reasoning, however. Reviewing the holdings of other circuits, the court noted that the Sixth and Ninth Circuits had found that prisons have an affirmative First Amendment obligation to provide prisoners with telephone services while the First and Seventh Circuits held they did not have such an obligation.

None of the other circuits had engaged in an in-depth analysis of the First Amendment's application to prison telephones. In attempting to conduct such an analysis, the district court admitted that the test for First Amendment violations established by the U.S. Supreme Court in *Turner v. Safley* didn't work well in the context of prison phone rates.

The court wrote that, "[t]o the extent that contracts between prison systems and telephone companies impose higher costs on prisoners and their families and friends than other persons," the "issue would be governed by the equal protection clause, not the First Amendment." The district court specifically adopted the reasoning of the New York Court of Appeals in *Walton v. New York State Department of Correctional Services*, 921 N.E.2d 145 (N.Y. 2009) [PLN, Aug. 2010, p.18], holding that while prisoners enjoy a First Amendment right to communicate with people on the outside, that right can be satisfied by mail and visitation, thus the additional expense of commissions on prison phone rates do not imperil the right of prisoners to communicate with others.

The district court noted that the plaintiffs continued to make phone calls, just less frequently than they would have with lower rates. Therefore, the excessive rates caused by the kickbacks from GTL were "not a constitutionally significant curtailment of the free speech and association guarantee, particularly given the limited nature of that right in the

prison setting." Summary judgment was entered in the defendants' favor and the complaint was dismissed with prejudice. See: *Holloway v. Magness*, U.S.D.C. (E.D. Ark.), Case No. 5:07-cv-00088-JLH-BD; 2011 WL 204891.

On appeal, the Eighth Circuit affirmed the district court in a February 2, 2012 opinion. The appellate court, in a *de novo* review, observed that "Numerous lawsuits have challenged the practice, asserting claims under the Telecommunications Act of 1996, state and federal antitrust laws, state consumer protection and unfair trade practices acts, state constitutional provisions, the First Amendment, and the takings, due process, and equal protection clauses of the federal Constitution." However, "No court has held any contract between a telephone company and a prison system unlawful under any of these theories."

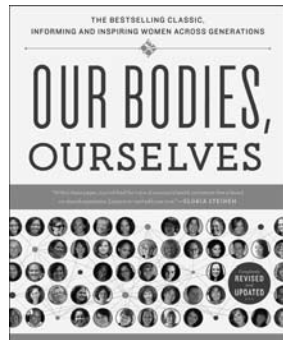
The Court of Appeals found that despite the plaintiffs' arguments to the contrary, "Just as ADC had no First Amendment obligation to provide any telephone service, it had no obligation to provide that service at a particular cost to users."

The Eighth Circuit's analysis of the *Turner* standards focused on the fact that "inmates retain many alternative means of communicating with family members and friends in the outside world," including correspondence and visitation. Consequently, and because the other First Amendment arguments presented in the case were not persuasive, the district court's grant of summary judgment to the defendants was affirmed. See: *Holloway v. Magness*, 666 F.3d 1076 (8th Cir. 2012).

This ruling is the latest in a long line of cases challenging prison phone rates, which have been overwhelmingly unsuccessful. [See: PLN, April 2011, p.1].



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# PLN Public Records Suit Reveals Litigation Payouts for District of Columbia DOC

by Alex Friedmann

As the result of a Freedom of Information Act request and subsequent lawsuit filed by *Prison Legal News*, litigation payouts in cases involving the District of Columbia's prison system have been publicly disclosed.

In January 2008, PLN filed a request with the District of Columbia's Department of Corrections (DC DOC) seeking copies of records concerning litigation against the DC DOC, including documents related to public funds that had been paid between January 1, 2000 and December 31, 2007 as a result of lawsuits or claims.

Such records included the complaint and verdict sheet, settlement agreement or release "in each case where the District of Columbia Department of Corrections paid more than \$1,000.00 in damages, attorney fees or sanctions," excluding claims "of lost or damaged inmate property and excluding car or vehicle accident-related claims under \$5,000."

The records request was brought under the D.C. Freedom of Information Act (FOIA); however, the D.C. Office of the Attorney General (OAG) only produced a partial list of cases responsive to the request, stating, "[d]ue to the overwhelming volume of documents on which the attached report is based ... we are not in a position to provide you with copies of all the underlying documents you have requested."

Further, the OAG refused to grant PLN a fee waiver for producing the requested records. PLN had sought a fee waiver under D.C. Code § 2-532(b) because production of the records would be in the public interest, as they would shed light on the operations of the DC DOC and provide the public with a better understanding of how the D.C. prison system is run and managed.

The OAG responded that a fee waiver "was not in the interest of the agency"; however, that misstated the applicable FOIA provision, which says a fee waiver can be granted if it is in the interest of the public – not just the self-serving interest of the agency that receives a FOIA request. The OAG also declined to produce the requested records in electronic format if they were available electronically, al-

though FOIA provides that records can be requested in that format pursuant to D.C. Code § 2-536(b).

## PLN Obtains Records After Filing Suit

Due to the refusal of the OAG to provide a fee waiver and produce the requested records in electronic format, PLN filed suit in Superior Court of the District of Columbia on June 25, 2008 with representation by the Partnership for Civil Justice. [See: *PLN*, May 2010, p.8].

During the course of that litigation the DC DOC produced hundreds of documents responsive to PLN's FOIA request, including complaints and settlement agreements involving lawsuits filed by both prisoners and prison employees. More than 600 records were produced over a two-year period ending in September 2010.

One of those documents was a 55-page spreadsheet of lawsuits involving the DC DOC that resulted in settlements, from January 2000 to January 2008. After excluding duplicates, habeas petitions, several complaints related to police misconduct and other non-relevant cases, approximately 457 lawsuits filed against D.C. prison officials were settled or resolved during that time period.

Of those cases around 280 resulted in monetary payments, which totaled about \$20.8 million. Thus, over the 8-year period examined, the DC DOC had an average of \$2.6 million in litigation payouts annually. This is in the context that the DC DOC's budget averaged approximately \$122 million from fiscal year 2002 through 2007; thus, the average litigation payouts constituted over 2% of the DC DOC's average operating budget – an additional expense paid by D.C. taxpayers.

The vast majority of the lawsuits involving the DC DOC that resulted in settlements were brought by prisoners; only 18 were filed by D.C. employees, who raised claims of wrongful termination, discrimination, sexual harassment and other work-related issues. Which is interesting because in most jurisdictions litigation by employees constitutes a larger dollar amount of payouts.

Overall, the settlement amounts

ranged from a low of \$30 to a high of \$12 million in a class-action lawsuit described below. Only two other cases resulted in settlements of \$1 million or more during the time frame examined.

## Settlements Revealed

While most of the records produced by the OAG were necessarily dated, given that PLN's original records request covered a time period from 2000 to the end of 2007, some of the cases were noteworthy.

For example, several lawsuits involved abuses experienced by school children during tours of the D.C. Jail in the early 2000s. On August 15, 2003, the U.S. District Court for the District of Columbia approved a \$150,000 settlement in a lawsuit filed by Angela Harvin on behalf of her 14-year-old son, Joseph Bennett. Joseph participated in a school field trip to the jail, during which he and his classmates were strip-searched; when he refused to comply with orders to remove his underwear, he was forcibly stripped by guards. See: *Harvin v. District of Columbia*, U.S.D.C. (D. D.C.), Case No. 1:02-cv-00729-JGP.

A similar case involved Reuben Minor, 14, who also was subjected to an unlawful strip-search during a tour of the D.C. Jail. Reuben was first forced to watch guards strip-search a male prisoner; if he refused to watch, the guards told him he would be similarly searched. They then ordered him to strip anyway, and when he refused he was threatened and intimidated into compliance by guards and prisoners. On September 9, 2003, the District agreed to pay \$150,000 to settle a lawsuit filed by Reuben's mother, Michelle Minor. See: *Minor v. District of Columbia*, U.S.D.C. (D. D.C.), Case No. 1:02-cv-01225-JGP.

Two other lawsuits involving children who were strip-searched during tours of the D.C. Jail settled for \$150,000 and \$105,000 on October 16, 2003. See: *Wagner v. District of Columbia*, U.S.D.C. (D. D.C.), Case No. 1:02-cv-00965-JGP and *Rice v. District of Columbia*, Superior Court of the District of Columbia, Case No. 02-0637, respectively.

Further, between December 2002 and August 2004, the District agreed to settle claims in another lawsuit related to

children being improperly treated at the D.C. Jail. According to the complaint in that case, a dozen 13 and 14-year-old girls toured the jail on May 18, 2001. One of the girls was taken to a private room and made to expose her breasts and "pull her pants down, squat and cough."

All of the children, who were supposed to talk with female prisoners at the jail, were instead locked in a holding area in a unit housing male prisoners. They were left there for about 10 minutes, without supervision, while the prisoners masturbated in open view and screamed at them. The District settled the lawsuit by paying \$31,000 to each of eleven plaintiffs plus \$54,000 to one plaintiff, for a total of \$395,000. Additionally, the court awarded the plaintiffs \$100,000 in attorney fees on June 16, 2003. See: *Pratt v. District of Columbia*, U.S.D.C. (D. D.C.), Case No. 1:01-cv-01525-JMF.

The above cases were particularly egregious because they did not involve juvenile offenders participating in a "scared straight"-type program, but rather involved students who toured the jail as part of field trips from their public schools. Their parents, who gave permission for the tours, were not informed

that their children would be subjected to humiliating strip-searches or other abusive treatment. During at least one tour, D.C. jail guards allegedly threatened to have an adult prisoner anally rape students who refused to be strip-searched. The children probably learned more about the reality of the American criminal justice system, and its legal system, from this experience than any amount of book learning could possibly give them.

Other litigation payouts revealed in the records produced by the OAG pursuant to PLN's FOIA lawsuit were related to violence in the D.C. prison system.

Notably, a complaint filed by D.C. prisoner Jesse L. Sparks described a litany of more than 20 violent incidents at D.C. correctional facilities involving prisoner-on-prisoner attacks, which allegedly resulted due to the DC DOC "operating and maintaining its prison facilities in a hazardous and unsafe condition" with an "inadequate guard-to-inmate ratio." Despite such incidents, "no significant corrective action was ever taken." Sparks was attacked by other prisoners and suffered serious injuries, including stab wounds. His case settled for \$31,000 on October 2, 2001. See: *Sparks v. District of*

*Columbia*, Superior Court of the District of Columbia, Case No. 00-8209.

Typical examples of other failure-to-protect cases settled by the DC DOC include lawsuits filed by D.C. prisoners Antonio Avery and Jeremiah Lester. Avery was attacked by two other prisoners at the Central Facility in Lorton, Virginia in 1999, and stabbed in the face. D.C. prisoners were housed at the Lorton facility until 2001. [See: *PLN*, April 2002, p.20].

Prison officials allegedly had confidential information before the attack that Avery's assailants had planned to kill him, but did not place him in protective custody. The District settled the case in October 2000 for \$5,000. See: *Avery v. District of Columbia*, Superior Court of the District of Columbia, Case No. 99-8071.

Lester suffered serious injuries after being assaulted by other prisoners at the D.C.'s Youth Center One on May 16, 1999. His right thumb was nearly severed, and he was stabbed in the right arm, right shoulder, left shoulder near his neck, twice in the back and once in the upper shoulder blade. His lawsuit alleged common law negligence for failure to control contraband and the movement of prisoners, lack of staffing, and improper classification

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## PLN Public Records Suit in DC (cont.)

of prisoners. The District agreed to settle the case for \$6,000 on May 12, 2003. See: *Lester v. District of Columbia*, Superior Court of the District of Columbia, Case No. 99-5676.

Sometimes the injuries suffered by D.C. prisoners were caused by staff rather than other prisoners. A class-action suit filed in U.S. District Court in 2000 on behalf of D.C. prisoners who were transferred from a prison in Youngstown, Ohio to the Sussex II facility in Virginia alleged that they had been denied food, water, access to toilets and medication, and were subjected to hand and leg restraints that were “intentionally applied” too tightly by DC DOC transport guards.

Such conditions occurred during two transfers from Ohio to Virginia in 1999, one lasting 15 hours and the other lasting 10 hours. According to the complaint, the tight restraints caused “lacerations, pain, swelling, other damage, and lasting residual injury.” Also, due to the denial of food and medication, the prisoners suffered “hunger and thirst, high blood pressure, uncontrolled diabetes, other

serious medical conditions that withheld medications were prescribed to alleviate, and the humiliation, discomfort, and stench of having to urinate and defecate in their clothing, or to travel with those who had done so.”

The case eventually settled in June 2008 for \$600,000, with 97 class members splitting \$300,000 and their attorneys receiving \$300,000 in fees. Payments to the individual plaintiffs ranged from \$1,721.43 to \$8,500. See: *Anderson-Bey v. District of Columbia*, U.S.D.C. (D. D.C.), Case No. 1:00-cv-02000-RCL.

Other lawsuits settled by the DC DOC concerned more mundane matters, such as accidents. D.C. prisoner Eric T. Thompson received a \$18,500 settlement on March 30, 2005 after he filed suit due to an incident in which his fingertip was “partially severed” when a guard closed a cellblock gate. See: *Thompson v. District of Columbia*, Superior Court of the District of Columbia, Case No. 04-5265.

D.C. prisoner Joseph C. Poindexter was being transferred to the Red Onion State Prison in Virginia on February 5, 2001 when the driver of the transport bus lost control and “veered into the right lane and struck a second vehicle with great force and violence.” Poindexter filed suit, claiming he suffered a back injury and a lump on his forehead; the District settled the case for \$4,000 in February 2004. See: *Poindexter v. District of Columbia*, Superior Court of the District of Columbia, Case No. 02-10504.

The litigation documents produced by the OAG also included records related to cases that PLN had previously reported, including the only three lawsuits against the DC DOC during the time period specified in PLN’s FOIA request that had resulted in settlements of \$1 million or more.

Those cases included a \$12 million settlement in a class-action suit, finalized in January 2006, that involved improper strip-searches at D.C. correctional facilities and holding prisoners an unreasonable amount of time after their release dates. [See: *PLN*, Oct. 2006, p.29].

Another previously-reported case involved a \$1 million settlement in a federal lawsuit over the September 2004 death of quadriplegic prisoner Jonathan Magbie. Other defendants in that case, including Corrections Corporation of America (which operates the D.C. Correctional Treatment Facility), Correctional Health and Policy Studies, Inc. and Greater

Southeast Community Hospital, paid settlements totaling \$3.6 million. [See: *PLN*, June 2009, p.30; Feb. 2005, p.27].

Lastly, in August 2005 the District agreed to pay \$1.1 million to settle a lawsuit filed by Joseph Heard, a deaf, mute and mentally disabled prisoner who was wrongfully incarcerated in the D.C. Jail for nearly two years after a judge ordered his release. [See: *PLN*, March 2006, p.24; April 2002, p.4].

### PLN Awarded Fees, Costs as Prevailing Party

On December 1, 2011 the Superior Court of the District of Columbia entered an order in PLN’s FOIA lawsuit, awarding attorney fees and costs. The court noted that “the key determination is whether the plaintiff prevailed – in whole or in part – in the instant litigation.” The court found that PLN was a prevailing party because it had established a causal nexus “between bringing this suit and the defendant’s search for and production of responsive records.”

Not that it was easy to obtain those records. “The defendant was so excessively dilatory in the performance of its duties under the D.C. FOIA that the court issued multiple orders to compel delivery of responsive documents by specified dates,” the Superior Court observed. Indeed, it took 3½ years to resolve PLN’s FOIA suit.

Weighing several factors, including the fact that PLN would be able “to synthesize and analyze these documents, and then publish articles in both printed format and online” for the public’s benefit, and the fact that the OAG had “functionally withheld the documents from PLN by its ineffectual and protracted searches for and production of responsive records,” the court awarded \$75,000 in attorney fees and \$290 in costs.

PLN was ably represented by Carl Messineo, Radhika Miller and Mara Verheyden-Hilliard of the Partnership for Civil Justice and Lance Weber, litigation director of the Human Rights Defense Center. See: *PLN v. District of Columbia*, Superior Court of the District of Columbia, Case No. 2008 CA 0004598.

All of the original lawsuit documents are posted on PLN’s website at [www.prisonlegalnews.org](http://www.prisonlegalnews.org) and individual cases have been summarized and are available on the website as well. ■

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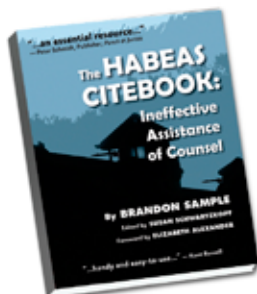
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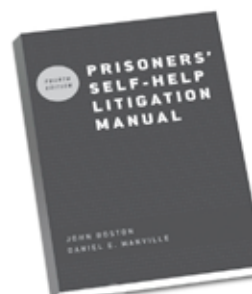


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# Prisons: An Unsustainable Jobs Program

by Alexandra Cox

Employment has been at the center of national debates about the economy, as evidenced by the bickering in Congress and the protests on Wall Street. A number of jobs have been lost through the deinstitutionalization of prison systems in recent months, with layoffs of a number of blue- and white-collar workers in those institutions. Many of these workers come from impoverished rural communities, where jobs like theirs offer a modicum of stability and well-being. But it should also be acknowledged that prisons tear away at the stability and well-being of the individuals who are incarcerated within them, who themselves come from and return to communities with few stable jobs.

In order to address the problems that mass incarceration has created, we must look carefully at what prison does for the prospects of all people who pass through them.

Prisons are an unsustainable jobs program, as has been demonstrated by the layoffs of countless numbers of individuals who work in them over the past few months. Members of the Public Employees Federation, a white-collar public sector union in New York, recently rejected a contract offer by the state, which may result in the layoffs of over 3,000 workers. Many of these workers are teachers, social workers and counselors in prisons and juvenile facilities across the state. The contract they rejected included a rise in health care costs, furloughs and three years without raises. These workers, like many others in the state, now face bleak prospects as they seek to support their families. For the individuals who are incarcerated, this also means there will be fewer educational and social services resources available to them.

A number of the union workers come from rural communities in upstate New York like Delaware County. This county has very few jobs in part because a substantial part of the land is devoted to the New York City water supply. Residents there are engaged in heated debate

about whether hydrofracking should be introduced as a salve for their economic problems; some fear it will spoil the natural beauty that drew them to the county, and others see the potential for jobs and for money. The county is also the site of two residential facilities for young people charged with crimes, one of which was recently downsized and the other closed, resulting in the loss of about 60 jobs.

Just a few hundred miles away, in Brownsville and East New York, two deeply impoverished communities in Brooklyn, where many of the young people incarcerated in the Delaware County facilities came from, the unemployment rate is over 19 percent. The Justice Mapping project has designated several "Million Dollar Blocks" in these neighborhoods, indicating the amount of money spent by the state on incarcerating people from those areas. Few, if any, jobs are available to the residents of these communities other than short-term, insecure service-sector work. For those who carry the stigma of a criminal conviction, such jobs are even further out of reach.

Delaware County and Brooklyn have both experienced the negative toll that incarceration levies on poor and under-resourced communities that exist across the country. Places like Westchester County and the Upper East Side, two of the wealthiest communities in New York, are buffered against this. Delaware County, with few other options for local development, sees prison jobs as a boon, despite how insecure those jobs may be and how little they may actually stimulate the local economy. The loss of 60 jobs, however small it may seem, has made a significant dent in this sparsely populated county.

The prisons of upstate New York have gobbled up the residents of Eastern Brooklyn at such a serious and substantial rate it would seem that there is an epidemic of incarceration that has struck the community. Governor Cuomo has announced over \$4 billion in the development of nanotechnology industries in New York; neither Brooklyn nor Delaware County will see the benefits of this investment.

As rural communities across America have been devastated by the decline of manufacturing industries, low-level service-sector jobs at places like Wal-Mart

offer the best hope for some of these communities (Wal-Mart has a store in Oneonta, NY, bordering Delaware County, and they are hoping to build one in East New York). These jobs offer few protections to their workers, such as the stability of health benefits, manageable hours and an adequate, living wage. Poor residents in both urban and rural areas are often left with few options but to take jobs at the Wal-Marts or McDonald's of this world, or to seek out an escape from poverty through joining the military or working in a prison or jail. All of these options simply perpetuate violence and social inequality.

We must take the issue of rural and urban economic development seriously. In New York, Governor Cuomo has created a \$50 million fund to support economic growth in communities affected by prison and juvenile facility closures, which is a step towards supporting alternative forms of development. New York City Mayor Michael Bloomberg, together with George Soros through his foundation's Campaign for Black Male Achievement, has funded the Young Men's Initiative, which will provide substantial forms of employment and educational support for young men of color in New York City. These programs represent strong steps toward meaningful change in the lives of people affected by imprisonment.

Yet, can more be done to actually prevent a retreat to prison as the solution for warehousing the poor and providing jobs for rural communities? Unless we throw a wrench in the cycle of opening and closing prisons in our states, and recognize that the state is a political and social ecosystem which nourishes these cycles of mass incarceration, then we are doing an injustice to the poor and working class people in this country who find that their well-being is at the mercy of a deeply volatile and unsustainable prison system. ■

*Alexandra Cox is a Soros Justice Fellow who is studying the dynamics of resistance to reforms in the juvenile justice system. She is a doctoral candidate at the Institute of Criminology at the University of Cambridge. This article was originally published on the Open Society Foundations website ([www.soros.org](http://www.soros.org)), and is reprinted with permission.*

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# Research Finds Capital Punishment System in California is Costly, Ineffectual

A June 2011 law review article by Ninth Circuit Court of Appeals Senior Judge Arthur L. Alarcón and Loyola Law School Professor Paula M. Mitchell, Alarcón's longtime law clerk, analyzes the costs to taxpayers of administering California's capital punishment system, the misrepresentations repeatedly made to voters regarding those costs and the largely ineffectual nature of a system that exists more in theory than in practice.

Since reinstating capital punishment in 1978, California has carried out 13 executions – at a cost of approximately \$4 billion. During that same period of time, 54 condemned prisoners have died of natural causes and 18 by suicide; another six died due to violent incidents or undetermined causes.

As of June 2011 there were 714 prisoners on California's death row, and that population is expected to grow to over 1,000 by 2030. The cost of maintaining the current population of condemned prisoners adds around \$184 million to the state budget each year. Those costs will only increase if the system is not changed, according to Alarcón and Mitchell in their *Loyola of Los Angeles Law Review* article, titled "Executing the Will of the Voters: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debate."

Since 1978, California voters have supported six ballot measures to expand the types of crimes eligible for the death penalty; each time, voters were informed that the fiscal impact of such measures were "none," "unknown," "indeterminable" or "minor." In their 184-page article, Alarcón and Mitchell suggest that, to the extent voters in the state were misled, a court could find that the measures expanding the death penalty statute (which now includes 39 "special circumstances") were unconstitutional.

Currently, the average time span between conviction and execution is more than 25 years. Further, as a result of legal challenges to the state's lethal injection process, no executions have been carried out since 2006 and none are likely to occur in the near future. Indeed, on April 18, 2012, a state Senate committee rejected a bill (SB 15-14) that would have streamlined death penalty cases by eliminating "automatic" appeals.

Much of the reason for the slow pace of executions lies in the fact that it takes a long time to assign qualified lawyers to handle appeals in capital cases. This in itself is a source of some controversy. While past studies have found a shortage of death penalty-qualified attorneys in the state, capital punishment advocates argue that, with California's bar membership exceeding 230,000, the dearth of attorneys qualified to represent death row prisoners is deliberate.

According to Kent Scheidegger, director of the Criminal Justice Legal Foundation, a conservative think-tank that advocates for reduced rights for people accused or convicted of crimes, "[c]hoking off the appeals is part of the strategy" for those who oppose capital punishment.

Michael Millman, executive director of the California Appellate Project, sees things differently. According to Millman, working on death penalty cases is discouraging, difficult and time-consuming, and the compensation inadequate; as a consequence, fewer than 100 attorneys in the state are qualified (and willing) to handle such cases.

Meanwhile, public opinion polls suggest that support for the death penalty may be waning, with more voters now favoring life-without-parole sentences. In fact, between January and August 2011,

California juries imposed death sentences in only four cases, significantly down from the high of 3.5 such sentences, on average, that were imposed every month in 1999.

Voters will have an opportunity to determine the future of the death penalty in California in November 2012 when they consider a ballot initiative that proposes to abolish capital punishment in the state. The initiative, titled The SAFE California Act, would replace the death penalty with sentences of life without parole.

"I have seen the death penalty from all points of view. I understand the cost of incarceration for people on death row, which is far more expensive than if they had life without possibility of parole," stated Jeanne Woodford, executive director of Death Penalty Focus and a former warden at San Quentin. "Our initiative seeks to utilize our criminal justice dollars in a much more effective way and it sets aside \$100 million over three years for the particular purpose of solving unsolved murders and rapes."

Other death penalty opponents, however, are also opposed to life-without-parole sentences, which they term "the other death penalty" – e.g., death by incarceration. ■

Sources: *Los Angeles Times*, *The Daily Recorder*, <http://sanfrancisco.cbslocal.com>, [www.safecalifornia.org](http://www.safecalifornia.org)

## Ninth Circuit Holds *Phoenix New Times* Executives May Sue Special Prosecutor over Improper Arrests; Prosecutor Disbarred

by Matt Clarke

On June 9, 2011, the Ninth Circuit Court of Appeals held that executives with the *Phoenix New Times*, an alternative weekly publication, could sue a special prosecutor who arranged for their late-night arrests after the *New Times* criticized Maricopa County Sheriff Joe Arpaio, County Attorney Andrew P. Thomas and special prosecutor Dennis Wilenchik.

The *New Times* has long been critical of Arpaio. In a 2004 article that criticized the sheriff's failure to list his personal information in the public records of his

real estate transactions, the *New Times* published Arpaio's home address. The address was already available on government and Republican Party websites, and would later be distributed by Arpaio in campaign flyers.

After waiting almost a year for Thomas – a political ally – to be elected County Attorney, Arpaio sought to have *New Times* editors Michael Lacey and Jim Larkin prosecuted for violating an obscure state law that made it illegal to knowingly make available on the Internet a peace officer's personal information if

it is reasonably apparent that it would pose an imminent and serious threat to the safety of the peace officer or his or her family. Arpaio claimed that he had received death threats, thus the publication of his home address by the *New Times* was unlawful.

Thomas' staff reviewed the case, determined it was weak and recommended that it not be prosecuted. Claiming a conflict of interest because the *New Times* had criticized "ethical irregularities" in his office, Thomas referred the case to the Pinal County Attorney's Office, which took no action for nearly two years and then declined to prosecute because there was no evidence that the publication of Arpaio's address had posed an imminent and serious threat.

Thomas then hired Wilenchik, his former law partner, to serve as a special prosecutor. Before a grand jury was sworn and contrary to Arizona law, Wilenchik issued subpoenas seeking wide-ranging information about the *New Times*, its subscribers and visitors to the publication's website. The *New Times* published an article critical of the investigation that detailed the subpoenas' demands. Without waiting for a court order, Wilenchik allegedly initiated a late-night raid by sheriff's officers that resulted in the arrests of Lacey and Larkin at their homes on October 18, 2007 for disseminating grand jury information.

The charges were quickly dropped following a public outcry over the arrests, and Thomas removed Wilenchik as special prosecutor and disavowed any involvement in the arrests, subpoenas and other court proceedings. [See: *PLN*, Aug. 2008, p.12]. Thomas later resigned, effective April 6, 2010, to unsuccessfully run for the office of Arizona's Attorney General.

"The actions of Mr. Thomas and Sheriff Arpaio in this case are beyond outrageous. They abused their offices by engaging in Gestapo-like tactics designed to silence a newspaper that has been highly critical of them in the past," said Richard Kerpel, executive director of the Association of Alternative Newsweeklies.

Lacey and Larkin subsequently filed a civil rights lawsuit in federal court against Maricopa County, Arpaio, Thomas and Wilenchik. The district court found that Arpaio and Wilenchik were entitled to absolute immunity, dismissed all federal claims in the suit and remanded the state claims to be heard in state court. Lacey and Larkin appealed.

The Ninth Circuit held that Thomas was entitled to absolute immunity and Arpaio was entitled to qualified immunity, but Wilenchik was entitled to neither. The complaint alleged that because Wilenchik had failed to adhere to Arizona law regarding grand jury subpoenas, he knew that the contents of the subpoenas published in the *New Times* were not protected grand jury material. He then allegedly initiated the arrests without probable cause to believe an offense had been committed, and thus was not entitled to qualified immunity. Further, the investigatory function of a prosecutor does not qualify for absolute immunity.

Therefore, the claims against Wilenchik alleging First and Fourth Amendment violations and malicious prosecution could proceed. The district court's order was affirmed in part and reversed in part. On November 10, 2011 the Ninth Circuit agreed to rehear the case *en banc*; oral arguments took place on December 22, 2011, and the appellate court's *en banc* ruling remains pending. See: *Lacey v. Maricopa County*, 649 F.3d 1118 (9<sup>th</sup> Cir.

2011), *rehearing en banc granted*.

Separately, an Arizona ethics panel held on April 10, 2012 that Thomas would be disbarred effective May 10. That ruling was unrelated to his involvement in the arrests of Larkin and Lacey, but rather because there was "clear and convincing evidence" that Thomas and former deputy county attorney Lisa M. Aubuchon had abused their power when they attempted to prosecute a Superior Court judge and two Maricopa County supervisors as part of a campaign to harass and embarrass political opponents. Thomas also had a conflict of interest in one of the cases but pursued it anyway.

Both Thomas and Aubuchon were disbarred for five years while the law license of another former deputy county attorney, Rachel R. Alexander, was suspended for six months and one day.

The 247-page ethics ruling concluded, "This is the story of County Attorneys who did not 'let justice be done,' but rather, birthed injustice after injustice. This is the story of the public trust dishonored, desecrated, and defiled. This multi-year-wreck-of-a-ride, operated by Andrew Thomas and staffed by Aubuchon and Alexander, outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law."

Sheriff Arpaio was involved in the politically-motivated prosecutions of county officials, but since he was not an attorney he was not named in the ethics complaint. See: *In the Matter of Members of the State Bar of Arizona*, Before the Presiding Disciplinary Judge of the Supreme Court of Arizona, Case No. PDJ-2011-9002 (April 10, 2012). ■

Additional sources: *Phoenix New Times*, *Arizona Republic*

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# New York Not Liable for DOCS' Unauthorized Addition of Post-Release Supervision

The New York Court of Appeals, the state's highest court, has held that the state cannot be held liable for the Department of Correctional Services (DOCS) adding post-release supervision to prisoners' sentences when such supervision had not been ordered by the sentencing court.

Farrah Donald, Shakira Eanes, Jonathan Orellanes and Ismael Ortiz were convicted of felony offenses and received determinate sentences without the sentencing court orally pronouncing they were subject to a period of post-release supervision (PRS). In each case, the DOCS added PRS when they were released. All except Orellanes were reincarcerated for violating the conditions of their PRS, and they filed separate actions in the state Court of Claims alleging false imprisonment. The Court of Claims granted partial summary judgment to Donald but dismissed the other cases.

On appeal, the Appellate Division reversed the partial summary judgment in Donald's case and affirmed the dismissal of the other cases. All four claimants then appealed to the Court of Appeals. [See: *PLN*, April 2010, p.46].

On June 23, 2011, the Court of Appeals held that Orellanes' claim should be dismissed because, although the judge failed to orally pronounce a period of PRS, the commitment sheet from the court did include PRS. Therefore, the DOCS had merely carried out the mandate of the trial court and the court alone was responsible for the error in failing to orally pronounce the PRS.

The Court of Appeals also held that Donald, Eanes and Ortiz had failed to plead that they were falsely imprisoned, an essential element of the tort. Donald and Eanes further failed to plead another essential element – that their confinement was not privileged. "A detention, otherwise unlawful, is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction." Neither Donald nor Eanes alleged defects in the process that resulted in their arrests for violating their PRS, even though they were improperly placed on PRS in the first place.

Their claims also could be interpreted as asserting that the state negligently subjected Donald, Eanes and Ortiz to

unauthorized PRS, the Court of Appeals found. However, the state is immune from suit for discretionary acts of its officials, and this applies even when the official was mistaken. Such was the case when the DOCS added PRS to the claimants' determinate sentences.

The DOCS did not have authority to add the PRS, but the DOCS often has to

interpret the directions it receives from judges. "Because DOCS was exercising – albeit mistakenly – the discretion given it by law, its acts cannot be a basis for State liability," the Court of Appeals wrote. Thus, the dismissals of the cases by the Appellate Division were affirmed. See: *Donald v. State*, 17 N.Y.3d 389, 953 N.E.2d 790 (N.Y. 2011). ■

## California Pilot Program Reduces Recidivism

A pilot program enacted by the California legislature in 2009 appears to be achieving its intended goal of reducing recidivism, according to a June 2011 report prepared by Dorothy Korber with the California Senate Office of Oversight and Outcomes.

With three-year recidivism rates hovering around 65 percent on average, California has the worst record in the nation when it comes to released offenders returning to prison. [See: *PLN*, March 2012, p.46]. In the words of criminology professor Joan Petersilia, "California epitomizes revolving door justice in the United States."

To address this problem, the California legislature responded by passing two measures. In 2009, state lawmakers passed Senate Bill X3 18, which created a \$9.5 million pilot program that established Parolee Reentry Courts in six counties (Alameda, Los Angeles, San Diego, San Francisco, San Joaquin and Santa Clara).

According to a fact sheet produced by California's Administrative Office of the Courts, "The reentry court teams are authorized to determine the appropriate conditions of parole, order rehabilitation and treatment services to be provided, determine appropriate incentives, order appropriate sanctions, lift parole holds, and hear and determine appropriate responses to alleged violations."

Then, in 2011, the legislature passed Assembly Bill 109, a budget bill intended to restructure public safety by, among other means, shifting responsibility for parole violations to local jurisdictions generally, with judges making revocation decisions instead of the state Board of Parole Hearings. Such a shift could result in a significant downsizing of the Board and its \$200 million budget; in turn, this could

present an opportunity to pay for AB 109's otherwise-unfunded restructuring.

By diverting money from a downsized Board of Parole Hearings, Korber suggests in her report that the state could convert the collaborative drug courts that now exist in most California counties into Parolee Reentry Courts. Then, if the Reentry Courts are successful in stopping the revolving prison door – as has been the case, apparently, in the six counties participating in the pilot program – the money saved could be channeled into local treatment programs and job training for parolees.

To the extent the proposal works, it would be a win/win/win situation: parolees would be given an opportunity to rebuild their lives, communities would be safer and taxpayers would save on the costs of unnecessary re-incarceration.

In San Joaquin County, after just seven months the Reentry Court had saved taxpayers millions of dollars, according to Judge Richard Vlavianos. Of the 135 parolees who have gone through his court, only three – less than 3% – were re-incarcerated.

The most-established Reentry Court is in Santa Clara County. There, Judge Stephen V. Manley heads a team of a dozen people – lawyers, psychologists, doctors, parole agents and probation officers – who work together with the goal of helping parolees stay off drugs and out of prison. After three years of operation, the team can boast an 80% success rate.

The key to the Reentry Court's success is its collaborative rather than adversarial approach. And, by all accounts, having the right judge is essential. "Our 80 percent completion rate is a result of sticking with people over time," stated Judge Manley. He added, "You need to motivate people



to change. It's not a get-out-of-jail-free card with no accountability – they spend time in the treatment programs, [or] they do time in jail if they screw up.”

“Anyone who participates in this process loves it,” said Judge Vlavianos. “It’s contagious. Our parolees are telling other parolees on the run to turn themselves in. You can see the change in the defendants, once you establish trust with them. The light just goes on.”

## Georgia Court Rules Prisoners Held in County Facilities Barred from Suing State for Negligence

The Court of Appeals of Georgia held on October 21, 2011 that a county housing state prisoners under a contract with the Georgia Department of Corrections (GDOC) is an independent contractor; therefore, the state is entitled to sovereign immunity against negligence claims brought by prisoners housed at county facilities.

That ruling came in an appeal by the GDOC in a case where the trial court had denied the state’s motion to dismiss a lawsuit brought by prisoner Anthony W. James. The suit claimed that James had sustained injuries on May 31, 2005 while on a work detail at an Effingham County ball park. At the time he was a state prisoner incarcerated at the Effingham County Prison (ECP) pursuant to a contract with the GDOC.

Although the weather was rainy, James was forced to continue pouring a concrete slab. When he lost his balance, the wet concrete came into contact with the skin on his legs. A few hours later James complained to the maintenance coordinator and a guard; he was given “burn cream” and subsequently returned to ECP.

James sought treatment for his legs at the ECP medical unit the next day. A nurse treated him for abrasions rather than burns, and applied hydrogen peroxide solution and triple antibiotic ointment on the affected area before wrapping it in gauze. She provided similar treatment for each of the next five days. On June 6, 2005, the nurse’s supervisor returned from vacation, looked at James’ legs and immediately ordered him transported to a hospital.

James had to undergo two surgeries and skin grafts as a result of chemical

burns from the wet concrete; he was treated at a burn unit and also needed physical therapy.

Sources: “*A Courtroom Unlike Any Other*,” Dorothy Korber, *California Senate Office of Oversight and Outcomes* (June 1, 2011); *Administrative Office of the Courts fact sheet*

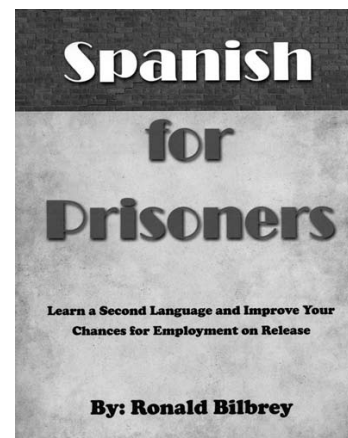
burns from the wet concrete; he was treated at a burn unit and also needed physical therapy.

The state moved to dismiss James’ lawsuit, which raised a claim of negligence and argued that the GDOC “had breached a non-delegable duty to provide safety and health at the construction site and that it had breached a non-delegable duty to provide proper and expedient care after he sustained injuries at the construction site.”

The Georgia Tort Claims Act (GTCA) waives sovereign immunity for torts committed by “state officers and employees,” but the Act specifies that that “term does not include an independent contractor doing business with the state.” The “true test of whether the relationship is one of employer-employee or employer-independent contractor is whether the employer, under the contract either oral or written, assumes the right to control the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity with the contract,” the appellate court wrote.

“The record before us contains no evidence the GDOC assumed the right to control the time, manner and method of operating either the work detail or the medical unit.” Consequently, the Court of Appeals found that Effingham County was acting as an independent contractor, which entitled the GDOC to sovereign immunity.

The trial court’s order was therefore reversed and the case remanded to grant the GDOC’s motion to dismiss. See: *Georgia Department of Corrections v. James*, 312 Ga.App. 190, 718 S.E.2d 55 (Ga.App. 2011).



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# Private Prison Health-care Industry Grows as States Cut Costs, Bringing in Millions of Dollars

by Yana Kunichoff

Aleshia Napier was 18 years old in 2006 when she hung herself with a bed sheet at the Broward Correctional Institution in Fort Lauderdale, Florida, after being placed in solitary confinement despite her diagnosis of clinical depression and bipolar disorder.

The attorney hired by the young woman's devastated family, Randall Berg, Jr., the executive director of the Florida Justice Institute, points to two culprits for ignoring the medical and mental health needs of Napier: the private prison health-care companies PHS Correctional Healthcare and MHM Services.

Napier's family settled with the companies for \$500,000, but Berg said this case is part of a larger trend.

"My main concern is the profit motive taking precedence over patient care," said Berg, who has taken out more than ten lawsuits against private health care companies. "The second one is that once the government entity contracts with the private provider, the government entity doesn't provide any oversight."

The outsourcing of health care in prisons to private companies is just one multi-billion dollar industry that has grown up around incarceration in the U.S. With that expansion has come mounting evidence of injury or death from improper medical care, or under-qualified or understaffed medical teams at prisons.

Mel Wilson, assistant director of Officer Workforce Studies at the National Association of Social Workers, says he is aware of "a lot of gaps in services" in for-profit private health care in prisons, especially for prisoners with chronic conditions like HIV. Prisoners with HIV were found to die of the disease at twice the rate than that of the general population, according to HIV Symptoms, an information site on HIV.

The federal government outsources at least some aspects of its health-care operations, according to a spokesperson from the Bureau of Prisons, but doesn't completely hand over entire health-care operations in any of its facilities.

On the state level, however, the outsourcing of all health-care needs in a facility is more widespread. Those states include: Alabama, Connecticut, Delaware, Georgia,

Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, New York, Pennsylvania, Tennessee, Texas, Utah, Ohio, Louisiana, Colorado, Indiana, Florida, Illinois, Alaska, Mississippi, Kansas, Nevada and Virginia.

## The Models of Companies Big and Small

The companies that take these contracts are diverse in size, including small contractors, subsidiaries of larger private prison firms and products of large-scale mergers. They include Corizon Healthcare, the result of combining PHS Corrections and Correctional Medical Services; MHM Services Inc.; Armor Correctional Health Services Inc.; Correct Care Solutions; the Birmingham, Alabama-based NaphCare and GEO Group's GEO Care.

The recent merger that created Corizon Healthcare shows the scope of the industry. Prior to the merger, PHS Corrections had 57 contracts in 150 prisons and jails across 19 states, serving about 165,000 prisoners, and Correctional Medical Services served 250,000 prisoners in 19 states. Since the two companies merged, Corizon Healthcare has become the largest prison health-care provider in the country. It "provides quality healthcare services at over 400 correctional facilities across the country serving approximately 400,000 inmates in 31 states."

The smaller private health-care companies also have no shortage of clients. MHM Services provides care for over 280,000 individuals in 14 states; GEO Care is in more than 60 facilities in more than 20 states and Correct Care Solutions "cares for more than 57,000 lives" in 17 states.

Alex Friedmann, associate editor at the anti-privatization *Prison Legal News*, said there are two funding models for privatized health care in prisons. There is the cost-plus model, in which a vendor is reimbursed at a specific rate that includes actual costs and profit, and the flat-fee model, under which a company is given a flat-rate amount of money and everything they don't use is profit, giving them the most incentive to cut costs.

"Medical care in public prisons isn't great either," said Friedmann. "Prison medical care in general is pretty abysmal, just

even more abysmal in the private sector."

Martin Ricketts, deputy director of Rehabilitation Programs at the New York City Department of Health and Mental Hygiene and a contracted clinical social worker with a New York-based private prison health-care firm, said many of the people entering prison have had little or no health care throughout their lives.

Though privatized health care is not a new concept for American society – 70 percent of Americans get their health coverage through some form of private insurer – what makes the risks of privatized health care in prisons particularly worrisome is that prisoners have no other options.

"If you take all the bad parts of the HMO [Health Maintenance Organization] and put it in a monopoly situation, then you have the private prison medical-care industry," said Friedmann. "But prisoners can't go to another clinic, can't pick a plan."

Though Ricketts said the profit motive in private prison health care does disturb him, he sees the move to private care happening now because "the system is in transition anyhow."

"Our whole system is more profit-driven than it used to be," said Ricketts, who has been with the New York City Department of Health and Mental Hygiene for 25 years. "And health providers are being squeezed especially hard by the government as there are cuts in programs like Medicare and Medicaid."

## Garnering Contracts in an Age of Cost-cutting

According to the ACLU National Prison Project, it costs some states up to \$47,000 to house a prisoner, and in a time of budget crisis, some legislators argue that outsourcing health-care services is cost efficient. Most recently, the Michigan Department of Corrections floated a proposal to privatize its entire prison health-care services, hoping to save up to \$20 million.

"As a result of the economic downturn, states are taking steps to reduce their expenditures," said Friedmann, though he doesn't think it's ever been proven or shown that costs are reduced by privatizing health care.

The New York Department of Corrections (NYDC), for example, signed a 6-year contract with Correctional Medical Services in 2005 for \$5,419,000, and then extended the contract for six months in February 2011 for \$2,910,480, according to its contracts site. Not long after the CMS contract, NYDC also signed two contracts with NaphCare, Inc. in 2006 for more than \$1 million each, and extended them at the start of 2011 for more than \$1 million each.

The Correctional Medical Services contract was signed in 2005, only a year after a *New York Times* article exposed widespread abuses and deaths of prisoners at Rikers Island under the care of Prison Health Services.

In Texas, the state is looking for a cheaper alternative to contracting prison health care with the University of Texas, the *Texas Independent* reported, but "the idea didn't get too far with the Texas Legislature, in part because state Rep. Jerry Madden (R-Plano) kept reminding everyone there was no evidence privatization would save any money at all."

Because there are "very few companies in competition," said Friedmann, "they just gain other contracts" when one state kicks them out.

Prison Health Services (PHS) got its largest contract ever in 2000, \$253 million for three years, from New York City after both Florida and Pennsylvania began official investigations of PHS into treatment of those states' prisoners. At the same time it received the contract, PHS was paying millions in legal fees.

### Expansion

The range of health-care services provided by private companies has continued to broaden. PHS and Corizon also run nationwide pharmacies to supply their respective operations.

This makes cases like that of Ashley Ellis, who died in a PHS-contracted facility in Vermont from a lack of a vitamin that could be bought over the counter, all the more sad. Ellis, 23, died on August 16, 2009, three days into her 30-day sentence. PHS did not have potassium in stock at the prison, and during Ellis' stay there was no doctor on staff and only one registered nurse, during just one shift. [See: *PLN*, Feb. 2011, p.36].

*Prison Legal News* is currently involved in a lawsuit with PHS to release details of any lawsuits PHS has settled in Vermont, including the case of Ashley Ellis. PHS left

the state in January 2010. The *Northfield News* reported Vermont was then off to look for its fifth private company in 14 years to run its prison health-care system.

"It's tragic," Friedmann said of Ellis' death, "but illustrates that these companies are interested in only one thing."

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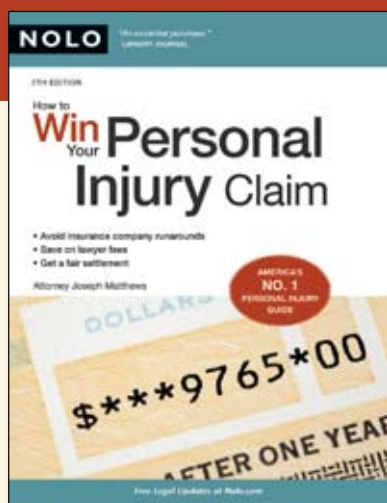
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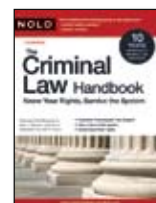
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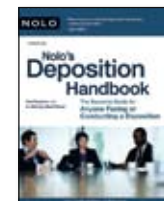
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# Ninth Circuit Holds Hawaii Prison Officials Entitled to Qualified Immunity when Calculating Release Dates in Accordance with State Law

In an interlocutory appeal, the Ninth Circuit reversed a Hawaii district court's denial of qualified immunity to prison officials who, in apparent conformity with Hawaii state law, treated a prisoner's sentences issued at different times for different crimes as being presumptively consecutive rather than concurrent. This was despite the prisoner's objections – which ultimately proved to be well-founded – that the sentencing court in his case had ordered the sentences to “run concurrent with each other.”

Cornelius Alston was sentenced in 1991 for robbery. In 1997, while on parole for that offense, he was sentenced on two counts of promoting a dangerous drug, which the judge ordered were to run concurrently. The judge later ordered that the sentences on the drug-related counts also run concurrent with the remainder of Alston's robbery sentence, but a copy of that order was apparently never received by the Hawaii Department of Public Safety (DPS).

Alston's release date was originally calculated as August 4, 2007 under a DPS policy that treated sentences issued at different times for different crimes as concurrent unless the judgment specified otherwise. That policy was inconsistent with Hawaii state law (HRS § 706-668.5), which presumes that such sentences are consecutive unless the court orders otherwise, and DPS changed its practice to conform with the law in 2005.

Pursuant to its updated policy, DPS recalculated Alston's release date to be November 17, 2011 – more than four years after his original release date. In response to Alston's complaints, DPS explained that his sentences in the two drug-related cases were running concurrently, consistent with the court's order, but because there was no order on file for those sentences to run concurrent with his sentence for the robbery conviction, that sentence was run consecutively.

With the help of a public defender, Alston was able to obtain an amended judgment reflecting the judge's order that all of the sentences were to “run concurrent with each other.” He was released on December 27, 2007, the same day the amended judgment was issued – 145 days after his original release date.

Alston and other similarly situated

prisoners filed suit under 42 U.S.C. § 1983, alleging they were held past their release dates in violation of the Eighth and Fourteenth Amendments. The district court granted the defendants' motion for summary judgment with respect to state law claims, but found there were “genuine issues of fact as to whether Alston had been deprived of meaningful process in violation of the Due Process Clause of the Fourteenth Amendment and whether [the defendants] had acted with deliberate indifference in response to Alston's over-detention claim in violation of the Eighth

Amendment.” The court declined to grant the defendants qualified immunity.

In a December 14, 2011 opinion, the Ninth Circuit had little trouble finding that no reasonable prison official would have known that he or she had a duty to obtain the prisoner's original courthouse file in order to determine whether or not the prisoner was in fact being detained past his or her release date. Thus, the defendants were entitled to qualified immunity and the case was reversed and remanded. See: *Alston v. Read*, 663 F.3d 1094 (9th Cir. 2011). ■

## Seventh Circuit Upholds Indiana DOC's Ban on Pen-Pal Ads

by David M. Reutter

On September 16, 2010, an Indiana U.S. District Court held that a prison regulation prohibiting prisoners from advertising for pen-pals and receiving materials from services that advertise for or provide pen-pals did not violate the First Amendment. The district court's order was affirmed by the Seventh Circuit in July 2011.

The rulings came in a class-action suit filed on behalf of all state prisoners in the Indiana Department of Corrections (IDOC) who were subject to IDOC Administrative Policy and Procedure No. 02-01-103, which became effective July 1, 2006. Before then Indiana prisoners were allowed to advertise for pen-pals. [See: *PLN*, June 2009, p.9].

The policy banning pen-pal ads was enacted following an investigation by prison inspector Todd Tappy. The Commissioner of the IDOC ordered the inquiry after he had a conversation with an elderly man who allegedly was defrauded by prisoners.

Tappy found 350 IDOC prisoners listed on Internet pen-pal advertising sites. Conversations with people who had responded to the ads and corresponded with Indiana prisoners indicated that some felt deceived about sending money to prisoners after being lied to about their sentence lengths and offenses. Most of the evidence of fraud was anecdotal.

Following his investigation, Tappy suggested a cap on the amount of funds

allowed in prisoner accounts, a rule limiting the source of money deposited in prisoner accounts to family members and other authorized persons, and a prohibition on “soliciting or commercially advertising for money, goods, or services, including advertising for pen-pals.” The IDOC rejected the first recommended policy change but implemented the other two.

Each of the parties in the class-action suit filed a motion for summary judgment, and in determining the constitutionality of the regulation the district court applied the four-prong test established in *Turner v. Safley*, 482 U.S. 78 (1987).

The prisoner class members conceded that “Preventing fraud is a legitimate governmental objective. And, on its face, a pen pal prohibition appears to be rationally related to this legitimate goal.” Notwithstanding that admission, the class members tried to undermine the relationship between the challenged rule and the governmental interest by showing that “little-to-no fraud has occurred as a result of pen pal advertising.”

However, they were unable to cite any authority suggesting that prison officials must wait until a critical mass of people have been harmed before instituting a policy to prevent that harm. “To the contrary, *Singer [v. Raemish]*, 593 F.3d 529 (7th Cir. 2010) teaches that prison officials can act as soon as they perceive a threat to penological interest,”



the district court wrote.

The court then found that soliciting pen-pals or receiving information from commercial entities that facilitate pen-pal relationships “could lead to ... behavior among inmates that would undermine” the penological interest of preventing fraud against the public – an interest that both parties agreed was legitimate.

The district court held that prisoners had “alternative means of expression,” as they “are allowed to have unlimited pen pals and to receive unlimited quantity of mail from each one. Moreover, various groups regularly visit prisons, and prisoners may acquire pen pals from those groups, along with pen pals from churches in the community or pen pals introduced through mutual friends. They can even acquire pen pals from other pen pals,” the court stated. It also found that communication with the outside world can be achieved by receiving newspapers and magazines from publishers.

Voiding the regulation, the district court said, would impact prison resources by creating more incoming mail to be reviewed. Finally, the court found the regulation was not an exaggerated response to purported security concerns. As such, summary judgment was granted to the defendant prison officials. See: *Woods v. Commissioner of the Indiana Department of Corrections*, U.S.D.C. (S.D. Ind.), Case No. 1:08-cv-01718-JMS-TAB. The class members appealed.

On July 19, 2011, the Seventh Circuit Court of Appeals affirmed the summary judgment ruling and upheld the IDOC’s prohibition against prisoners advertising

for pen-pals on websites or receiving materials from pen-pal services. The Court of Appeals conducted a *de novo* review of the class members’ First Amendment challenge under the *Turner* standard.

The appellate court determined the first prong of *Turner* was in favor of the IDOC, as the prisoners argued only that the challenged policy was gratuitous and unnecessary. However, the prong requires a showing that the justification for the rule is “so remote as to render the policy arbitrary or irrational.”

As for the second prong, prisoners have alternative means of obtaining pen-pals and the amount of mail they can send and receive is nearly unlimited, the Court of Appeals found. This also favored the IDOC.

The Seventh Circuit rejected the district court’s holding on the third prong of the *Turner* analysis, finding it was tenuous at best to say an increase in Internet usage will cause increased use of pen-pal sites, thus resulting in an escalation of prisoner mail.

“More relevant to our inquiry is

whether lifting the ban would re-open a channel of communication that creates a large potential for fraud to occur,” the appellate court wrote. “We believe that it would.” When prison officials believe an unchecked activity will lead to fraud, “we hold that banning that activity does not violate inmates’ First Amendment rights.”

With respect to the fourth *Turner* prong, although limiting the source from which prisoners can receive funds is a ready alternative, “it can hardly be said to eradicate” potential fraud. “In our view, no single regulation can serve as a catchall for eliminating the potential for fraud,” the Court of Appeals stated, noting that the circuit precedent was to defer “to matters of professional judgment by prison officials.”

Finding that the *Turner* analysis favored the IDOC’s ban on pen-pal ads as being constitutionally valid, the district court’s summary judgment order was affirmed. See: *Woods v. Commissioner of the Indiana Department of Corrections*, 652 F.3d 745 (7<sup>th</sup> Cir. 2011). ■

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## \$3,750 Posthumous Settlement in California Prisoner's Medical Suit

State officials have settled a federal lawsuit against California Department of Corrections and Rehabilitation medical staff that alleged lengthy delays in the diagnosis and treatment of a prisoner's stomach cancer.

Gerardo Richardo Gallegos was a California state prisoner who did not speak or read English. Beginning in 1996, he began to experience episodic weight loss, stomach upset and abdominal pain while eating. Using X-rays, prison physicians diagnosed an obstructing sternotic lesion. Following endoscopic examination and a biopsy, Gallegos was treated for "multiple deep ulcerations" and a prison doctor recommended a CT scan to rule out stomach cancer should the symptoms return.

The treatment that Gallegos received for ulcers – antacids and antibiotics – gave him a brief period of relief. Then the symptoms returned.

In 1997, an upper GI barium X-ray series was performed and no evidence of abnormal growth was discovered. The doctor's prior recommendation for a CT scan was ignored.

By 1998 Gallegos began to experience shortness of breath along with his other symptoms. This led prison physicians to look for heart and lung problems. Although they noted that abnormal gastrointestinal growths should be ruled out, they did nothing to actually determine whether Gallegos had stomach cancer. Instead they gave him antacids, Prilosec, Tegamet and various antibiotics. Gallegos never received a CT scan or pain medication despite having experienced severe pain for over two years.

A prison doctor recommended an appointment with a gastrointestinal specialist in July 1998, but Gallegos didn't see the specialist until October 1999. Finally, in December 1999, Gallegos was transferred to a hospital where an endoscopic examination revealed an "appearance highly suspicious of cancer of the stomach." Ten days later he received emergency radical surgery to remove his stomach due to advanced cancer.

Gallegos' post-surgical recovery was hindered when he was transferred from the hospital to the wrong prison without any medical records. A week later he was finally sent to the correct facility and began to receive medical treatment in the form of multiple CT scans, liquid nutritional supplements, dietary supplements for iron-deficient blood, close monitoring

of his weight, vitamins, pain medication and multiple stool sample analyses.

Gallegos filed a pro se civil rights action in U.S. District Court pursuant to 42 U.S.C. § 1983 in 2001, alleging that prison medical employees, including physicians John Parsons, Charles Pickett, Sunil Walia and James S. Burrell, were deliberately indifferent to his serious medical needs. A decade later, Gallegos' widow, Dora Alvarez Gallegos, settled with the defendants for \$3,750. No information was available on the circumstances of Gallegos' death, which occurred during the course of the

litigation. Following the settlement in February 2011, the case was dismissed.

A civil rights complaint such as this one, in which prison medical personnel provided some medical services – albeit not the services needed to diagnose the actual problem – is very hard to win due to the difficulty of proving deliberate indifference when some medical care is supplied. Such cases are often better brought in state court raising claims of medical negligence and/or medical malpractice. See: *Gallegos v. Parsons*, U.S.D.C. (S.D. Cal.), Case No. 3:01-cv-01874-DMS-JMA. ■

## Dramatic Increase in Number of Hispanics Sentenced to Federal Prison

by Matt Clarke

Tougher immigration enforcement efforts coupled with fast-track procedures in immigration cases have combined to dramatically increase the number of Hispanics entering the federal prison system. Statistics released in June 2011 indicate that Hispanics, who make up only 16% of the U.S. population, accounted for almost half of the defendants sentenced to federal prison.

According to data from the U.S. Sentencing Commission, convictions for immigration felonies, including illegally re-crossing the border and smuggling aliens into the U.S., made up about 87% of the past decade's increase in the number of Hispanics entering federal prisons. Critics say that a large part of the increase is due to rapid, mass immigration hearings which began in the Del Rio, Texas sector of the U.S.-Mexico border in 2005 under a program called Operation Streamline, then rapidly expanded to other parts of the border. Currently, U.S. Attorneys in all four southern border states have approved fast-track programs for immigration violations.

Prior to the fast-track initiative, immigration offenses were handled under a policy known as "catch and release." Pursuant to that policy only a few members of any group of immigrants caught illegally in the U.S. would be charged with a federal misdemeanor, which could result in deportation or up to six months in federal custody. Most Mexican immigration violators were simply taken to the border and told to leave the United States without being charged.

Under the current policy, however,

all immigration offenses are prosecuted. The first time a person is caught illegally in the U.S., the charge will likely be a misdemeanor provided he or she has no prior criminal history. A defendant with a criminal record, or who is caught illegally in the country a second time or is smuggling aliens, will probably be charged with a federal felony although such charges may be plea bargained down to misdemeanors. Illegally re-entering the U.S. after having been deported carries up to 20 years in federal prison.

Typically, under Operation Streamline's fast-track system, groups of up to 70 misdemeanor immigration defendants are herded into a federal courtroom. Wearing headphones so they can listen to interpreters, they meet their lawyers, have whispered conversations and are then called before the magistrate judge in groups of five to be read their rights. They are asked questions by the judge, answer in Spanish as a group and enter guilty pleas. They are usually sentenced and deported the same day.

Meanwhile, felony immigration offenders are processed in a similar manner in another courtroom nearby. By entering guilty pleas, the felony violators can more quickly begin serving their federal prison sentences.

This fast-track program has been the driving force behind a jump in the number of immigration violators sent to federal prison – from 6,513 in FY 2000 to 19,910 in FY 2010, some of whom were also sentenced for other, non-immigration crimes. Supporters of the fast-track pro-

gram claim victory in the battle against illegal immigration.

"We've made tremendous progress and are moving in a direction where there are consequences of continuous efforts to cross the border illegally," said Dennis Burke, an Arizona U.S. Attorney. "If that has resulted in a higher number of individuals in the overall aggregate system being of Latino descent, I would say that is a separate issue."

Arizona U.S. Senators John McCain and Jon Kyl have introduced a bill to expand Operation Streamline. Kyl cited Border Patrol statistics that show a 93% drop in arrests for illegal immigration since the program started in Yuma in 2006. An expansion of the fast-track program to a zero-tolerance model would add an estimated 50,000 beds to the immigration detention system, at a cost of up to \$1 billion annually.

Critics of fast-tracking criminal prosecutions argue that the downturn in the U.S. economy and resulting poor job market, combined with heightened border security and an increased Border Patrol presence, caused most of the reduction in illegal immigration. They also question the constitutionality of reducing procedural protections in criminal prosecutions for certain groups of people. Jason Hannan and Saul Huerta, federal public defenders in Tucson, called Operation Streamline a separate and unequal criminal justice system in a court challenge to the fast-track process.

"I think anytime you have such a large proportion of one minority group sentenced to prison that means the country needs to look closely at what it's doing here," remarked Deborah Denno, a Fordham University Law School professor and an expert on racial disparities in the criminal justice system.

Other critics claim that Operation Streamline is an expensive give-away to the private prison industry, as private prison companies that operate detention facilities under contract with Immigration and Customs Enforcement (ICE) benefit financially

from the increase in immigration prosecutions. [See: *PLN*, Feb. 2011, p.11].

Sources: *Associated Press*, *USA Today*, <http://grassrootsleadership.org/operation-streamline>

## Louisiana Sheriff Pleads Guilty to Corruption Charges

An October 5, 2011 federal Bill of Information charged Louisiana's Plaquemines Parish Sheriff Irvin F. "Jiff" Hingle, Jr., 59, with conspiracy to commit mail fraud and bribery concerning a program involving federal funds.

Hingle, the sheriff of Plaquemines Parish since 1992, entered into a contract with Benetech, LLC in 2007 to provide services related to recovery from previous and future natural disasters. On two separate occasions in March and April 2008, Hingle approved invoices and issued Benetech checks for work purportedly performed under the contract.

Within weeks of those payments, Benetech's owner, W. Aaron Bennett, gave Hingle \$20,000 in two equal cash installments which were intended to influence him in connection with the contract. Bennett was charged with bribery and conspiracy to commit bribery as a result of his cash payments to Hingle.

The Bill of Information also claimed that Hingle used over \$100,000 in reelection campaign funds for personal matters. His campaign finance report for 2008, filed with the Louisiana Board of Ethics – an agency that receives federal funds – falsely indicated the money was used for campaign-related expenditures when it was really used for personal expenses.

"We place greater trust in our law enforcement officials, trust that they will

maintain and display ethical and lawful conduct. No one is above the law. Conduct as detailed in the Bill of Information reduces the opportunity for fair business and severely reduces the public's trust in our elected officials," said David Welker, Special Agent in Charge of the FBI's New Orleans Field Office.

Hingle pleaded guilty to one count of conspiracy on November 30, 2011. Bennett has also pleaded guilty, and both are scheduled to be sentenced on June 27, 2012. See: *United States v. Hingle*, U.S.D.C. (E.D. La.), Case No. 2:11-cr-00252-SSV-ALC.

Additional sources: *U.S. Attorney's Office press releases*, [www.nola.com](http://www.nola.com)

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## Pennsylvania Businessman Sentenced to 18 Months in “Kids for Cash” Kickback Scandal

In November 2011, a Pennsylvania U.S. District Court sentenced the former owner of two for-profit juvenile detention centers to 18 months in prison for his role in a kickback scheme that included two judges. The scandal, involving the juvenile justice system in Luzerne County, Pennsylvania, came to be known nationally as “Kids for Cash.” [See: *PLN*, June 2010, p.26; Nov. 2009, p.42; May 2009, p.20].

The owner of the two juvenile facilities was high-powered businessman and attorney Robert J. Powell. Once Luzerne County closed its dilapidated public juvenile detention center, Judges Mark A. Ciavarella, Jr. and Michael T. Conahan supported sending youthful offenders to Powell’s for-profit facilities.

Powell, 52, testified at Ciavarella’s trial in February 2011 that the judges’ support came at a cost. He said the two jurists extorted him and made him pay them more than \$750,000 between 2003 and 2007. Over that same time period, Powell’s company received around \$30 million from Luzerne County to house juvenile offenders, many of whom were sent to the facilities by Judge Ciavarella.

“Even though they were in positions of power and influence, I had the ultimate ability to do the right thing and say no. I was wrong for giving in and paying them and will forever bear the burden of having done so,” Powell wrote in a letter to U.S. District Court Judge Edwin M. Kosik.

Powell was sentenced on November 4, 2011 to 18 months in federal prison after pleading guilty to misprision of a felony and accessory after the fact to conspiracy to commit income tax evasion, plus one year on supervised release and a \$60,000 fine. See: *United States v. Powell*, U.S.D.C. (M.D. Penn.), Case No. 3:09-cr-00189-EMK.

Prosecutors had asked for a 12- to 18-month sentence due to Powell’s cooperation in the case, which included wearing a wire to record incriminating conversations with Conahan and Ciavarella. In addition to his testimony at Ciavarella’s trial, Powell also wore a wire against a third Luzerne County judge, Michael T. Toole, in an unrelated case. Toole, 51, pleaded guilty to corruption and tax-related charges and was sentenced on April 2, 2011 to serve 2½ years in federal prison.

“Mr. Powell’s cooperation was vital to the success of this investigation and the

prosecutions that resulted from it,” said U.S. Attorney Peter Smith. “Without Mr. Powell’s vital cooperation, it might have been a much more difficult, much longer, if not impossible, process.”

Powell’s attorney, Joseph D’Andrea, sought a more lenient sentence based on his client’s “extraordinary assistance” to federal prosecutors. “Bob found himself being muscled and pressured by two very corrupt and evil men who sat as judges in Luzerne County,” he told Judge Kosik.

While acknowledging Powell’s cooperation, Judge Kosik said Powell had benefited financially from the “cabal” that ran the county. “He could have told the judges to go to hell,” Kosik noted. Prior to being sentenced, Ciavarella criticized Powell as “a liar and a self-centered individual who would say and do anything to protect himself.”

Powell surrendered his law license and said in his letter that he had lost his home and ability to earn a living, and brought shame on his family. “I would not wish this on any human being. I have been punished in ways no one could imagine or conceive. I have been financially and professionally ruined,” he wrote, adding that he was “both scared and selfish.”

Of course, many of the thousands of juveniles who were sent to Powell’s for-profit facilities due to the kickback scheme had their lives ruined, too. At least one committed suicide.

For their roles, Ciavarella and Cona-

han, who received a total of \$2.8 million in kickbacks, are serving 28 and 17½ years in prison, respectively. [See: *PLN*, Nov. 2011, p.14]. Robert K. Mericle, the builder of the detention centers, who also was charged in connection with the bribery scheme, pleaded guilty and awaits sentencing. Mericle has “voluntarily contributed the sum of \$2,150,000 for the express purpose of funding programs for the health, safety and general welfare of the children of Luzerne County,” presumably in an effort to get a lighter prison sentence.

The Pennsylvania Supreme Court vacated thousands of Ciavarella’s juvenile convictions, saying he ran his courtroom with “complete disregard for the constitutional rights of the juveniles,” including depriving them of the right to counsel and the right to knowingly enter guilty pleas. In order to keep Powell’s private juvenile detention facilities full, Ciavarella would routinely convict juvenile offenders who were not represented by counsel and order them to serve time for minor infractions.

Notably missing from this entire episode has been any sense of responsibility from either the prosecutor’s office or the criminal defense bar of Luzerne County, which both colluded in the mass imprisonment of children as the judges and private prison officials profited at the expense of taxpayers. ■

Sources: *Washington Post*, <http://citizens-voice.com>

## Ninth Circuit Holds New Claims Need Only be Exhausted Prior to Filing Amended Complaint

The Ninth Circuit has held that a § 1983 prisoner litigant who wants to raise new claims based on conduct that occurred after an initial complaint was filed may do so by exhausting available administrative remedies (relative to the new claims) prior to filing an amended complaint. In so doing, the appellate court rejected an interpretation that would have required the exhaustion of all claims prior to filing suit – an obvious impossibility in the case of claims that only arise later.

State prisoner Kavin Maurice Rhodes filed suit pursuant to 42 U.S.C. § 1983 in 2002, alleging that prison staff at the

California Correctional Institution at Tehachapi had retaliated against him for exercising his First Amendment right to file grievances. After the district court dismissed his complaint, the Ninth Circuit reversed.

In an important published opinion the appellate court detailed the elements of a First Amendment prisoner retaliation claim, clarifying, in the process, that a prisoner could satisfy the adverse-effect element of such a claim even if his protected First Amendment communications had not been totally silenced, so long as they had been chilled. See: *Rhodes v. Robinson*, 408 F.3d 559 (9th Cir. 2005).

On remand to the district court, Rhodes filed a second amended complaint, adding 21 new claims that alleged the defendants had perpetrated additional retaliatory acts against him in response to his initiating the lawsuit, and that he had exhausted the administrative remedies available to him with respect to those new claims.

The district court dismissed Rhodes' new claims sua sponte, interpreting 42 U.S.C. § 1997e(a) as requiring that all claims be exhausted prior to the initial filing of a § 1983 lawsuit.

On appeal, the Ninth Circuit rejected the district court's interpretation – which was the same as the argument advanced by the defendants – as being inconsistent with the general rule of pleading that an amended complaint “completely supercedes any earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant.”

Additionally, the Ninth Circuit found the district court's interpretation of the administrative remedy exhaustion requirement to be incompatible with the language and purpose of Fed.R.Civ.P. Rule 15(d), which expressly permits a supplemental pleading to be filed based on facts that occur after the filing of the original complaint. See: *Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010).

Following remand, on March 10, 2011 the district court entered an order allowing Rhodes to file his amended complaint. “Although the action is over nine years old and has gone to trial on twelve causes of action, the Ninth Circuit's remand on Causes of Action Thirteen through Thirty-three essentially starts the procedural process anew,” the court wrote. The case remains pending. See: *Rhodes v. Robinson*, U.S.D.C. (E.D. Cal.), Case No. 1:02-cv-05018 LJO DLB PC. 🖨

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# Pennsylvania Prisoner's \$185,000 Jury Award Reduced to \$75,005

by Matt Clarke

On June 7, 2011, a Pennsylvania federal judge issued an order reducing a prisoner's jury award for destruction of legal materials to \$75,005. The award had previously been reduced from \$185,000 to \$115,000.

Andre Jacobs, a Pennsylvania state prisoner, filed a pro se civil rights lawsuit in federal court alleging that guards at the State Correctional Institution (SCI) in Pittsburgh had seized and destroyed 151 pages of his legal materials. The suit claimed violations of Jacobs' right of access to the courts, retaliation, conspiracy and defamation, and named SCI guards Thomas McConnell, Carol Scire and Gregory Giddens as defendants along with other state employees and agencies. The legal materials in question were part of a lawsuit Jacobs was preparing against SCI staff.

In 2008, an eight-member federal jury deliberated for three days before awarding a total of \$120,000 in compensatory damages and \$65,000 in punitive damages against Giddens on the defamation claim; against Giddens and McConnell on the access to courts claim; and against Giddens, Scire and McConnell on the conspiracy and retaliation claims. [See: *PLN*, Oct. 2010, p.36].

The defendants filed a motion for judgment as a matter of law pursuant to Rule 50, Federal Rules of Civil Procedure. The district court granted the motion with respect to the conspiracy claims involving Scire and McConnell, and to the access to courts claims against Giddens, Scire and McConnell. Accordingly, the court reduced the jury award to a total of \$75,000 in compensatory damages and \$40,000 in punitive damages.

The defendants then filed a second or renewed Rule 50 motion for judgment as a matter of law, requesting remittitur or a new trial. The motion essentially argued that without Scire or McConnell as co-conspirators, Giddens should also be dismissed as there was no party left for him to have conspired with. Further, as a lieutenant, Giddens was entitled to sovereign immunity on the defamation claim; under the PLRA, Jacobs could not be awarded damages for mental harm caused by retaliation, conspiracy or defamation absent physical injury; and Jacobs had failed to prove the value of the legal

materials that were destroyed.

The district court granted the motion with respect to mental harm, reducing the awards for retaliation and conspiracy to nominal damages of \$1 for each defendant for each claim. The court also reduced the mental harm (mental anguish and humiliation) portion of the defamation claim to a nominal \$1 award, but left in place the \$10,000 award for harm to reputation. The defendants' challenge regarding the value of the legal materials was waived because they had not previously raised that issue. Additionally, there was evidence that Giddens had conspired with someone but not necessarily a party, therefore the award for conspiracy was upheld.

Further, the district court found that

Giddens was acting against policy and outside his scope of employment when he acted as the Grievance Officer for a grievance Jacobs had filed against him and decided the grievance was fabricated and false. Thus he was not entitled to sovereign immunity.

Accordingly, the jury awards for property damage (50% of the original retaliation and conspiracy awards), damage to reputation and punitive damages for retaliation, conspiracy and defamation remained for a total award of \$75,005. The parties have since filed cross-appeals, which remain pending. See: *Jacobs v. Pennsylvania Department of Corrections*, U.S.D.C. (W.D. Penn.), Case No. 2:04-cv-01366-JFC. ■

## Florida Lawmakers Disband Correctional Medical Authority

The Florida legislature did an end-run around a veto by the Governor by eliminating funding for the state's prison medical oversight agency, thereby causing it to disband. With Florida turning to private companies to provide prisoner healthcare services, there is concern that medical care will decline and potentially subject the state to litigation absent adequate oversight.

The Florida Correctional Medical Authority (CMA) was created in July 1986 in response to a class-action lawsuit. Brought in 1972, *Costello v. Wainwright*, U.S.D.C. (M.D. Fla.), Case No. 72-109-Civ-J-S, challenged conditions in Florida's prison system. The federal district court maintained jurisdiction over the state's prison medical services until 1993, when the state committed to using CMA to oversee healthcare in its prisons. [See: *PLN*, Aug. 1993, p.14].

The legislature's decision to slash the CMA's \$796,151 budget came after Governor Rick Scott vetoed a bill to close the agency. At the time, Scott said the CMA was a "valuable layer of oversight," and its elimination "could cause public health and safety risks."

When CMA closed its doors on August 18, 2011 after being de-funded by state lawmakers, supporters of the agency spoke out about the potential repercussions.

"The recent elimination of the CMA does not comport with the letter or spirit of Judge Susan Black's 1993 court order, which closed the long running *Costello v. Wainwright* case," said John Bailey, CMA's chairman since 2005. "Florida is now at risk of further federal intervention, and at increased risk of further class-action lawsuits relating to health care of prison inmates."

Two Democratic lawmakers also raised objections to CMA's abrupt demise. "To preempt any attempts to hold the State of Florida in contempt, or open the door to new litigation as a result of its closure, we urge Governor Scott to explore all possible options, including the issuance of an executive order sustaining CMA's operations pending the return of the legislature," state Senator Arthenia L. Joyner and Rep. Mark S. Pafford wrote in a joint statement.

"The governor did everything within his authority that he could do to save that program. It's unfortunate that the legislature doesn't see the value in that program," said Scott's spokesman, Lane Wright. "It had not only a medical value for the inmates there but it also was a good thing from a financial standpoint as well. We are looking at whatever options might be available but we're not even sure there are any."

Over the years, the CMA became a national model for oversight of prison

healthcare. Prisoners also reported that the agency was effective in protecting their right to receive adequate medical services.

"While at Tomoka Correctional, there was an epidemic of MRSA. Medical was filled with prisoners seeking treatment for boils but nothing was done to treat its spread or acknowledge a problem," said Florida state prisoner and *PLN* contributing writer David Reutter. "I wrote the CMA. A week later, the head nurse called me out. She was livid I had gone outside the prison, and she contended the problem was bird mites.

"A medical orderly later told me a review of prisoner medical records found over 200 cases of prisoners exhibiting symptoms of staph infection," he continued. "Shortly thereafter, nurses came to the dorm to inspect every prisoner for MRSA. Those with symptoms were treated and preventative procedures were implemented."

Bailey predicted that the CMA's closure "will expose the state to a resumption of the conditions that led to the *Costello v. Wainwright* class-action lawsuit – an enormously expensive proposition for the state."

State Senator Mike Fasano agreed. "It's very dangerous," he said. "It's the wrong way to go because in the long run it may cost the taxpayers more."

That is particularly true considering the Florida Department of Corrections has contracted with two for-profit companies to provide prisoner medical care: Corizon and Wexford Health Services. Since private companies have an incentive

to cut corners in order to generate profit, more oversight is needed, not less. ■

Sources: *Palm Beach Post*, [www.saintpettersblog.com](http://www.saintpettersblog.com), *Sun-Sentinel*

## New Director of Tennessee Corrections Institute Faces Conflict of Interest

The new executive director of the Tennessee Corrections Institute (TCI), an agency that oversees standards, inspections and certification of the state's jails, faces an inherent conflict of interest in certifying the Wilson County Jail, as that county's sheriff is her husband.

Despite being made aware of the conflict, Governor Bill Haslam appointed Beth Ashe to the director's position. Supporters of Ashe say she is the most qualified for the \$80,000-a-year job: She is a former Louisiana sheriff and worked with the Tennessee Sheriff's Association to develop a victim notification system that alerts victims when offenders are released, transferred or escape.

However, her marriage to Wilson County Sheriff Terry Ashe is the greatest concern to those worried about conflicts of interest. "Her agency is responsible for inspecting and certifying her husband's jail," noted attorney Jerry Gonzalez, who has represented prisoners in civil litigation, including some who challenged conditions at the Wilson County Jail. "You don't have to be a rocket scientist or an ethical philosopher to recognize that that is an inherent conflict of interest."

In her new position at TCI, Ashe will supervise trainers and inspectors charged with upholding standards for administration, personnel, security, disci-

pline, cleanliness, food services, visitation policies, programs, medical care and other matters at county jails. Decertification raises the possibility of lawsuits, higher insurance premiums and even loss of funding for housing state prisoners.

Gonzalez once represented a mistreated prisoner held at the Wilson County Jail. "If they go in and inspect the jail and see [] they're not adequately treating inmates, is the wife going to threaten the husband to decertify his jail?" he asked.

Ashe dismissed such criticism, saying TCI's board makes final decisions on jail certification issues. "I don't see the connection," she said. "I answer to the board of control, so they give me my direction."

Davidson County Sheriff Daron Hall, former chairman of TCI's control board, supported Ashe's appointment. "It makes me feel comfortable that the board ... is who makes decisions about what is found in those institutions."

However, John Lachs, a professor of ethical philosophy at Vanderbilt University, said Ashe never should have been appointed. "The obvious first thing to do is to not even create this perception of a conflict of interest. You just avoid it," he was quoted as saying in an August 22, 2011 news report. ■

Source: *The Tennessean*

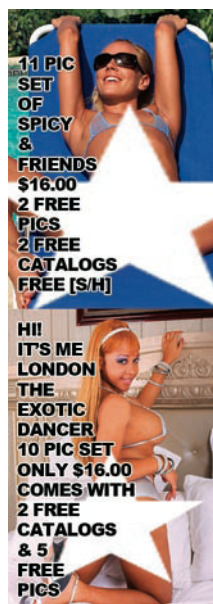
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# Florida Citizen Fights CCA over Public Records Request

Prison officials tend to frown on public records requests. In fact, employees at a Florida facility operated by Corrections Corporation of America (CCA) were so ruffled by a citizen's request for records that they called the cops.

Joel Chandler, 47, has made himself the self-appointed leading advocate for Florida's Sunshine Act, which is the state's public records law. He has filed around three dozen lawsuits against school boards, medical examiners and other government agencies in his quest to assure public records are accessible to the public, as the law intends.

When Florida considered privatizing dozens of state prisons in 2011, Chandler decided to visit one facility that was already privately operated and check its compliance with the Sunshine Act. So on June 3, 2011, he walked into the 985-bed, CCA-operated Moore Haven Correctional Institution.

With a video camera in hand and accompanied by his brother, Chandler entered the prison and said, "I'm here to make a public records request." He asked to see the visitor log. When requested to present identification, Chandler refused, noting that a citizen is not required to show ID to see public records.

The situation deteriorated from that point. CCA officials called the Glades County Sheriff's Office after telling Chandler to submit his request in writing. Upon arrival, a sheriff's deputy issued a trespass warning notice.

Florida's Sunshine Act provides: "Any person shall have the right of access to public records for the purpose of making photographs of the record while such record is in the possession, custody, and control of the custodian of public records."

"This was not a typical public records request. They came in with a video camera," said CCA spokesman Steve Owen, who said safety and security is CCA's top priority. "We're going to work in good faith through the judicial process to resolve this matter."

That judicial process included the lawsuit Chandler filed against CCA for failing to comply with his records request. "It looks as if Joel Chandler likes to stir up trouble," Jerry Lankford III, CCA's senior director of Partnership Relations, wrote in an email to Moore Haven warden Laura E. Bedard.

CCA also said that for security reasons, it requires anyone who enters its facilities to present identification. Further, the company's policies prohibit videotaping without the warden's approval. Shortly after the incident, CCA's lawyers sent Chandler a copy of the visitor log he requested.

Chandler has no interest in what the log contains. "What I care about is access to the documents," he stated. "My rights have been violated since June 3." His lawsuit requested a written apology from CCA and for CCA officials to take a course on how to deal with public records requests.

"I can't let go of it. It's a civil rights issue," said Chandler. He contacted the

State's Attorney's Office and told officials there that he was detained for an hour against his will – just for seeking access to records that are supposed to be public.

The happy ending to this story is that the trespass notice was dropped and Chandler prevailed in his lawsuit over CCA's failure to comply with the Sunshine Act, with the court finding that "CCA had unlawfully denied ... access to non-exempt public records." According to Chandler, following a trial in February 2012, he was awarded around \$10,000 in attorney's fees. See: *Chandler v. CCA*, Glades County Circuit Court (FL), Case No. 11-CA-143. ■

Sources: *Tampa Bay Times*, [www.fogwatch.org](http://www.fogwatch.org)

## California: Federal Court Grants Increased Attorney Fee Rates in Armstrong Disability Case

On August 8, 2011, a California federal district court approved an increase in the hourly rates for the plaintiffs' attorneys due to additional experience the attorneys had accrued since the beginning of the litigation.

The court had entered an order on September 20, 1996, granting an injunction that required California prison officials to develop plans ensuring that state prisoners and parolees were afforded their rights under the Americans with Disabilities Act (ADA), including state prisoners and parolees held in county jails. [See: *PLN*, Nov. 2011, p.28; July 2003, p.14; Sept. 1998, p.13; Sept. 1997, p.3].

The district court also held the plaintiffs were the prevailing party, which entitled them to fees and litigation costs. A March 26, 1997 order governed the payment of attorney's fees and any dispute over fees.

The parties agreed in 2009 that the plaintiffs' attorneys, paralegals and other legal support staff would be compensated at 2008 hourly rates for work completed in 2009. At the end of the first quarter for 2010, however, they were unable to agree on rates for work performed in 2010. The plaintiffs sought an increase, which the defendants rejected. Mediation efforts failed to reach an accord.

The plaintiffs asserted in a motion to compel compensation that the increased

2010 hourly rates they submitted were reasonable, as the 2008 rates resulted in their attorneys being paid \$110,070 less than they should receive.

Under the ADA, reasonable attorney's fees are determined by looking to the "prevailing market rates in the relevant community." Several factors may be considered, "including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel, and fees awarded in similar cases."

To meet its burden of establishing that fees are reasonable, a party may submit affidavits from counsel and from "other attorneys regarding prevailing fees in the community, and rate determination in other cases, particularly those setting a rate for the [party's] attorney."

For partner-level attorneys, the plaintiffs sought rates ranging from \$560 for a 1997 law school graduate to \$800 for a 1962 law school graduate. For associates, the plaintiffs requested a range of \$285 for a 2009 graduate to \$510 for a 1993 graduate. For paralegals they sought rates ranging from \$200 to \$240. Finally, they sought rates from \$150 to \$185 for litigation support staff and paralegal clerks. These rates applied to personnel with the San Francisco law firm of Rosen, Bien & Galvan.

For attorneys with the Prison Law Office, the plaintiffs sought rates ranging



from \$275 for a 2009 graduate to \$700 for a 1978 graduate. They also requested \$170 hourly for their office manager.

Attorneys with the Bingham-McCutchen law firm sought hourly rates of \$400 for an associate who graduated in 2008, \$480 for an associate who graduated in 2006 and \$655 for a partner who graduated in 1997. An attorney who was a 1988 graduate and represented the Disability Rights Education Defense Fund sought \$565 hourly.

The defendants offered no evidence that the requested rates were unreasonable, nor did they dispute they were "prevailing market rates in the Bay Area." The district court held that attorneys, like state employees, are entitled to hourly rate increases for additional experience gained over time.

The court granted the plaintiffs' motion to compel and ordered the defendants to pay the disputed increased rates with interest. Note that in cases brought under the ADA involving prisoners, attorney fees are not capped pursuant to the Prison Litigation Reform Act as the ADA contains its own attorney fee provisions. See: *Armstrong v. Brown*, 805 F.Supp.2d 918 (N.D. Cal. 2011). ■

## Ohio Prison Industry Cuts Over 35% of Workforce

The workforce for Ohio Penal Industries (OPI) has been reduced by more than 35% since 2007. With budget cuts due to the economic downturn forcing state agencies – OPI's largest customers – to reduce spending, revenue at OPI has spiraled downward.

Net sales at OPI were \$36.4 million in FY 2007. Sales for FY 2010 were only \$28.2 million. "It's a lack of demand," said Carlo LaParo, a spokesman for the Ohio Department of Rehabilitation and Correction. "Many government entities have had their budgets cut."

In 2008, OPI closed 13 of its 42 prison industry programs. That caused a decline in prisoner workers from 2,097 to 1,347. OPI manufactures numerous products, including license plates, office furniture, trash can liners, bedding, clothing, toilet paper, eyeglasses, and state and U.S. flags. It also has a meat processing plant and refurbishes salt trucks for the Ohio Department of Transportation.

OPI announced the closure of additional prison industry programs in February

2010, which resulted in another reduction in its prisoner workforce. [See: *PLN*, Sept. 2010, p.28]. The agency still operates 24 manufacturing programs at 16 facilities.

OPI recently exited an "extensive furniture-making endeavor" because private businesses, amazingly, were able to make cheaper products without the use of prison slave labor. OPI is now seeking customers to purchase a new line of furniture that uses parts from an Amish company that are assembled by prisoners.

LaParo said OPI is trying to solicit Ohio colleges and universities as customers, and hopes to partner with private companies. The expansion will have limits, though. "We certainly do not want to be in a position where we negatively impact private-sector jobs," he stated. However, given that OPI products are produced with cheap prison slave labor, it is difficult to fathom how they could not "negatively impact" freeworld businesses that sell similar products made by non-prisoners. ■

Source: *Dayton Daily News*

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# Washington State Corrections Secretary Resigns Due to Affair with Subordinate

by Matt Clarke

Eldon Vail, the Secretary for the Washington Department of Corrections, submitted a letter of resignation on July 1, 2011 when it was publicly revealed that he had been having an affair with a subordinate.

Shortly before Vail resigned, several Seattle-area television stations received copies of a video purporting to show Vail and a subordinate employee leaving a motel less than two miles from the Department of Corrections (DOC) headquarters in Tumwater after a noontime tryst. According to the person who shot the video, rumors of the affair had been circulating throughout the DOC.

The unidentified videographer said he waited outside the motel for about an hour and caught Vail and the woman, a 49-year-old program manager, as they exited and left in separate vehicles. A Seattle television station verified that the white pickup shown in the video was registered to Vail.

"Being as he is the head of an agency, I don't feel that it is right for him having inappropriate contact with a subordinate, possibly on state time. And the department should hold themselves to a higher standard," said the videographer, an anonymous DOC employee.

Vail, 59, who is married, acknowledged having an "inappropriate" relationship with an employee and said rumors of the affair forced his resignation.

"Once I became aware of that possibility, I knew I had only one choice, and that was to resign," Vail stated. "This is no one's fault but my own. It's not the employee's fault. It is not my wife's fault." He had been Corrections Secretary for more than three years and received a \$147,000 annual salary.

Washington state law does not prohibit manager-employee sexual relationships, but does forbid state workers from having a conflict of interest in the performance of their duties. Executive Ethics Board director Melanie de Leon said that, while not specifically prohibited, such relationships are fertile ground for violations if a manager exhibits favoritism toward the subordinate employee.

"We don't like to say how you live your life, but it just screams conflict of interest right out of the chute," she observed.

Department policy prohibits interoffice relationships if the parties involved are in the same chain of command. Obviously, anyone working at the DOC would be in the Corrections Secretary's chain of command, since he's at the top of the chain.

Vail denied having granted the employee any non-sexual favors, privileges or benefits, and said he didn't use state resources in pursuing the affair. He also said he did not plan to speak publicly again about the incident.

"I'm going to try to work that out with my wife," he stated.

Vail announced his resignation just days after a prisoner was shot and killed

during an escape attempt from the Clallam Bay Corrections Center, which was initially thought to be the reason for his abrupt decision to resign before details of the affair were made public. [See: *PLN*, Feb. 2012, p.39].

Washington DOC Prisons Director Bernie Warner, who was formerly employed as the Chief Deputy Secretary of Juvenile Justice for the California Department of Corrections and Rehabilitation, was appointed to serve as Corrections Secretary following Vail's resignation. ■

Sources: *Seattle Times*, [www.seattlepi.com](http://www.seattlepi.com), [www.opb.org](http://www.opb.org)

## Ninth Circuit Rules Sheriff May be Held Liable for Violence in Los Angeles County Jails

The Ninth Circuit Court of Appeals held in a revised ruling that Los Angeles County Sheriff Leroy Baca could be held liable for his subordinates causing dangerous conditions in the Los Angeles County Jail system (LACJ). The appellate court also found that *Ashcroft v. Iqbal*, 129 S.Ct. 1371 (2009) [*PLN*, July 2009, p.18] did not eliminate supervisory liability claims in prison conditions cases brought under 42 U.S.C. § 1983.

Dion Starr was an LACJ prisoner when he was assaulted by other prisoners and beaten, stabbed, and severely and permanently injured in 2006. The deputies at the jail, far from ensuring Starr's safety, allegedly assisted his attackers by opening his cell door to let them in. After the other prisoners left, deputies allegedly entered Starr's cell, called him racial slurs, beat him and delayed medical assistance.

Starr filed a § 1983 suit in federal court against the deputies who assaulted him and Sheriff Baca, alleging that Baca knew of numerous incidents of prisoner-on-prisoner violence and LACJ employee misconduct but had failed to take corrective action, thus making him liable for the assault. The district court dismissed Baca as a defendant because Starr did not allege that the sheriff had personally participated in the assault or the ensuing investigation, or had promulgated any policy that allowed the assault to occur. Starr appealed.

Baca claimed on appeal that the Supreme Court's ruling in *Iqbal* had eliminated supervisory liability in § 1983 cases. The Ninth Circuit ordered special briefing on the issue. The appellate court then decided that *Iqbal*, which involved a claim of purposeful discrimination, did not eliminate supervisory liability in conditions-of-confinement suits. In doing so, the Court of Appeals wrote it was in agreement with three other circuits, the 1st, 7th and 10th, that had addressed the same question.

Noting that under the prevailing deliberate indifference standard a claim of supervisory liability in prison conditions cases requires that the supervisor knew of and acquiesced in the unconstitutional conduct, the Ninth Circuit held that that standard was not the same as vicarious liability, which was prohibited by *Iqbal*. Instead, the deliberate indifference standard makes supervisors liable for their own culpable actions or inaction.

Starr's complaint also could not be dismissed under Rule 8(a), Federal Rules of Civil Procedure, as the district court had held. The rules require only that Starr present a short, plain statement of the claim showing he is entitled to relief. "Starr's complaint specifically alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable

actions of the subordinates of Sheriff Baca. The complaint specifically alleges that Sheriff Baca was given notice of all of these incidents,” as well as reports of systemic problems in LACJ which resulted in prisoner deaths and injuries.

“Finally, [the complaint] alleges that Sheriff Baca did not take action to protect inmates under his care despite the dangers, caused by his subordinates, of which he had been made aware. These allegations are neither ‘bald’ nor ‘conclusory.’” Thus, Starr had satisfied the notice pleading requirements, and the district court’s dismissal

of Sheriff Baca was reversed and the case remanded for further proceedings.

Starr was represented by Culver City attorneys Sonia Maria Mercado and R. Samuel Paz. The initial appellate decision was issued on February 11, 2011, but was superseded by a revised ruling on July 25, 2011. The defendants filed a petition for rehearing *en banc*, which was denied in October 2011 with eight circuit judges joining a dissenting opinion. See: *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), *petition for rehearing en banc denied*, 659 F.3d 850 (9th Cir. 2011). ■

## Tennessee Discontinues Polygraph Tests as Sex Offender Supervision Tool

Legal concerns have led the Tennessee Board of Probation and Parole (BOPP) to order probation officers to discontinue the use of polygraphs, better known as lie detector tests, in their supervision of sex offenders.

Polygraphs are to be used for treatment purposes only, said Gary Tullock, director of field services for the BOPP. Probation officers were asked years ago to ensure that sex offenders took at least one polygraph test a year. That led officers to believe they had the authority to question sex offenders about their compliance with parole and probation conditions during their polygraphs.

“Over the course of time, some officers thought it was part of supervision, not treatment,” said Tullock. “Our attorneys say we can’t do that. We can’t force someone to take a polygraph and incriminate themselves.”

Psychologists, counselors and other treatment providers use polygraph tests to formulate a treatment plan that addresses an offender’s problems. “It motivates them to be truthful,” stated Dr. Donna Moore, a psychologist in Brentwood, Tennessee. “And if they’re not truthful, that’s obviously something we need to work on in treatment, too.”

Some, however, believe polygraphs should continue to be used in the super-

vision of sex offenders. “If officers feel it was a useful tool, I hate to hear it’s no longer going to be available,” said Tom Tohill, president of the Nashville-based Sexual Assault Center. “If the probation officers thought that was helping them, it seems to me it could be a pretty good resource.”

Polygraphs tests are used by treatment providers to encourage sex offenders to tell the truth about behavior and desires they may consider private or shameful. If such tests are used to question offenders about compliance with the terms of their supervision, that can undermine treatment goals.

PLN has previously reported on various problems and shortcomings associated with polygraph tests, which are not admissible as evidence in court. [See: *PLN*, Oct. 2010, p.1; Dec. 2008, p.1]. ■

Source: *The Tennessean*



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# Arizona Privatizes Health Care in State Prison System

On April 27, 2011, Arizona Governor Jan Brewer signed into law House Bill 2154, which resulted in the privatization of medical care for prisoners in the Arizona Department of Corrections (ADC). The move comes three years after ADC's food services were privatized. The Republican-dominated state government favors privatization as a means to cut costs and help reduce a large budget deficit.

The idea of privatizing the ADC's health care system seemed dead in January 2011, but HB 2154 moved quickly through the legislature to the governor's desk as an emergency measure. In a May 9, 2011 email, ADC Director Charles Ryan described the privatization debate as "a long and tedious issue for ADC and Health Services employees," and urged prison medical staff to comply with the law and assist in the privatization transition.

The ADC began developing a plan to contract for medical services for the state's 34,000 prisoners in July 2011. Understandably, ADC health care employees, who faced around 750 job losses due to privatization, were not happy.

Previous legislation introduced in 2009 (HB 2010) required that privatization of the ADC's health care services not exceed the department's cost for providing medical care to prisoners. HB 2154 removed that cost limitation.

"The legislation speaks to the best qualified. The legislation does not speak to a target dollar amount," Ryan noted.

Ten companies responded to the ADC's 2011 request for proposals (RFP) for the prison medical care contract, including Correctional Health Partners, Wexford Health Sources and Corizon; the latter company was formed following the merger of Prison Health Services and Correctional Medical Services in June 2011.

In April 2012, Wexford was awarded a three-year, \$349 million contract. This works out to an average of \$116.3 million annually – or \$5 million more per year than the ADC spent on prisoner medical care in fiscal year 2011, which was \$111.3 million. State Rep. John Kavanagh, who championed the privatization legislation, said money would be saved over time through reduced pension costs for ADC employees whose jobs were privatized.

Caroline Isaacs, director of the American Friends Service Committee's office in Tucson, Arizona, disagreed. "This has never been about saving money; the real

reason is that legislators are ideologically wedded to privatization and damn the evidence," she said.

The ADC's transition to privatization of prison medical services is expected to be finalized by June 30, 2012. Meanwhile, in November 2011 the ADC agreed to investigate complaints that prisoners had been denied treatment for serious medical conditions by state health care employees, and a lawsuit over inadequate prisoner medical care was filed by the ACLU and the California-based Prison Law Office on March 22, 2012. See: *Parsons v. Ryan*, U.S.D.C. (D. Ariz.), Case No. 2:12-cv-00601-NVW.

As reported extensively in *PLN*, private prison health care providers have a history of providing shoddy medical ser-

vices while pursuing profits at the expense of prisoners, including Wexford Health Sources. [See, e.g.: *PLN*, June 2011, p.12; Dec. 2010, p.27; Nov. 2009, p.16].

According to a September 2007 study co-authored by University of California-Santa Barbara economist Kelly Bedard, which examined the results of privatization of prison health care services in 32 states, for every 20 percent increase in privatization of prison medical staff, the prisoner mortality rate increased by 2 percent. ■

Sources: *www.eacourier.com*, *Arizona Capitol Times*, *Arizona Republic*, *www.acluaz.org*, "Prison Health Care: Is Contracting Out Healthy?" by Kelly Bedard and H.E. Frech III (September 2007)

## Juvenile Facility Guard's Bigamous Marriage Complicates Death Benefits

Following the death of a guard at a Cleveland, Ohio juvenile detention center, the Public Safety Officers' Benefits program (PSOB), which provides payments to the families of law enforcement officers killed in the line of duty, made an award of \$157,873 to the guard's widow. However, that award is now the subject of a lawsuit filed by another woman who also was married to the guard.

William Lynn Hesson died on April 29, 2009 while employed at a juvenile detention facility. A teen offender pleaded guilty in January 2010 to involuntary manslaughter for hitting Hesson, 39, in the chest during horseplay, which caused his death. [See: *PLN*, March 2010, p.50]. Hesson's on-duty death made his family eligible for PSOB benefits.

His wife, Julia Ann Hesson, 29, applied for those benefits, but the PSOB instead awarded them to another woman, Julie Keady Hesson, 41. On May 31, 2011, Julia Ann filed a lawsuit in Circuit Court in Pinellas County, Florida that seeks a "pure bill of discovery" to prove that Julie Keady, who lives in St. Petersburg, has held herself out as being divorced for more than ten years.

William Hesson married Julie Keady in 1995 in North Carolina. While stationed in Hawaii during military service, the couple split up. Julie moved to New York and tried to file for divorce, but was

unsuccessful due to her inability to serve the divorce papers on her husband.

William then married Julia Ann Bernhardt in 2004, and the couple had two children together. Julia Ann learned of the previous marriage after William's death. "Mr. Hesson never informed the plaintiff of his previous marriage to the defendant," according to the lawsuit filed by Julia Ann.

The suit claims the PSOB awarded benefits to Julie Keady Hesson "even though the defendant admitted to having no contact with Mr. Hesson since their estrangement in 1999."

Julie Keady's attorney, Bob Heyman, said that she also had two children with William. "She raised his children by herself. She has not had the benefit of child support for ten years," said Heyman. "She understands Julia Hesson's circumstances. Unfortunately, it was the result of a bigamous marriage." See: *Hesson v. Keady*, Circuit Court for Pinellas County (FL), Case No. 11004783CI. ■

Source: *St. Petersburg Times*

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## New York Prison System Allows Same-Sex Partners to Participate in Family Reunion Program

In late April 2011, the New York Department of Correctional Services (DOCS) formally adopted a regulation permitting same-sex married partners and those in civil unions to participate in the prison system's family reunion program, also referred to as conjugal visiting. The regulation, Directive No. 4500, formalizes a policy change initiated three years ago by then-Governor David Paterson, who ordered all New York state agencies to recognize civil unions and same-sex marriages legally performed in other states.

In an unusual twist, New York's prison system found itself ahead of the social curve, as same-sex marriages were not approved by the state legislature until June 2011. DOCS spokesperson Peter Cutler said he was aware of one prisoner in a same-sex relationship who had requested a conjugal visit, and the request was pending. Previously the family reunion program had been available only to those in traditional marriages. About a third of New York's prisons allow conjugal visits.

With the adoption of the new regula-

tion, New York joins California as one of only a few state prison systems to allow conjugal visits for same-sex partners. Since late 2007, California's prison regulations have permitted "family visits" (i.e., extended overnight visits typically lasting close to 48 hours) for registered domestic partners, including same-sex couples, as well as for more traditional "immediate family members." [See: *PLN*, June 2008, p.15].

Ross Levi, executive director of the Empire State Pride Agenda, applauded the DOCS policy change to allow same-sex conjugal visits, as did Molly McKay of Marriage Equality USA. "This is a recognition of same-sex couples as families," McKay stated.

Further, DOCS held its first same-sex marriage at the Auburn Correctional Facility in December 2011, when a male prisoner married a male former prisoner in a civil ceremony. [See: *PLN*, April 2012, p.50].

Sources: [www.certops.com](http://www.certops.com), [www.aolnews.com](http://www.aolnews.com)

## California Appeals Court Holds Release from Prison Moots Challenge to Parole Denial

The California Court of Appeal, Third District, has held that release from prison moots a prisoner's habeas corpus petition challenging an adverse decision by the Board of Parole Hearings ("Board").

Convicted of second-degree murder in 1984, Damian Miranda was sentenced to an indeterminate term of 19 years to life. In June 2003 the Board found Miranda suitable for parole, but the Governor subsequently reversed that decision.

In November 2004, after the superior court granted his petition for writ of habeas corpus, Miranda was released from prison. The Court of Appeal, however, reversed that decision in 2006; nonetheless, Miranda remained free pending a new parole consideration hearing.

That hearing was held in January 2007, at which time the Board, disagreeing with its previous 2003 decision, found that Miranda was not suitable for parole.

Despite the Board's determination, Miranda was not returned to prison until May 2008. He then filed a petition challenging the 2007 parole denial. The superior court denied his petition in June 2009. Later

that same month, however, the Board held another hearing and found Miranda suitable for parole. This time the Governor did not reverse that decision and Miranda was released on parole in November 2009.

Meanwhile, Miranda had petitioned the Court of Appeal regarding his 2007 parole denial. The appellate court held that Miranda's petition was moot "because the only remedy he requests (immediate release) and the only remedy we have authority to give (a new parole-suitability hearing) are no remedy at all to one who has already been released from prison." That decision was a direct consequence of the California Supreme Court's ruling in *In re Prather*, 50 Cal.4th 238, 234 P.3d 541 (Cal. 2010) [*PLN*, Nov. 2010, p.40].

Similarly, the Court of Appeal rejected Miranda's argument that if his due process rights had been violated in 2007, then his parole period should be ordered shortened. Under *Prather*, the Court reasoned, that remedy was "unavailable." See: *In re Miranda*, 91 Cal.App.4th 757, 120 Cal.Rptr.3d 461 (Cal.App.3 Dist. 2011), *review denied*.

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# Arizona DOC Makes Visitors Pay for Prison Maintenance, Repairs

by Joe Watson

Two lawsuits have challenged the Arizona Department of Corrections' newly-adopted policies of imposing a background check fee on prison visitors and deducting a fee from deposits made into prisoners' accounts.

On July 20, 2011, Arizona began charging visitors what prison officials termed a "background check fee" of \$25, requiring the payment before visitors are allowed to see prisoners at any of the state's 15 prison complexes.

Since confirming that the background checks don't cost the DOC anything, however, state officials have admitted that the fees – along with a one percent charge on all deposits made to prisoners' accounts – were being deposited into the DOC's Building Renewal Fund to pay for prison maintenance and repairs.

The fees, then, are an "unconstitutional tax on a single group of people" and a "special law," according to declaratory judgment suits filed by an Arizona-based prison reform group and a state prisoner.

"The legislature in Arizona needs to stop thinking of prisoners and their families, who often are economically disadvantaged, as cash cows," said Donna L. Hamm, executive director of Middle Ground Prison Reform. Hamm's lawsuit, filed in September 2011 with her husband, James J. Hamm, as a co-plaintiff, argued that the visitation fee attempts to "replace what should be general taxpayer obligation."

"It's the responsibility of state government to pay for the maintenance of their state buildings," Hamm told the *Arizona Republic*.

Prisoner David Arner filed a separate suit challenging the one percent deduction from money deposited into prisoners' accounts, raising similar arguments. See: *Arner v. Ryan*, Superior Court for Maricopa County (AZ), Case No. CV 2011-096782.

The \$25 visitation fee was the brainchild of Arizona Governor Jan Brewer, whose fiscal ineptitude has contributed to the state's \$1.6 billion budget deficit. State lawmakers passed legislation approving the fee, but tweaked it to apply only to visitors over the age of 18 and exempted prisoners' attorneys and guardians of prisoners' children. The fee is imposed on visitors only once.

"We were trying to cut the budget

and think of ways that could help get some services for the Department of Corrections," Arizona Senate chief of staff Wendy Baldo told the *New York Times*. She added that about \$150 million in repairs at state prisons were stalled, "and it wasn't a safe environment for the people who worked there."

But David Fathi, director of the National Prison Project of the ACLU, said the visitation fee could end up negatively impacting public safety.

"We know that one of the best things you can do if you want people to go straight and lead a law-abiding life when they get out of prison is to continue family contact while they're in prison," Fathi said. "Talk about penny-wise and pound-foolish."

As of the end of November 2011, the DOC had collected \$95,090 from the background check fees imposed on visitors, according to DOC public information officer Bill Lamoreaux.

On December 19, 2011, the Superior Court granted summary judgment to the state in the lawsuit filed by Donna and James Hamm. The court rejected their argument that the background check fee imposed on prison visitors was a tax, instead holding that it was a fee and thus legally permissible. The distinction hinged on the court's finding that "the charge at hand is voluntary ... in that the party who pays it has voluntarily asked the Depart-

ment of Corrections to provide a benefit not shared by other members of society – the right to enter a highly secure and regulated facility in order to visit a person incarcerated in that facility."

The court determined that its analysis held true even though the background check fees did not go to pay for background checks, but were instead used for prison repairs and maintenance, because visitors benefited from the repair of prison buildings. The court did not address the fact that while visitors typically only frequent prison visitation areas, the fees were being used to provide maintenance and repair for *all* DOC buildings. See: *Hamm v. Ryan*, Superior Court of Maricopa County (AZ), Case No. CV 2011-097117.

Middle Ground said it would appeal the ruling. No other state prison system imposes a background check fee on visitors, according to Hamm, and prisoners' families and friends are already subject to other types of price gouging by prison officials.

"Visitors pay inflated prices for vending machine food in the visitation rooms, as well as outrageous fees to accept collect calls [from prisoners] – and some of the profits are kicked-back to the DOC coffers," she noted. ■

Sources: *Arizona Republic*, *Arizona Capitol Times*, *New York Times*, [www.middlegroundprisonreform.org](http://www.middlegroundprisonreform.org)

## Seattle Federal Halfway House Case Manager's Reentry Plan for Prisoner Allegedly Included Sex, Heroin

by Derek Gilna

A former case manager at Pioneer Fellowship House, a halfway house in Seattle, Washington, has been accused of having a sexual relationship with one of the released prisoners she supervised and providing him with money to buy heroin.

According to records filed in federal court by Special Agent Wayne Hawney with the Office of the Inspector General (OIG) of the U.S. Department of Justice, the former halfway house employee, who quit her position in March 2011, befriend-

ed the ex-prisoner after he was released from federal prison upon completing a sentence for robbing numerous banks.

PLN contacted both the OIG's office and the U.S. Attorney's office, but both declined to provide the name of the case manager or the former prisoner involved in the investigation. PLN later determined the ex-prisoner was Christopher S. Webb. We have not yet determined the identity of the case manager.

The matter came to light after Webb, described as a habitual heroin user in

court records, absconded from the halfway house, saying he would fail a drug test administered by another worker at the facility. He then offered to provide evidence against the case manager, whom he claimed had given him money on several occasions to buy drugs and had forced him to have sex with her. Other employees at the halfway house also made allegations involving the same case manager, with one accusing her of “whorey things.”

Investigators executed a search warrant at the former case manager’s apartment on June 30, 2011 and seized her cell phone. According to court pleadings, the phone contained more than 1,360 text messages she had exchanged with Webb. Court documents also stated that the former case manager had provided \$20 to Webb to purchase heroin, and watched as he injected it. Days later, she allegedly gave him an additional \$100 to buy more heroin.

Other court records indicated that the former case manager provided Webb with a work pass so they could meet at her West Seattle apartment and have sex. He was later able to describe the books on her shelves, as well as details about her bedroom furniture. He also alleged the case manager gave him advance warning

of drug tests, and sheltered him after he absconded from the halfway house.

Webb began robbing banks in 2004 to support his heroin addiction after he went AWOL from the Army. Dubbed the “Button-up Bandit,” he was arrested in July 2006 after robbing 29 banks in Washington and Oregon, which netted him around \$42,000. He pleaded guilty and received a 51-month prison sentence plus three years on supervised release. He was released in 2010, and participated in a substance abuse treatment program at Pioneer Center North before moving to Pioneer Fellowship House in January 2011. See: *United States v. Webb*, U.S.D.C. (W.D. Wash.), Case No. 2:06-cr-00294-MJP.

Prisoners in the custody of the federal Bureau of Prisons are often placed in halfway houses to assist them in successfully transitioning back into the community after their release. They technically remain under the authority of the Bureau of Prisons while at the halfway house and must adhere to specified conditions of supervised release – which include not using drugs and, presumably, not having a sexual relationship with their case manager.

While an investigation remains pend-

ing, the former Pioneer Fellowship case manager has not yet been charged with any crime in connection with her alleged misconduct involving Webb, unlike Deborah Belim, 44, a program monitor at the Coolidge House, a halfway house for federal prisoners in Boston, Massachusetts.

Belim was sentenced on March 22, 2011 to one month of incarceration and two years on supervised release, including 7 months of home detention. She pleaded guilty to charges of distributing heroin to residents at the Coolidge House along with her boyfriend, who was a former resident at the halfway house. Belim’s job duties had included monitoring ex-prisoners – such as performing pat down searches, bed checks and breathalyzer tests. ■

Sources: [www.seattlepi.com](http://www.seattlepi.com), [www.justice.gov/oig](http://www.justice.gov/oig)

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# Federal Bureau of Prisons Says DNA Backlog No Longer Exists

by Derek Gilna

In July 2011, the federal Bureau of Prisons (BOP) announced that it had eliminated a backlog of over 90,000 DNA samples from federal prisoners. This milestone occurred more than a decade after Congress passed the DNA Analysis Backlog Elimination Act in 2000.

Florida Congressman Vern Buchanan, who had drawn attention to the backlog, was pleased with the long-delayed results. "DNA is an extremely important and effective tool for law enforcement," he stated. "I will continue to work with the Bureau of Prisons to ensure that DNA evidence is available in a timely manner to help prevent violent crimes in the future."

DNA samples are now taken from BOP prisoners when they enter the prison system rather than when they leave, and the samples are processed within 30 days after receipt by the FBI laboratory.

According to a September 2011 report from the Office of the Inspector General (OIG) of the U.S. Department of Justice, "Our review determined that as of September 2010, the FBI Laboratory's Federal DNA Database Unit had effectively eliminated its backlog of convicted offender, arrestee, and detainee DNA samples. We determined that the FBI reduced this backlog from over 312,000 samples in December 2009 to a workload of approximately 14,000 samples in May 2011." The FBI lab can process approximately 16,000 samples a month.

The backlog of hundreds of thousands of DNA samples was eliminated through "hiring additional personnel and contractors, using high throughput robotics, implementing Expert System software for a semi-automated review of DNA profiles after completion of analysis, and reconfiguring laboratory space for more efficient processing," the OIG report stated.

Rep. Buchanan had become interested in the DNA backlog issue after Florida police arrested a murder suspect, Delmer Smith III, in 2009. Smith was charged with using a sewing machine to bludgeon Kathleen Briles to death in her home on August 3, 2009, which authorities said could have been prevented had Smith's DNA been entered into the federal database shortly after he went to prison for bank robbery.

Lack of a readily-available DNA

sample prevented Sarasota police detectives from immediately linking Smith to four other home invasion attacks which had occurred prior to Briles' death. Smith's DNA was first linked to the Briles case after it was entered into the FBI database following his arrest for a bar fight. [See: *PLN*, Aug. 2010, p.14].

According to Rep. Buchanan, "We must remain vigilant in being sure we do not repeat the mistakes that the Bureau of Prisons [made].... Unfortunately, in our community a violent criminal remained at-large and was able to keep committing crimes."

Manatee County Sheriff Bard Steube stated, "First, we ought to give Congressman Buchanan our gratitude for pushing this issue. It's another tool to help fight crime."

Briles' widower, Dr. James Briles, echoed that sentiment, saying, "Hopefully it will help solve some unsolved crimes and keep people safe in the future."

Smith is now facing first-degree murder and burglary charges in connection with Briles' death, with a trial date scheduled for July 2012. He was sentenced to life in prison on December 28, 2011 for an unrelated home invasion robbery.

Beginning in April 2009, the FBI began collecting DNA samples from pre-trial detainees as well as convicted prisoners and people held on immigration charges. [See: *PLN*, Sept. 2009, p.39]. The FBI's DNA database, the Combined DNA Index System (CODIS), currently contains over 10.6 million DNA profiles from offenders. Searches of CODIS using DNA evidence have resulted in over 176,000 matches in criminal investigations. ■

Sources: *Bradenton Herald*; [www.fbi.gov](http://www.fbi.gov); "Audit of the Federal Bureau of Investigation's Convicted Offender, Arrestee, and Detainee DNA Backlog," U.S. Dept. of Justice, Office of the Inspector General, Audit Report 11-39 (September 2011)

## UNICOR Fraudsters Plead Guilty, Sentenced

A former federal Bureau of Prisons (BOP) employee and a former contractor were indicted and have pleaded guilty to conspiring to defraud UNICOR, the prison industries arm of the BOP.

The indictment, handed down by a grand jury in the Northern District of Florida, alleged that James Bailey, formerly employed at the UNICOR electronics recycling program at a BOP facility in Marianna, Florida, conspired with Lee Temples, a former UNICOR contractor, to manipulate the sale of electronics from the recycling program for their personal gain.

Bailey was the factory manager at the Marianna UNICOR plant, which recycles computers and other electronics primarily received from local, state and federal agencies. Salvageable electronics are sold by UNICOR for profit, typically by a third party.

As factory manager, Bailey was able to steer the best electronics to Temples for resale through his businesses, Fast-Lane Computers and E-Surplus Solutions, according to the indictment. Bailey failed

to disclose, though, that he was a silent partner in those business ventures and that Temples was his cousin.

From 2004 to 2007, Bailey allegedly received \$228,252 from Temples – half the profits from the sale of all the electronics Bailey steered to him.

Temples and Bailey were charged with conspiracy, money laundering, wire fraud, conflict of interest and depriving UNICOR of honest services. Bailey was also charged with making false statements, and Temples with obstruction of justice.

Bailey subsequently pleaded guilty to 19 counts, including conspiracy and fraud charges, and was sentenced to 27 months in prison and three years supervised release. He was also ordered to pay a \$5,000 fine and forfeit \$25,000. Temples entered a guilty plea to six charges and was sentenced to five years probation plus a \$25,000 fine. See: *United States v. Bailey*, U.S.D.C. (N.D. Fla.), Case No. 3:10-cr-00068-LC-CJK.

Bailey later filed a habeas corpus petition challenging his convictions, including the honest services charge, which he ar-

gued was illegal under *Skilling v. United States*, 130 S.Ct. 2896 (2010). His habeas petition remains pending.

Problems with UNICOR's recycling program are nothing new. As previously

reported in *PLN*, numerous prisoners and BOP and UNICOR staff have been harmed as a result of shoddy work practices that exposed prisoners and employees to toxic dust from recycled

electronics. [See: *PLN*, Oct. 2011, p.44; Jan. 2009, p.1].

Additional source: [www.panhandleparade.com](http://www.panhandleparade.com)

## New Washington State Law Eliminates Tolling of Community Custody upon Violation

The Washington State Court of Appeals, Division Three, has ruled that a 2011 state law "eliminates tolling of the term of community custody while the offender is serving a sanction for violation of the conditions of that community custody." The appellate court also held the law applies retroactively.

Christopher Brady Howard petitioned for his immediate release from prison based on Engrossed Substitute Senate Bill (ESSB) 5891, which went into effect on June 15, 2011. Howard was sentenced to 68 months in prison and 18 months of community custody following his July 22, 2002 guilty plea to domestic violence felonies of second degree kidnapping, second degree assault and harassment.

He was released to community cus-

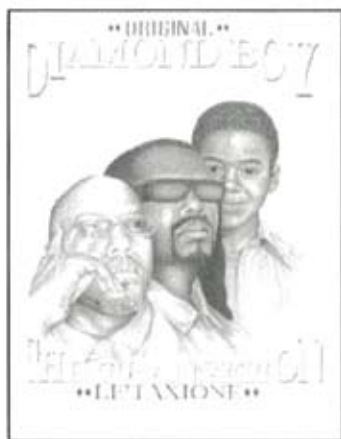
tody on April 17, 2006 and repeatedly violated the conditions of his supervision, which included the commission of new crimes. Under the terms of RCW 9.94A.171 (2008), this served to toll his term of community custody as he served a 240-day sanction imposed by the Washington State Department of Corrections (WDOC).

The WDOC admitted that applying ESSB 5891 § 1(3)(a) to Howard's case would leave him with "no remaining days of community custody to serve at the time he began to serve his current 240-day sanction."

In a November 22, 2011 decision, the Court of Appeals held the legislation's language was plain and that it applied "to persons convicted before, on, or after the effective date of this section." ESSB

5891 requires the WDOC to "credit the community custody terms of non-sex offenders with periods of time previously tolled while the offender served sanctions for violating the conditions of the community custody."

Although the appellate court concluded that "Howard is, by all accounts, including his own, a dangerous man who, based on even a cursory review of this record, is likely to reoffend," he was "unlawfully restrained in violation of state statute and ... is entitled to immediate release as a matter of law." As such, the Court of Appeals granted Howard's personal restraint petition and ordered his release. See: *In the Matter of Personal Restraint of Christopher Howard*, 165 Wash. App. 1002 (Wash.App. Div.3 2011); 2011 WL 5842772.



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# Reports on Privatizing Ohio Prisons Indicate Savings are Illusory

by David M. Reutter

Was Ohio's attempt to sell off and privatize five of its state prisons in 2011 a race to the bottom? That's the question raised and analyzed in a report titled *Cells for Sale: Understanding Prison Costs & Savings*, released by Policy Matters Ohio in April 2011.

Ohio is ten years into its prison privatization experiment, which state officials laud as having saved taxpayers more than \$45 million over that time period. However, an in-depth examination of the calculations used for those seemingly robust savings found them "not only riddled with errors, oversights and omissions of significant data, but also potentially tainted by controversial accounting assumptions that many experts consider deeply flawed," according to Policy Matters Ohio.

The calculations used to determine savings from prison privatization came under scrutiny after Governor John Kasich proposed in March 2011 to sell five of the state's prisons to private companies for \$200 million. The idea gained momentum with the need to close the state's \$8 billion budget gap.

At the time Ohio already had two privately-operated state prisons, the Lake Erie Correctional Institution (LECI) and the North Coast Correctional Treatment Facility, both run by Management and Training Corporation (MTC). State officials have admitted that previous efforts to calculate savings were inconsistent and imprecise, and said they were creating a new model for such calculations. Under state law, private prisons must achieve a minimum five percent cost savings.

The debate over prison privatization is heated and decisive, and opinions on the issue tend to be more emotional than analytical. "A lot of the arguments are very hypothetical and more based on theory than on fact, more on ideology than anything," said Dr. Gerry Gaes, a former director of research for the Bureau of Prisons and a visiting scientist with the National Institute of Justice from 2002-2007. "Direct comparisons of cost and quality neither favor the public nor the private sector."

To determine cost savings, Ohio used a hypothetical prison identical to the privately-operated facility, then determined what it would cost the state to operate that

imaginary prison. "You fabricate a cost savings that way," noted Dr. Travis Pratt, an Arizona State University criminologist who studies privatization issues.

Spreadsheets obtained by Policy Matters Ohio through a public records request revealed that the purported cost savings were largely illusory and also created potential security issues. The model for the calculations required an imaginary prison identical to LECI, and estimated what it would cost to staff the prison with state employees; to stock, supply and equip the facility to provide an appropriate array of services; and to provide the prison with heat, electricity, water and sewer services.

Of those three components, utilities are the least costly expense and are consistent whether a prison is privately or publically operated. Calculating costs for equipment, supplies and contract services is more complex, as it requires comparing costs with a facility that has the same characteristics.

In calculating savings for LECI, state officials used comparable state prisons that are more expensive to operate because they have mental health residential components, prescribe more medication, have higher staffing levels, and house older and less healthy prisoners. Additionally, costs for prisoner pay and hospitalization expenses above \$20,000 were not calculated in the expenditures for the hypothetical model. Finally, the model did not take into account state prison "central office" overhead costs.

"The problem of overhead costing is so pervasive and difficult," wrote Dr. Gaes, "that ... this calculation alone can tip the balance (often erroneously) in favor of one sector over another."

Private prison operators achieve the majority of their savings through staffing. The cost differentials between private and public-sector workers come from disparate training requirements, differences in pay and benefits, and different staffing levels. Staffing costs account for 70% of public prison expenditures. Research on issues related to staffing at private and public prisons has been minimal, leaving many questions unresolved.

"What is the impact of lower labor costs on staff turnover or staff performance?" Dr. Gaes asked in a 2010 research review. "How do private companies devel-

op training for workers with fewer skills? Do private companies, in fact, hire lower skilled workers? Have private companies re-engineered the prison employee's job?" Gaes cited a possible "McDonaldization" of prison labor.

The dangers of staffing issues in private prisons, including in the areas of training and supervision, were exemplified when three prisoners escaped from an MTC-operated facility in Arizona in July 2010. The escapees are accused of killing a man and his wife while on the run. [See: *PLN*, March 2011, p.24]. Security concerns aside, the real motivation behind privatization – achieving cost savings – is the driving force behind contracting out government services.

The Policy Matters Ohio report found that with proper accounting – with all costs considered and proper comparisons – LECI achieved fewer savings than required by state law, and that privatizing the facility may have actually resulted in a "loss for taxpayers between \$380,000 and \$700,000" for the 2006-2007 biennium.

Even if privatization can achieve cost savings, it may be unwise to place what is an essential government service into private hands. "There are going to be occasions where you are going to save money. You can begin to squeeze money out of the system. Maybe you can squeeze half a percent out, who knows," said Dr. Gaes. "But it's not as if these systems are overfunded to begin with. And at some point, you start to lose quality. And because quality is very difficult to measure in prisons, I'm just worried you're getting into a race to the bottom."

Reviews of privatization in other states indicate that once a state goes private, it becomes so reliant on the service provider that it is very difficult to resume control over the operation again, creating an endless cycle of privatization. The only winners are the private companies that profit and the lawmakers who receive campaign donations from those companies. [See: *PLN*, Aug. 2007, p.13].

In September 2011, Ohio sold one of the five state prisons it had offered for sale. Corrections Corporation of America (CCA) paid \$72.7 million for LECI, and will operate the facility under a 20-year contract with the state for annual payments of \$32.8 million. The company assumed

management of the prison on January 1, 2012. CCA's lobbyist in Ohio, Don Thibaut, was Kasich's chief of staff when Kasich served in Congress. Ohio's prison director, Gary C. Mohr, previously worked as a managing director for CCA.

In addition to selling LECI, the North Coast prison was returned to state control while MTC won contracts to operate the North Central Correctional Institution and the previously-vacant Marion Juvenile Correctional Facility. These developments are estimated to save \$13 million annually, according to state officials – but given the questionable methodology the state has used to calculate prison privatization savings in the past, it is unknown whether such cost reductions will actually occur.

In another report released on December 15, 2011, Policy Matters Ohio claimed the sale of LECI “could easily wind up costing taxpayers millions of dollars,”

while estimated savings from privatizing the North Central and Marion facilities were “based on what appear to be highly dubious accounting assumptions that one expert calls ‘bogus’ and that seem to bear little relation to reality.”

The report concludes by stating, “This deal looks like it could turn into a loser for Ohio taxpayers. Only time will tell if it will.”

The Policy Matters Ohio reports are available on PLN's website. The ACLU of Ohio released another report on prison privatization in April 2011, which also concluded that privately-operated prisons achieve few cost savings and may be more expensive than state facilities. [See: *PLN*, Dec. 2011, p.22]. ■

Sources: *Associated Press*; [www.policymattersohio.org](http://www.policymattersohio.org); “*Cells for Sale: Understanding Prison Costs & Savings*,” *Policy Matters Ohio* (April 2011)

## Failure to Refute Expert Testimony Warrants Summary Judgment Against California Prisoner Suing for Medical Malpractice

In an unpublished opinion, the California Court of Appeal affirmed a trial court's grant of summary judgment against a prisoner who sued a surgeon for medical malpractice, but then failed (due to limited resources) to refute the expert testimony submitted on behalf of the surgeon, which established that the treatment provided was within the professional standard of care.

In 2001, California state prisoner Lorenzo Cunningham had surgery intended to alleviate the back pain he had suffered for nearly 20 years. The surgery was not successful; Cunningham's pain increased over time.

In 2007, Cunningham consulted with surgeon Jason Huffman, who performed additional surgery. Although he initially recovered well from the surgery, Cunningham experienced incremental increasing pain. After receiving follow-up care in 2008, Cunningham sued Huffman for medical malpractice.

Huffman moved for summary judgment in 2010, arguing that his treatment complied with the accepted standard of care. In support of his motion he submitted a declaration from a board-certified orthopedic surgeon, who concluded that Huffman's treatment decisions were competent.

In response, Cunningham moved for appointment of counsel and an expert to assist him, arguing that the issues were too complex for him to litigate alone. The trial court denied Cunningham's motion, then granted Huffman's motion for summary judgment on the ground that Cunningham had failed to present expert testimony refuting the opinions of Huffman's expert.

On appeal, Cunningham argued that the trial court had erred in failing to appoint counsel and an expert for him. Canvassing the applicable case law, the Court of Appeal found that a prisoner's right (under state law) to meaningful court access to pursue civil lawsuits includes the right to have accommodations made to ensure that the restrictions of incarceration do not deprive the prisoner of an opportunity to prosecute his or her case.

However, Cunningham, the appellate court found, had sought more than that – the trial court's assistance in prosecuting his case – something the court was simply not obligated to provide. Accordingly, the trial court's summary judgment order was affirmed. See: *Cunningham v. Huffman*, Cal. Court of Appeal, First App. District, Div.1, Case No. A129273; 2011 WL 140301 (unpublished). ■

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# The Criminalization of Mental Illness in Missouri

by Christopher Cross

In response to the 1999 U.S. Supreme Court ruling that prohibits states from forcing people with mental health disabilities to live in state mental institutions when they are capable of living in community settings, state governments turned to using jails and prisons instead. Although this trend continues today, there is very little evidence that prisoners with mental disabilities receive necessary treatment and services while incarcerated.

Sol Wachtler, former chief judge of the New York Court of Appeals, once wrote that “Few judges can fully sense or relate to determinations concerning sentencing, or the inhumanity or cruelty of punishment.” Wachtler was arrested in November 1992 on extortion, racketeering and blackmail charges; he resigned and served time in prison, which is when he discovered he had mental health problems. [See: *PLN*, Nov. 1995, p.6].

Judges do not fully consider the long-term ramifications for both society and defendants with mental disabilities who are sentenced to serve time in jails and prisons, particularly given the lack of necessary mental health programs and services provided to prisoners. It is naïve to believe that people are not sentenced to jail or prison because they have mental disabilities, which is a reality that has perpetuated our criminal justice system’s revolving door.

Theoretically, when a person is sent to prison or jail it provides them an opportunity to contemplate on their life and the direction it is heading. But for people with severe mental disabilities this opportunity is clouded by the fact that they have mental health problems which impede or preclude their ability to do so, which is further obstructed by the reality that they do not receive adequate mental health care while incarcerated.

In Missouri, MHM Services, Inc. is the current mental health contract provider for the state’s prison system. MHM began its contract in 2007 and, according to news media reports, the Missouri Department of Corrections reported a 14.6% recidivism rate in 2006 among parolees with severe mental disabilities. In 2010, the Missouri Department of Corrections reported a 14.8% recidivism rate among parolees with severe mental disabilities.

According to these reports, Mis-

souri has not experienced a decrease in recidivism in the four years that MHM has provided mental health services to state prisoners. One possible contributing reason for this is that, as local media reports also noted, MHM prison mental health employees do not provide offenders with access to individual counseling services. MHM staff have argued that they are not required to provide such services because monthly chronic care evaluation meetings constitute individual counseling. That argument is clearly contradicted by the company’s contractual obligations, however.

Section 4.1.11b of MHM’s contract requires that “at a minimum” prison mental health staff are to conduct “routine, face to face, follow up visits to all offenders identified as having severe mental impairments” in order to determine if the offender “requires psychiatric assessments and medication evaluation....” If the offender is not provided individual counseling, mental health staff is still required, at a minimum, to conduct the monthly chronic care evaluation meetings.

Further, section 4.1.15 of the contract specifically states that “[T]he contractor shall offer gender relevant individual and group psychotherapy or counseling for offenders with the following ... whether or not the offenders have a severe mental impairment.” The five areas covered in that section include a history of sexual or physical abuse, chronic thoughts of suicide or attempted suicide, low frustration with anger management issues, issues with adjustment to prison life, and grieving the loss of another. This clearly demonstrates that individual counseling is a distinctly different service independent of monthly chronic care evaluations.

Despite the clarity of these contractual mandates, the news media reported in March 2011 that “[A] former mental health provider who worked in the Missouri prison system, and asked not to be identified, said the prison system didn’t really offer counseling,” and that “[T]he counseling sessions that took place were mostly responses to requests for services from the prisoners....” When mental health staff meet with offenders, “[A] typical ‘session’ lasts less than five minutes, and they are scheduled four to 10 per hour.”

Individual counseling is a funda-

mentally important aspect of delivering effective mental health services, and can greatly assist in decreasing prison violence and the extent that offenders violate prison rules and regulations. Additionally, it can have a significant impact in reducing the extent that prisoners with mental disabilities are denied or delayed in receiving parole. Moreover, individual counseling can assist offenders in successfully reintegrating back into society after their release from prison.

When individual counseling is denied, prison mental health staff are failing to provide meaningful access to mental health services, programs and activities. This is particularly detrimental to offenders with mental disabilities because, as Congress pointed out in the Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008, “[I]n addition, mentally ill offenders can be affected psychologically by incarceration differently than general population offenders.”

Further, as the Commission on Safety and Abuse in America’s Prisons wrote in 2006, “What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released.” This is especially true for offenders with mental disabilities because they are affected differently by prison life and conditions than their non-disabled counterparts.

Unfortunately, based on news reports in March 2011, it appears that MHM and its employees apply a very narrow interpretation of section 4.1.11b of the contract, as they believe they are only required to provide the absolute bare minimum treatment to offenders with mental disabilities while being paid over \$101 million since 2007 to deliver mental health services to state prisoners. This mindset does not serve any genuine penological interest, nor does it serve the best interests of offenders or the public.

Even if we assume for the sake of argument that section 4.1.11b allows prison mental health staff to substitute a monthly chronic care evaluation meeting in lieu of individual counseling services, it is highly improbable that an offender is going to receive effective therapeutic help if all they get is a once-a-month chronic care evaluation. Many would argue that

this amounts to a temporary and ineffective band-aid solution that provides the appearance of delivering effectual mental health services without having to actually produce results.

When prisoners with mental disabilities are denied effective opportunities to access the mental health services and programs they need, they face incredible odds in terms of whether they can and will successfully reintegrate back into society. This perpetuates the vicious cycle of our criminal justice system's revolving door, whereby prisoners with mental health problems end up being recycled through the system over and over again.

It is not that judges, legislators,

prison administrators and mental health personnel are oblivious to the fact that offenders with mental disabilities are not being provided necessary mental health services and programs while incarcerated; indeed, many openly admit this is the case. Rather, it is indifference to this situation that continues the trend of using jails and prisons as *de facto* mental institutions, to the detriment of prisoners with mental health problems. ■

*Christopher Cross, M.A., R.D.S.P. is a court-appointed legal guardian of an adult prisoner incarcerated in Missouri's prison system. He provided this article exclusively for Prison Legal News.*

## Alabama Uses Federal Stimulus Money to Prop up Prison System

Alabama allocated 11% of its federal education stimulus funds to its prison system. Of the \$1.1 billion the state received from the U.S. Department of Education from 2009 to 2010, the state gave more than \$118 million to the Alabama Department of Corrections (ADOC).

Not a penny of that money went to educational or rehabilitative programs for prisoners, however; instead, it partly funded the salaries and benefits of about 4,200 guards and other prison employees for three-and-a-half months. The rest was spent on costs related to health care for the state's 26,000 prisoners.

The stimulus money allocated to the ADOC amounts to around \$4,500 per prisoner – about four times what is spent on each student in kindergarten through the 12<sup>th</sup> grade in Alabama. Some critics said the money would have been better spent on education for children.

"If we had that \$118 million," stated Alan Lee, superintendent of the Baldwin County school system, "we could have given the prisons less business." Studies have repeatedly indicated that students who fail or drop out of school are more likely to end up in prison.

With 62,000 students, Mobile County's school system is the state's largest. It received the second-greatest amount of federal education stimulus funds behind the ADOC – about \$77 million, or approximately \$1,233 per student.

States were allowed to use up to 18% of their federal stimulus money on public safety or other government services. Other

than the 11% provided to the ADOC, all of Alabama's stimulus funds went to the state's education department.

Absent the injection of stimulus funds, the ADOC would not have been able to operate some of its 31 prisons. "We've done 'what if' drills before. We would have had to release 40% of our inmates," said ADOC Associate Commissioner Steve Brown. "That's not a viable option."

While the state's prison system continued to operate overcrowded and understaffed facilities even with the stimulus money, Mobile and Baldwin counties have slashed programs and laid off more than 1,000 teachers due to budget cuts in recent years.

Mobile County schools Superintendent Roy Nichols saw a political taint to the state's priorities when it came to divvying up the stimulus funds. "The governor wouldn't have looked good if he had to let prisoners out," he noted.

The state's federal stimulus money ran out at the end of September 2011, and the ADOC was expected to take a budget hit in 2012. Of course that didn't happen, as the prison system is considered the "third rail" of state politics. The ADOC's budget for 2012 was \$377 million, an increase from the department's \$339 million budget in 2011. Other than Medicaid, the ADOC receives the largest share of the state's General Fund. ■

Sources: *Press-Register*, *Huntsville Times*



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# Class Certified in Lawsuit Challenging Conditions at CCA-operated Indiana Jail, but Case Dismissed on Summary Judgment

by David M. Reutter

An Indiana federal district court certified a class and allowed claims to proceed that challenged unsafe conditions, lack of medical privacy and an alleged incentive scheme that rewarded staff for providing less medical care to prisoners at the Marion County Jail #2 (MCJ) in Indianapolis. Four months later, however, the court granted summary judgment to the defendants, dismissing the class-action suit.

Corrections Corporation of America (CCA) operates MCJ under a contract with the Marion County Sheriff's Office. A lawsuit, filed in 2008, alleged violations of state and federal law in areas such as conditions of confinement, mail policies, availability and handling of grievances, medical care, and privacy of medical information at the jail. The district court dismissed the claims related to grievances for lack of subject matter jurisdiction.

In a July 2, 2010 ruling, the court entered an order on the defendants' affirmative defense that the plaintiffs had failed to exhaust their administrative remedies before filing suit. At a hearing on that matter it became evident there was no reliable system in place for recording the details associated with the filing and resolution of prisoner complaints at MCJ.

As to some of the individual plaintiffs, the court found administrative remedies were not available due to staff failing to provide the necessary forms to prisoners or not answering the grievances they did file. Requiring prisoners to fully exhaust their claims administratively would force them to face the proverbial "run-around." The district court therefore allowed the case to proceed.

In a December 1, 2010 order on class certification, the court found the case was not moot even though the individual plaintiffs were no longer incarcerated at MCJ. The court held they were entitled to proceed on the "inherently transitory" exception, which is distinct from the "capable of repetition, yet evading review" exception.

Under the "inherently transitory" exception, the plaintiffs must show that "(1) it is uncertain that a claim will remain live for any individual who could

be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint."

"The crux of the 'inherently transitory' exception is the uncertainty about the length of time a claim will remain alive," the district court wrote. When making that determination, courts recognize "the length of incarceration in a county jail generally cannot be determined at the outset and is subject to a number of unpredictable factors, thereby making it inherently transitory."

The district court found the plaintiffs met the test to proceed as a class for declaratory and injunctive relief. However, the court dismissed the individual plaintiffs' claims because they were no longer incarcerated at MCJ. A class defined as "[a]ny and all persons currently, or who will be in the future, confined to the Jail #2 facility" was certified by the district court.

There were, nonetheless, claims that could not proceed as they were not typical of the class. The court therefore dismissed the medical care, personal and legal mail, and record claims. The record claim concerned denial of requested records under the Health Insurance Portability and Accountability Act (HIPAA). The district court also dismissed a reporting claim, which alleged MCJ staff had failed to report medical errors "as required by Indiana law." The court found that each of those claims "by their nature require individual fact-finding," and thus were not typical to the class.

The district court allowed three class claims to proceed. The Unsafe Conditions Count alleged "the presence of mold and insect infestations, inadequate security staffing, and broken heating and air conditioning systems" in violation of the Eighth and Fourteenth Amendments. The Privacy Count alleged violations of HIPAA's medical privacy provisions because two MCJ prisoners were in the same room at the same time when they were questioned about their medical history. Finally, the Incentives Count alleged "that CCA paid its administrators financial incentives to encourage them to treat

fewer medical patients, decline to report errors, and generally report more favorable conditions than were in fact present" at the jail. See: *Kress v. CCA of Tennessee*, 272 F.R.D. 222 (S.D.Ind. 2010).

Following class certification, the defendants moved for summary judgment. On April 13, 2011 the district court granted the motion as to the three remaining class-action claims and dismissed the case in its entirety.

In regard to the HIPAA claims, the court found – and the plaintiffs conceded – that "HIPAA does not grant a private right of action." Thus, those claims were dismissed. As for the plaintiffs' Eighth and Fourteenth Amendment claims, the district court held that it would consider the claims in light of conditions at MCJ as they currently exist, not as they existed in 2008 when the lawsuit was filed.

"Because the relief in this case would be limited to injunctive or declaratory relief, the Court concludes that evidence regarding Defendants' remedying of conditions is relevant and should be considered in conjunction with Plaintiffs' evidence regarding previous conditions."

Noting that significant improvements had been made at the jail in the interim, the court concluded that the presence of gnats and mold was "insufficient to rise to the level of a constitutional violation," and that the plaintiffs had failed to allege physical or mental injuries resulting from conditions in the intake areas at the jail. As the court found the defendants were not deliberately indifferent to unconstitutional conditions at MCJ, the Eighth and Fourteenth Amendment claims were dismissed.

Finally, as to the plaintiffs' allegations that CCA offered financial incentives for staff to provide less medical care to prisoners, not report errors and report more favorable conditions at MCJ, the district court found no evidence to support those claims.

The plaintiffs have since appealed the court's summary judgment order to the Seventh Circuit, and *PLN* will report the outcome of that appeal. See: *Kress v. CCA of Tennessee*, U.S.D.C. (S.D. Ind.), Case No. 1:08-cv-00431-LJM-DML. ■

# Civil Commitment Must be Challenged through Commitment Proceedings Instead of Habeas Corpus

by Brandon Sample

A federal prisoner challenging his or her civil commitment detention under the Adam Walsh Act (Act) as a “sexually dangerous person” may not resort to habeas corpus for such challenges, the U.S. Court of Appeals for the Fourth Circuit held on December 6, 2010. Following remand and another appeal, all challenges raised by a federal prisoner to his civil commitment proceedings were rejected.

Gerald Wayne Timms filed a 28 U.S.C. § 2241 petition challenging his continued detention three days after the U.S. government initiated civil commitment proceedings against him. Timms was finishing a 100-month federal prison sentence for receipt of child pornography when his release was stayed by the government’s civil commitment petition.

Counsel was appointed for Timms in the commitment action and his habeas case. The judge in the commitment action stayed all proceedings pending the Fourth Circuit’s decision in *United States v. Comstock*, which, at the time, was reviewing whether the federal civil commitment scheme was a proper exercise of Congress’ authority.

After the Fourth Circuit held in *Comstock* that Congress had exceeded its authority in enacting the statute (which was subsequently reversed by the U.S. Supreme Court) [See: *PLN*, July 2011, p.31; Dec. 2010, p.44], the judge handling Timms’ habeas petition granted habeas relief and ordered his immediate release. The government appealed.

The government argued that the district court over the habeas case should have declined to hear the habeas action because Timms was able to pursue the same claims during his civil commitment proceeding. The Fourth Circuit agreed.

“As a general rule, in the absence of ‘exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent,’ courts ‘require exhaustion of alternative remedies before a prisoner can seek federal habeas relief,’” the appellate court wrote.

In Timms’ case, an alternative remedy was available – the government’s civil commitment action. As such, the Fourth Circuit concluded, it was inappropriate for the district court to have considered Timms’ challenge to his civil commitment

detention via a habeas petition.

The judgment of the district court was accordingly reversed and the case remanded with instructions to dismiss Timms’ habeas petition and have him proceed with his civil commitment challenge under the provisions of the Act. See: *Timms v. Johns*, 627 F.3d 525 (4th Cir. 2010), *cert. denied*.

Following remand, on July 1, 2011 the U.S. District Court for the Eastern District of North Carolina held that the Act created civil rather than criminal proceedings, the Act did not require a higher burden of proof than “clear and convincing evidence,” and the Act’s definition of “sexually violent conduct” was not unconstitutionally vague. The district court further found, however, that the Act violated Timms’ equal protection and due process rights, unconstitutionally failed to require a speedy judicial hearing, and that dismissal of the civil commitment proceeding was an appropriate remedy for such violations. See: *United States v. Timms*, 799 F.Supp.2d 582 (E.D.N.C. 2011).

Not surprisingly, the government appealed. The government also asked the district court to stay its order that Timms be released to the custody of the U.S. Probation Office, which was denied

on July 15, 2011. The district court noted that Timms “has already waited over two and a half years for a resolution of his case, and his continued incarceration is unacceptable under the laws and the constitutional protections afforded all citizens.” See: *United States v. Timms*, 2011 WL 2893018 (E.D.N.C. 2011).

On appeal, the Fourth Circuit affirmed the district court’s order in part and reversed in part on January 9, 2012. The Court of Appeals agreed that the provisions of the Act were civil rather than criminal, but found the civil commitment proceedings did not violate equal protection. Further, the appellate court held that while “troubling,” a lengthy delay between the end of a prisoner’s sentence and a hearing on the government’s petition to have him civilly committed (which was around 31 months in Timms’ case) did not violate due process. The Fourth Circuit also noted that Timms’ argument related to the burden of proof standard was foreclosed by circuit precedent.

Accordingly, the case was again remanded to the district court, to make a determination as to whether Timms “satisfies the criteria for commitment as a ‘sexually dangerous person.’” See: *United States v. Timms*, 664 F.3d 436 (4th Cir. 2012). ■

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# New Mexico Judge Arrested for Raping Prostitute

New Mexico State District Judge Albert S. “Pat” Murdoch – the chief criminal court judge in Albuquerque – was arrested on July 19, 2011 and charged with criminal sexual penetration and intimidation of a witness. According to the criminal complaint, a detective was told by an informant that Murdoch had raped a prostitute and the incident had been videotaped. The informant helped the detective locate and purchase a DVD of the sexual assault for \$400.

When interviewed by police, the alleged victim said Murdoch had solicited her on a prostitution website. She said she met with the judge about eight times and charged him \$200 per visit. During one encounter, she claimed he used force to perform oral sex on her against her will. She then began secretly recording their liaisons and caught a second forcible oral sex rape on video.

The victim asked Murdoch what he would do if someone made allegations against him, and he reportedly said he would “use the police and his connections to take care of the situation,” according to a police affidavit.

Murdoch posted \$50,000 bond after his arrest and police said he was cooperating in the investigation. His attorneys filed a motion to dismiss the charges, arguing that the indictment failed to allege the essential elements required for 4<sup>th</sup> degree criminal sexual penetration and intimidation of a witness.

“We believe our client, Judge Murdoch, is a victim in this case,” stated defense attorney Nancy Hollander.

Murdoch is known as a well-respected judge who has presided over several high-profile cases, including a fraud case involving former New Mexico Secretary of State Rebecca Vigil-Giron. In 2010, he presided over a case involving a prostitution ring in which he suppressed the ring’s client list. He sentenced an Albuquerque man to 20 years in prison for promoting prostitution, racketeering and extortion. He had served on the bench 26 years.

The prostitute allegedly raped by Murdoch also accused the judge of having child pornography on his home computer. Murdoch retired effective July 29, 2011 as part of an agreement with the New Mexico Supreme Court, in lieu of disciplinary action. He agreed to never run for judicial office or accept a judicial appointment in the state.

Murdoch’s arrest came on the heels of Governor Susana Martinez’s call for attorneys and state judges to bolster public confidence in the judiciary following a scandal in which Las Cruces District Judge Michael Murphy allegedly told an aspiring judicial candidate that she had to pay a Democratic activist if she wanted an opportunity to be selected as a judge

by former Governor Bill Richardson. Murphy, who resigned from the bench in February 2012, currently faces felony bribery charges, while Richardson has denied any involvement in the bribery scheme. ■

Sources: *Associated Press*, [www.abcnews.go.com](http://www.abcnews.go.com), [www.abovethelaw.com](http://www.abovethelaw.com), [www.kob.com](http://www.kob.com)

## Third Circuit: § 2241 is Proper Vehicle for BOP IFRP Challenges

by Mark Wilson

The Third Circuit Court of Appeals held on December 2, 2010 that a federal habeas corpus petition under 28 U.S.C. § 2241 is the proper vehicle to challenge the Bureau of Prison’s (BOP) Inmate Financial Responsibility Plan (IFRP). Following remand, a Pennsylvania U.S. District Court granted partial habeas relief in November 2011.

Steven A. McGee was convicted of federal drug charges and sentenced to 120 months in prison and a \$10,000 fine. Due to his indigence, the court ordered that McGee pay the fine from his prison earnings at a rate of \$20 per month.

In 2004 or 2005, McGee was placed in the IFRP. “He agreed to pay a minimum of \$25 per quarter toward his fine in exchange for not (1) being limited to spending \$25 per month in the commissary, (2) being ineligible for placement in a halfway house prior to his release, (3) receiving an increased security designation, and (4) receiving an undesirable housing designation.” Other consequences for refusing the IFRP were possible under 28 CFR § 545.11(d)(1)-(11).

The BOP later requested that McGee “increase the payments to \$75 per quarter, apparently because ... he had a substantial sum of money in his bank account.” McGee claimed he had borrowed the money to pay his legal fees. “He refused to agree to the increase and was placed on ‘IFRP refusal status,’ which limited his commissary spending to \$25 per month – not enough to meet his needs as he pursue[d] habeas relief from the judgment against him.”

McGee then filed a § 2241 action, challenging his court access impairment by virtue of the IFRP commissary restrictions, including an inability to

make sufficient photocopies due to the restrictions. However, “the district court sua sponte dismissed the action without prejudice ..., concluding that because it challenged the conditions of McGee’s confinement it should have been filed as a civil rights action.” McGee appealed.

Following *Learner v. Fauver*, 288 F.3d 532 (3d Cir. 2002) and *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005), the Third Circuit found that in deciding whether § 2241 or § 1983 is the appropriate vehicle, the determining question is “whether granting the petition would ‘necessarily imply’ a change to the fact, duration, or execution of the petitioner’s sentence.”

McGee’s “petition is, at bottom, a challenge to the IFRP and its requirement that McGee pay \$75 per quarter when his sentence (i) requires only \$20 per month (i.e., \$60 per quarter), and (ii) specifically directs that such payments be made out of his prison earnings (which allegedly come to substantially less than \$75 per quarter).”

The appellate court agreed with opinions from the Fifth and Eighth Circuits which found that IFRP challenges are properly brought under § 2241. See, e.g., *United States v. Diggs*, 578 F.3d 318 (5th Cir. 2009) and *Matheny v. Morrison*, 307 F.3d 709 (8th Cir. 2002). “The IFRP payment schedule and the sanctions imposed for noncompliance are part of the execution of McGee’s sentence,” the Court of Appeals held. Therefore, “the claim that they are illegal and invalid falls under the rubric of a § 2241 habeas petition.” The case was therefore reversed and remanded for further proceedings. See: *McGee v. Martinez*, 627 F.3d 933 (3d Cir. 2010).

Following remand, the district court

entered a memorandum order on November 17, 2011 that explained, "As a result of the IFRP refusal designation, McGee avers that he has been subjected to institutional sanctions, including being restricted to '\$25.00 a month total commissary spending'.... This commissary restriction has purportedly denied Petitioner the ability to photocopy legal records which he wishes to file as exhibits" in a separate habeas action challenging his federal criminal conviction.

While the court acknowledged that the IFRP was constitutional based on Third Circuit precedent, it found that the "issue in the present matter is whether the BOP's implementation of the IFRP with respect to the payment terms imposed on McGee conflicted with the directives set forth by the sentencing court."

According to the evidence presented in the case, the BOP had ordered McGee to make IFRP payments in an amount greater than that ordered as part of his sentence, and the respondents did "not offer any argument or authority which would support a determination that the BOP had either the authority or discretion to exceed the installment payment amounts imposed by the" sentencing court.

The district court therefore granted McGee's petition for habeas corpus relief in part, and remanded the IFRP issue "to the BOP with instruction to recalculate McGee's IFRP payment contract in complete accordance with the directives of the sentencing court." However, the court denied McGee's access-to-court claim relative to his inability to make photocopies needed for his legal work due to the IFRP

spending restrictions imposed by the BOP. See: *McGee v. Martinez*, U.S.D.C. (M.D.

Penn.), Case No. 3:08-cv-01663; 2011 WL 5599338. ■

## Seven Argentine Military Officials Sentenced for Crimes against Prisoners

During the time of Argentina's American-backed dirty war against political dissidents, from 1976 to 1983, the military junta that was running the country ran a network of prisons and concentration camps, including a prison in a working class suburb of Buenos Aires. About 2,500 prisoners passed through the army's "El Vesubio" prison during that time. Few survived.

"The detainees were hooded and chained together, and the guards gave them almost nothing to eat," said Rodrigo Borda, an attorney for the Center for Social and Legal Studies, which has charted Argentina's progress in prosecuting the people responsible for an estimated 13,000 deaths during the dirty war. Human rights groups contend the actual number is around 30,000.

Eight prison officials from "El Vesubio" were charged with a total of 156 crimes against humanity – including the rape, kidnapping and torture of political prisoners, plus 19 executions. Their trial began in February 2011.

Witnesses testified that Col. Pedro Duran Saenz, who was in charge of the facility, frequently raped female prisoners and forced them to live with him in rooms inside the prison compound. He died in June 2011 while his trial was pending.

On July 14, 2011, former Gen. Hector

Gamen, 84, and Col. Hugo Pascarelli, 81, were convicted and received life sentences. Five former prison guards – Ramon Erlan, Jose Maidana, Roberto Zeolitti, Diego Chemes and Ricardo Martinez – were convicted and sentenced to between 18 and 22 years in prison.

The human rights crimes committed by the junta have been under investigation since 2005, when the Argentine Supreme Court threw out amnesties that were used to shield military personnel from prosecution.

In April 2010, Reynaldo Bignone, 82, the country's last military dictator, was sentenced to 25 years in prison for crimes committed during his regime, including torture and kidnappings at the Campo de Mayo army base.

As of May 2011, 807 defendants had been prosecuted for junta-era human rights violations. However, only 212 of those 807 had been sentenced and just 40 were in prison. The rest await the outcome of their appeals. The slow pace of prosecutions has frustrated both Argentine government officials and human rights advocates, moreso when compared to the speedy kidnappings, torture and murder of the military junta's victims. ■

Sources: *Associated Press*, [www.telegraph.co.uk](http://www.telegraph.co.uk)



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## News in Brief

**Arizona:** Former state prison guard Anthony Rinaldi, 26, allegedly shot and killed his wife on December 13, 2011, telling a 911 operator, "She is definitely dead – I put two to the chest and one to the head." He then left his house, drove up behind a police officer and turned himself in. Rinaldi had a history of domestic violence and threatening to commit suicide. He was immediately fired by the Department of Corrections.

**Arkansas:** On January 20, 2012, Sgt. Barbara Easter, 47, a guard at the East Arkansas Regional Unit, was killed by a prisoner serving a life sentence. Easter worked as a property officer; she was reportedly stabbed in the side, chest and abdomen when she went to the cell of La Tavius Johnson to check whether he had an unauthorized pair of shoes. Johnson has since been transferred to the supermax Varner facility and is expected to face murder charges.

**California:** Calipatria State Prison guard David Santos Zamudio was indicted by a federal grand jury on December 15, 2011 on multiple counts of taking bribes from prisoners to smuggle cigarettes and cell phones into the facility. He reportedly received over \$33,000 in bribes to deliver the contraband. Zamudio, a medical office technician at the prison, faces charges of honest services wire fraud.

**California:** A riot occurred at CSP-Sacramento on December 8, 2011 in the recreation yard of a maximum-security area, resulting in nine prisoners being taken to a local hospital with injuries. Around 50 prisoners took part in the disturbance, which lasted around 10 minutes; guards used pepper spray and fired rubber projectiles and live ammunition to put down the riot. The 2,800-bed facility was placed on lockdown. Another riot involving about 60 prisoners broke out at the California Substance Abuse Treatment Facility and State Prison at Corcoran on January 10, 2012. Five prisoners were sent to a hospital with stab wounds as a result of that incident.

**Florida:** While incarcerated at the Brevard County Jail, Tommy Dixon, 49, sent love letters to a 17-year-old female prisoner who also was being held at the facility. Apparently the letters were persuasive, as the two arranged a meeting in the infirmary, albeit on opposite sides of a cell door. That did not stop them from engaging in a sex act through a small

opening in the door, however. Dixon now faces additional charges for having sex with a minor, according to February 2012 news reports.

**Illinois:** In an effort to save money on food costs, the Massac County Sheriff's Department is having jail prisoners remove coupons from frozen dinner boxes. "The jail administrator brought it to my attention a few weeks ago," Sheriff Ted Holder said in a February 2012 interview. "He was looking inside these boxes and there's a coupon in every one of them. So the trustees started tearing them out as we serve them. Over the last two to three weeks we've saved \$600-\$700." The jail purchases hundreds of frozen dinners from a local Save-A-Lot for prisoners' meals.

**Kyrgyzstan:** Prison officials in this central Asian nation reported in January 2012 that around 6,400 prisoners were on a hunger strike, and over 1,100 had sewn their lips shut using metal staples or thread. The prisoners were protesting their conditions of confinement and demanding to be allowed to visit other prisoners in their cells. "They don't have medicine, normal food, linen or soap. Their illnesses are not treated because there are not enough doctors," said Tolekan Ismailova, director of Human Rights Center-Citizens Against Corruption. Two hundred prisoners later requested medical assistance to remove the stitches from their mouths.

**Louisiana:** In November 2011, Springhill Police Department reserve officer Charles Alexander Blanks, 27, was arrested and charged with malfeasance in office for allegedly having a sexual encounter with a prisoner. Blanks reportedly admitted to the incident, which occurred when he transported a female prisoner from the Springhill Jail to the Bayou Dorcheat Correctional Center. He was released on \$2,000 bond.

**Maine:** Cumberland County jail guard Nicholas Stein was acquitted of a misdemeanor assault charge following a jury trial on February 22, 2012. He had been accused of dragging and punching jail prisoner Brian Cote in June 2011 after Cote jumped from a second-floor balcony at the facility. Cote said he had jumped because he was not receiving his medication, and claimed Stein assaulted him and denied him medical care.

**Massachusetts:** Michael Rubino, a bailiff at the Edward W. Brooke Courthouse

in Boston, was arrested on December 16, 2011 and charged with raping two female prisoners. He was released on \$2,000 bond the same day. Rubino is accused of fondling one prisoner and forcing her to perform oral sex on him while she was shackled and handcuffed. He also allegedly received oral sex from another prisoner in exchange for cigarettes and cash; he gave her the cigarettes but not the money, according to court documents. Rubino was suspended without pay.

**Michigan:** On February 9, 2012, Terry Glenn Doxey, 47, was arrested on a charge of felony indecent exposure for masturbating in a car parked across from the Muskegon County jail. He allegedly engaged in the auto-erotic behavior so his girlfriend, who was incarcerated at the jail, and other female prisoners could watch him. Doxey was released after posting a \$10,000 personal recognizance bond. This incident was similar to one in Ohio, when Andrea Musser, 19, was arrested for exposing her breasts while visiting a prisoner at the Erie County jail in April 2011. [See: *PLN*, Aug. 2011, p.50]. Musser pleaded guilty and received a 10-day suspended jail sentence and a \$223 fine.

**Minnesota:** A prisoner at the St. Louis County jail died on December 27, 2011 due to streptococcus pneumoniae, a common strep infection, according to the medical examiner's office. Daniel Schlienzy, 42, was being held on charges related to a shooting at the Cook County Courthouse; his spleen had been surgically removed several years before, which made him more susceptible to infections. According to Schlienzy's sister, before he died Schlienzy was denied an extra blanket and cough medicine at the jail to help him deal with flu-like symptoms.

**New Jersey:** On February 24, 2012, Hasson "Hass" George, 12, the son of Shaara Green-Simms, a guard at the Hudson County Correctional Center in Kearny, was shot and killed with Green-Simms' semi-automatic service pistol. The accused shooter was Green-Simms' other son, who was 14 years old. The two children were half-brothers. Hasson's body was reportedly moved after he was shot inside Green-Simms' apartment to a sidewalk outside; the incident is under investigation.

**New York:** Former New York state prison guard Christian Ott, 28, was sentenced to 20 years in prison for first-degree

rape on August 25, 2011. He had raped a 25-year-old woman at knifepoint after breaking into her Buffalo-area home. Ott was employed as a guard trainee at the Greene Correctional Facility at the time, and was fired after his arrest.

**New York:** Nydia Cincioso, 41, a former case manager with the federal Bureau of Prisons who was employed at

the Metropolitan Correctional Center in Manhattan, pleaded guilty on January 18, 2012 to smuggling cell phones and drugs into the facility in exchange for bribes. Cincioso had been arrested in July 2011 after she accepted \$2,500 from a prisoner's relative who was cooperating with federal investigators.

**New York:** On February 29, 2012,

Donald Hughes, a former New York state prison guard, received a 43-year sentence following his conviction on charges of attempted first-degree criminal sexual act, first-degree sexual abuse and second-degree sexual conduct against a child. Hughes had sexually abused two young girls under 11 years old by making them touch his body. He said his actions were

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**Pennsylvania:** Former prisoner Craig A. Lewis, Jr., 21, shot prison guard David Whitcomb, 26, outside a bar on January 21, 2012. Lewis had been incarcerated at the York County Prison, where Whitcomb was employed. The two ran into each other at Piazza Romana and got into an altercation which apparently was unrelated to the prison connection. Whitcomb survived the shooting and was listed in satisfactory condition at a local hospital, while Lewis was charged with attempted homicide, simple assault, reckless endan-

germent and aggravated assault.

**Sweden:** A prisoner referred to as “Percy” in Swedish news reports was released from prison in January 2012 with a shirt, underwear and socks, but no pants or shoes. After serving two months, Percy apparently had gained weight and was unable to fit into the pants he was wearing when he began his sentence, and his request for money to purchase a new pair of pants was denied by prison officials. While he had 800 kronor in his prison account, he did not want to pay 650 kronor for pants and shoes at the prison’s store, as he feared that would leave him without enough money for food. He purchased shoes and pants at a more reasonable price

following his release.

**Vermont:** Prisoners who work at the print shop for Vermont Correctional Industries apparently have a sense of humor. In early February 2012 it was reported that decals for State Police cruisers had been altered at the print shop around four years ago, with a mark on a picture of a cow in the state seal being changed to the shape of a pig – a derogatory term for police officers. “It is fair to say the quality control will be improved at the Corrections Department and at the Vermont State Police,” said Major William Sheets, the executive officer for the State Police. The altered decals were placed on about 30 police cars before the pig was noticed. ■

## Criminal Justice Resources

### ***ACLU National Prison Project***

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners’ Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### ***Amnesty International***

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***Family & Corrections Network***

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### ***Innocence Project***

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### ***Just Detention International***

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### ***Justice Denied***

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### ***National CURE***

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### ***November Coalition***

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### ***Partnership for Safety and Justice***

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### ***The Sentencing Project***

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)

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# PRISON

## Legal News

VOL. 23 No. 6

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

June 2012

### God's Own Warden

*If you ever find yourself inside Louisiana's Angola prison,  
Burl Cain will make sure you find Jesus – or regret ever crossing his path.*

*by James Ridgeway*

It was a chilly December morning when I got to the gates of Angola prison,<sup>1</sup> and I was nervous as I waited to be admitted. To begin with, nothing looked the way it ought to have looked. The entrance, with its little yellow gatehouse and red brick sign, could have marked the gates of one of the smaller national parks. There was a museum with a gift shop<sup>2</sup> where I perused miniature handcuffs, jars of prisoner-made jelly and mugs that read “Angola: A Gated Community” before moving on to the exhibits, which include Gruesome Gertie, the only electric chair in which a prisoner was executed twice. (It didn’t

take the first time,<sup>3</sup> possibly because the executioners were visibly drunk).

Besides being cold and disoriented, I had the well-founded sense of being someplace where I wasn’t wanted. Angola welcomes a thousand or more visitors a month, including religious groups, school-children and tourists taking a side trip from their vacations in plantation country. Under ordinary circumstances, it’s possible to drive up to the gate and tour the prison<sup>4</sup> in a state vehicle, accompanied by a staff guide. But for me, it had taken close to two years and the threat of an ACLU lawsuit to get permission to visit the place.<sup>5</sup>

I was studying an exhibit of sawed-off shotguns when I heard someone call my name. It was Cathy Fontenot, the assistant warden in charge of PR. Smartly dressed in a tailored shirt and jeans, a suede jacket and boots with four-inch heels, she introduced me to a smiling corrections officer (“my bodyguard”) and to Pam Laborde, the genial head spokeswoman for the Louisiana Department of Public Safety and Corrections who had come up from Baton Rouge to help escort me on my hard-won tour of Angola.

Everyone was there except the person I had come to see: Warden Burl Cain, a man with a near-mythical reputation for turning Angola, once known as the bloodiest prison in the South,<sup>6</sup> into a model facility. Among born-again Christians, Cain is revered for delivering hundreds of incarcerated sinners to the Lord – running the nation’s largest maximum-security prison, as one evangelical publication

put it,<sup>7</sup> “with an iron fist and an even stronger love for Jesus.” To Cain’s more secular admirers,<sup>8</sup> Angola demonstrates an attractive option for controlling the nation’s booming prison population at a time when the notion of rehabilitation has effectively been abandoned.

What I had heard about Cain, and seen in the plentiful footage of him, led me to expect an affable guy – big gut, pale, jowly face, good-old-boy demeanor. Indeed, former Angola prisoners say that those who respond to Cain’s program of “moral rehabilitation”<sup>9</sup> through Christian redemption are rewarded with privileges, humane treatment and personal attention. Those who displease him, though, can face harsh punishments.

Wilbert Rideau,<sup>10</sup> the award-winning former *Angolite*<sup>11</sup> editor who is probably Angola’s most famous ex-con, says when he first arrived at the prison, Cain tried to enlist him as a snitch, then sought to convert him. When that didn’t work, Rideau says, his magazine became the target of censorship; he says Cain can be “a bully – harsh, unfair, vindictive.”

“Cain was like a king, a sole ruler,” Rideau writes in his recent memoir, *In the Place of Justice*.<sup>12</sup> “He enjoyed being a dictator, and regarded himself as a benevolent one.” When a group of middle school students visited Angola a few years ago, Cain told them<sup>13</sup> that the prisoners were there because they “didn’t listen to their parents. They didn’t listen to law enforcement. So when they get here, I become their daddy, and they will either listen to me or make their time here

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*PLN* is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

## **God's Own Warden (cont.)**

very hard."

Another former prisoner, John Thompson – who spent 14 years on death row at Angola before being exonerated by previously concealed evidence – told me that Cain runs Angola "with a Bible in one hand and a sword in the other." And when the chips are down, Thompson said, "he drops the Bible."

Who is the man who wields so much untempered power over so many human beings? I wanted to find out firsthand – but when I requested permission to visit the prison and interview Cain, back in 2009, Fontenot turned me down flat. Cain, she said, was not happy with what I had written about the Angola Three, a trio of prisoners who have been in solitary longer than any other prisoners in America.<sup>14</sup> Two years and much legal wrangling later, I was here at Fontenot's invitation, ready to see the Cain miracle for myself.

Burl Cain has friends in many places – a vast network of contacts and supporters from Baton Rouge to Hollywood. There has been talk in Louisiana of him running for office – maybe even for governor. But no position could ever be so secure, and no authority so complete, as what he already has.

Cain, now 68, was raised in Pitkin (population 1,965), about 90 miles due west of Angola; he began his career at the Louisiana Farm Bureau, then became assistant secretary for agribusiness at the Louisiana Department of Public Safety and Corrections, which runs a number of prison plantations. He became warden of the medium-security Dixon Correctional Institute in 1981 and landed at Angola 14 years later. One official bio notes that "to escape the pressures of running the nation's largest adult male maximum security prison, Cain enjoys hunting and traveling around the country on his motorcycle."

Cain's brother, James David Cain, served in the Louisiana legislature for more than two decades. Burl Cain himself was until 2011 the vice chairman of the powerful State Civil Service Commission, which sets pay scales for state workers. Corrections is big business across the nation, but nowhere more so than in Louisiana, which has the highest incarceration rate in the world,<sup>15</sup> keeping 1 in 55 adults behind bars. Angola is one of the largest employers in the state, with a staff

of about 1,600 and an annual budget of more than \$120 million; it is also a huge agricultural and industrial enterprise, with a network of customers and suppliers that depend on the warden's good graces.

Until 2008, the Department of Corrections, which oversees the state's prisons, was headed by Richard Stalder, who once worked for Cain. Today, its second in command is Sheryl Ranatza, who previously was Cain's deputy warden. She is married to Michael Ranatza, executive director of the Louisiana Sheriffs' Association. (The sheriffs have a direct interest in prison policy in Louisiana because the state effectively rents space in local jails – at premium rates – to house "overflow" prisoners who can't be fit into Angola and other prisons). Together, the Angola warden and the Department of Corrections have long been "a political powerhouse in Louisiana," says the Southern Center for Human Rights' Stephen Bright. "[They are] sitting on top of all this power. Governors who come along are afraid to touch them."

But Cain's reputation has reached far beyond Louisiana. Shortly after taking the reins at Angola, he gained a national audience through a 1998 documentary about the prison, *The Farm: Angola, USA*,<sup>16</sup> which won the Grand Jury Prize at Sundance and was nominated for an Academy Award. Soon Cain found himself interviewed<sup>17</sup> by an admiring Charlie Rose and profiled in *TIME*,<sup>18</sup> which noted his quest to "give the 5,108 hopeless men on this former slave-breeding farm hope." A follow-up to *The Farm* was released in 2009,<sup>19</sup> with Cain as the central character.

Cain has also had an open-door policy for Hollywood. Parts of *Dead Man Walking*, *Out of Sight* and *Monster's Ball* were filmed on the prison grounds, and more recently, William Hurt spent a night there to prepare for his role as an ex-con from Angola in *The Yellow Handkerchief*. As Fontenot proudly told me, Forest Whitaker recently visited to prep for narrating a two-hour documentary<sup>20</sup> on the prison's hospice for Oprah's new network. Even parts of the recent Jim Carrey film *I Love You Phillip Morris*, about two men who fall in love in prison, were filmed at Angola. "All the extras we were using were lifers, real killers," costar Ewan McGregor bragged.<sup>21</sup> (Cain drew the line, though, according to one Christian blogger,<sup>22</sup> at allowing a gay sex scene to be filmed in the prison).

With Cathy Fontenot at the wheel,

## God's Own Warden (cont.)

talking a mile a minute, our SUV sped through Angola's expansive grounds. At 18,000 acres, the prison covers a tract of land larger than the island of Manhattan. Surrounded on three sides by the Mississippi River and on the fourth by 20 miles of scrubby, uninhabited woods, it is virtually escape-proof.

With its proximity to the river, this is prime agricultural land, made up of five former plantations and named for the country of origin of the slaves who once worked its fields. Today the prisoners, three-quarters of whom are black,<sup>23</sup> still work the land by hand, earning between 2 and 20 cents an hour.

Angola's agribusiness operation grows cash crops like cotton, corn and soybeans, as well as fruits and vegetables. In addition to working the fields, prisoners tend to Angola's hundreds of beef cattle, its prize Percherons and quarter horses, and the dogs it breeds for law enforcement. (In addition to raising bloodhounds, the Angola kennels have experimented with crossing German shepherds and black wolves). Prisoners also make license plates and vinyl mattresses, and fashion toys for charity.

Fontenot crossed one levee after another, rolling off facts and figures and telling little stories about points of interest as we flew past. In 1997, she told me, a flooding Mississippi came close to breaching the ramparts, but they kept the water

out with teams of prisoners sandbagging, Warden Cain working by their side. We passed a herd of horses, which at Angola are used not only by officers riding guard over prisoners in the fields, but also to pull wagons and plows, replacing gas-guzzling tractors. Angola is working very hard to go green, Fontenot said. It is also highly entrepreneurial, with ventures such as the Prison View Golf Course bringing in extra funds at a time of budget cuts. They were, she said, considering a pet-grooming service and an Angola-branded clothing line. As we zipped down the road, we passed a big tour bus filled with visitors.

We also passed the 10,000-seat arena where Angola's famous prison rodeos<sup>24</sup> are staged each spring and fall, drawing some 70,000 people. The rodeo is famed for such events as "Convict Poker" (in which four prisoners try to remain seated around a card table while being charged by a 2,000-pound bull) and "Guts and Glory" (where prisoners vie to snatch a poker chip hung around the horns of an angry bull). Daniel Bergner, who spent a year at Angola researching his powerful 1998 book *God of the Rodeo*,<sup>25</sup> observed that the crowd's reaction was "electrified, exhilarated, the thrill of watching men in terror made forgivable because the men were murderers. I'm sure some of it was racist (See that nigger move), some disappointed (that there had been no goring), and some uneasy (with that very disappointment)." Even so, he writes, "many people were not laughing, were too bewildered or stunned by what they had just seen."

Outside the arena, prisoners sell arts and crafts, along with crawfish étouffée

and Frito pies for the benefit of various prisoner organizations: the Lifers Association, the Forgotten Voices Toastmasters group, Camp F Vets and dozens of Christian groups. The rodeo was originally conjured up by the prisoners, but it is now a centerpiece of Cain's PR operation. Bergner wrote that in Cain's first year at Angola, he entered the arena in "the closest thing he could find to a chariot" – a cart pulled by the prison's Percherons, in which he circled the ring before the opening prayer.

One thing I learned when attending the rodeo a year earlier (it was the only way to get into Angola without Fontenot's permission) is the vast difference in the way various groups of prisoners live. Most of the men who work the booths are "trusties." They live in open dorms or group houses, hold the most coveted jobs, move around with some degree of ease, and in some cases even have limited contact with the public. A few trustees are trucked out to keep up the grounds at the local school, while others tend to the homes and yards of B-Line, the small town inside the prison gates that is populated by Angola's staff, many of them third- or fourth-generation corrections officers. (Angola officials have military ranks; collectively, they are sometimes still referred to by their historical name, "freemen").

About 700 of Angola's 5,200 prisoners are trustees. Another 2,800 are "big stripes," who work in the fields and factories under armed supervision. The remaining 1,500 are confined in cellblocks – some in the general population, some in 23-hour-a-day lockdown, some in punish-

ment units. A word from the warden can make the difference between life in a "trusty camp" with a decent job and contact visits, and life in a six-by-nine isolation cell.

A little farther on was the main prison, surrounded by layers of razor wire shining bright in the sun. "Hiya," Fontenot called out to the prisoners as our entourage swept down the central walkway. "How ya

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doin'?" "Good morning," they responded. She put her arm affectionately around the shoulder of one man, asked another about a personal problem. She came off as part country-western princess, part girl next door and entirely in charge.

By most estimates, including Fontenot's, at least 90 percent<sup>26</sup> of Angola's prisoners will die here. In Louisiana, what are effectively life sentences are now doled out not only for murder but for anything from gang activity to bank robbery. The *Angolite* has reported that in 1977, just 88 men had spent more than 10 years in the prison. By 2000, 274 men had spent 25 years behind bars and in 2009, 880 Angola prisoners had spent 25 or more years inside. Sixty-four men had been locked up for more than 40 years.

Today, 3,660 men – 70 percent of Angola's population – are serving life without parole, and most of the rest have sentences too long to serve in a lifetime. "It is not too far of a stretch to claim life without parole as another form of capital punishment," writes Lane Nelson, the magazine's star writer (who recently received clemency). "[It is] slow execution by incarceration. Decades of segregation can numb a prisoner's soul until he becomes

devoid of an earnest desire for the joys of freedom."

Warden Cain has gone on record as favoring the possibility of parole for those who achieve "moral rehabilitation." Nick Trenticosta, a death penalty attorney who currently represents 15 prisoners at Angola, says, "He knows there are individuals at Angola he believes are rehabilitated, and he believes they should be released. I think he is very frustrated by the sentencing laws in the state [and] the whole process of pardon and parole because of its political nature."

As it stands, Cain and his staff confront an aging and increasingly infirm prison population, which is why some of Angola's best-known programs deal with easing old age and death in prison. The prison even operates a hospice,<sup>27</sup> founded and staffed by prisoners, that houses men judged to have fewer than 18 months to live. When these men die, if no relatives come to claim the body, they can count on a prisoner-crafted coffin, a decent funeral and delivery, via horse-drawn hearse, to their final resting place at Angola's Point Lookout Cemetery.

Five miles into the plantation, we arrived at death row. A central control

room led to a series of tiers, each marked by a locked door and color photos of the inhabitants, 83 in all. Guards patrol the tiers day and night, looking for potential suicides.

We walked past a plastic nativity scene to get to the death house, which contains the cells where prisoners spend their final hours, saying goodbye to loved ones and having their last meals. In the death chamber sat a flat, padded leather gurney with "wings" where the condemned man's arms would be outstretched to receive the needle. Fontenot pointed out where Warden Cain would stand, near the man's left hand, and described how he would motion for the execution to begin.

Cain's first execution, he told the *Baptist Press*,<sup>7</sup> was done strictly by the book. "There was a *psssh* from the machine, and then he was gone," Cain recalled. "I felt him go to hell as I held his hand. Then the thought came over me: I just killed that man. I said nothing to him about his soul. I didn't give him a chance to get right with God. What does God think of me? I decided that night I would never again put someone to death without telling him about his soul and about Jesus."

By 1996, in a Diane Sawyer special

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**God's Own Warden (cont.)**

about an Angola execution, Cain said that putting a prisoner to death was "so complex I can't even answer... I came here with an opinion about a lot of things. Today I don't have an opinion about hardly anything."

Attorney Nick Trenticosta says that in his view, Cain treats death-row prisoners better than wardens at most other prisons: "It is not that these guys had super privileges. But Warden Cain was somewhat responsive to not only prisoners, but to their families." Trenticosta recalls Cain demurring before one execution, "All I wanted was the keys to the big house. Not this." The lawyer offers a picture of a man torn between the duty to kill and the faith that makes him question that duty – a dilemma he seeks to resolve, perhaps, by giving prisoners the promise of a heavenly life before the state snuffs out their earthly one.

Chapels are all over Angola, and the main one, which seats 800, was a key stop on our tour – just as it is for visiting preachers from around the country. Gathered there waiting for us was a group of prisoner preachers, who spread the good news at the five houses of worship in Angola (a sixth is under construction) and at other prisons throughout the state. On occasion, they even have the opportunity to preach in the outside world. I asked the prisoners whether Warden Cain had to approve what they did; one said they answered only to "Him" and pointed skyward. For a while, we listened to a former country-western bandleader play gospel on the famed Angola organ, donated by a close associate of Billy Graham. As we began to leave, one preacher raised his hand to Cathy, smiled broadly, and said,

"We did good for you."

It had taken me a while to figure out what bothered me about Cain's religious crusade at Angola, beyond a healthy respect for the separation of church and state. My grandfather, a Methodist minister, was an evangelist of sorts, so this wasn't an altogether foreign world to me. And I've seen a lot of good come out of faith-based programs – which, particularly in prison, fill the void created when lawmakers nationwide slashed funding for rehabilitation. In 1994, for example, Congress dealt a crushing blow to prison education<sup>28</sup> by making prisoners ineligible for higher-education Pell grants. Prison college programs, which had proved the single most effective tool for reducing recidivism, disappeared almost overnight. In Louisiana today, 1 percent of the corrections budget goes to rehabilitation.

The imbalance "makes no rational sense from a prison management point of view," says David Fathi, who heads the ACLU's National Prison Project.<sup>29</sup> "But unfortunately it makes political sense for the next election." As a result, he says, "the religiously inspired programs are pretty much all there is."

According to estimates in the Christian press, some 2,000 of Angola's prisoners have been born again since the arrival of Cain – who has described his own religious persuasion as "Baptical" – and 203 have earned B.A. degrees in Christian ministry at the "Bible college," an extension program operated by the New Orleans Baptist Theological Seminary<sup>30</sup> that is the only route to earning a college degree at Angola.

Besides the prison seminary, Angola's major religious institution is the Louisiana Prison Chapel Foundation, which has raised at least \$1.2 million to dot the prison's grounds with houses of worship. Franklin Graham, Billy's son, reportedly donated \$200,000 to build one of the chapels, continuing a longstanding relationship with Angola. (Prisoners crafted the coffin<sup>30</sup> in which Billy Graham's wife was buried in 2007, and they are building one for Billy himself).

Franklin Graham wrote about one of his visits to preach at the prison under the title "Freedom for the Captives." It's a phrase drawn from Luke 4:18-19, where Jesus announces that God "has sent Me to proclaim freedom to the captives and recovery of sight to the blind, to set free the oppressed, to proclaim the year of the Lord's favor." It's not hard to see why this

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would be an appealing message for men who will never again be physically free.

But for my grandfather, personal redemption was inseparable from social justice. Cain's brand of Christianity, in contrast, serves in large part as an instrument of control – and the warden has little patience for those who don't get with his program, including other Christians. In 2009, the ACLU of Louisiana filed suit<sup>32</sup> on behalf of Donald Lee Leger, Jr., a practicing Catholic who had sought to take Mass while on death row. He alleged that Cain had TV screens outside his cell turned up full blast and tuned to Baptist Sunday services. Prison officials destroyed a plastic rosary sent to Leger from a nearby diocese. When Leger continued to file grievances requesting Mass, he was moved to a tier of ill-behaved prisoners and finally put in the hole for 10 days.

The ACLU also represented Norman Sanders,<sup>33</sup> a member of a Mormon Bible study course, who was denied books from Brigham Young University and Deseret Book Direct, sources of Mormon publications. (Cain told the Christian magazine *World*<sup>34</sup> that other religions are welcome to set up programs at Angola "as long as they're willing to pay for it. Let them all

compete to catch the most fish. I'll stand on the bank and watch").

An attorney representing another prisoner told me that the prisoner had been disciplined because he had not bowed his head during prayer. The prisoner also alleged that prisoners who don't participate in church services will have their privileges revoked, while those who attend will get "a day or two off from the field, a good meal and other goodies" such as ice cream. (Some help themselves to further goodies: In a recent scandal, several prisoner ministers were investigated<sup>35</sup> for allegedly bribing guards to let them have sex with visitors who came for special banquets).

Stan Moody, a onetime prison chaplain in Maine who has met with ex-Angola prisoners, believes that "Cain is without question a committed Christian" who "cares about the downtrodden and disadvantaged in a way that's sadly missing in prisons across the U.S." But he questions pushing religion<sup>36</sup> onto a "literally captive" audience, especially in exchange for better treatment. What Cain seems to be creating at Angola, Moody warns, is an atmosphere of "imposed Christian values" designed to put "notches on the

old salvation belt."

With those who resist salvation, Cain takes a somewhat different approach – as the men known as the Angola Three<sup>37</sup> found out. When they came to Angola in 1971 for armed robbery, Herman Wallace and Albert Woodfox were Black Panthers, and they began organizing to improve prison conditions. That quickly landed them on the wrong side of the prison administration, and in 1972 they were prosecuted and convicted for the murder of a prison guard. They have been fighting the conviction ever since, pointing out<sup>38</sup> that one of the eyewitnesses was legally blind and the other was a known prison snitch who was rewarded for his testimony.

After the murder, the two – along with a third prisoner named Robert King – were put in solitary, and Woodfox and Wallace have now spent nearly four decades in the hole – something Cain has suggested has more to do with their politics than with their crimes (King was released in 2001 when his conviction in a separate prison murder was overturned). In a 2008 deposition,<sup>39</sup> Cain said Woodfox "wants to demonstrate. He wants to organize. He wants to be defiant.... He is

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## God's Own Warden (cont.)

still trying to practice Black Pantherism, and I still would not want him walking around my prison because he would organize the young new prisoners. I would have me all kind of problems, more than I could stand, and I would have the blacks chasing after them.”

Wallace's and Woodfox's lawyers have pointed out that the two men, now in their sixties, have had a near-perfect record for more than 20 years. In response, Cain argued that “it's not a matter of write-ups. It's a matter of attitude and what you are.... Albert Woodfox and Herman Wallace is [sic] locked in time with that Black Panther revolutionary actions they were doing way back when.... And from that, there's been no rehabilitation.” Wallace has said that Cain suggested that he and Woodfox could be released into the general population if they renounced their political views and embraced Jesus.

I asked Fontenot about the Angola Three, and she told me matter-of-factly that they just hadn't played by the rules. Anyway, Wallace and Woodfox had recently been shipped off to other prisons in the state system. I asked about solitary confinement. The prisoners in what Angola calls “closed cells” had everything they needed, she said. It was like having a little apartment.

The Angola Three are not the only prisoners who claim they have suffered under Cain. Back in 1999, a group of five prisoners took two guards hostage and killed one of them during an attempted prison break. Both then-Corrections Secretary Richard Stalder and Warden Cain came to the scene, and after learning of the guard's death, Cain, according to news reports, sent in a tactical team that killed one prisoner and wounded another. Nine years later, as the state prepared to try five prisoners for the guard's murder, 25 prisoners who were not involved in the escape attempt testified to what happened next.

Transcripts of their pretrial statements<sup>40</sup> suggest that as prison officials tried to extract information or confessions, Angola became what one attorney described as “Abu Ghraib on the Mississippi.” Prisoners told of being beaten with fists, batons, bats, sticks and metal rods. “You've got these grown men crying,” one said. Several prisoners said they were thrown naked and without bedding

into freezing solitary-confinement cells, denied medical care and threatened with death if they refused to sign statements that had been prepared for them. The events prompted an FBI investigation, and the state of Louisiana eventually agreed to settle with 13 prisoners who filed civil rights lawsuits. But there was no admission of guilt and no reprimand for Warden Cain.

Even in normal times, Angola maintains a punishment unit known as Camp J, which combines extreme isolation and deprivation – prisoners cannot have any personal items and are fed a block of ground-up scraps known as “the loaf” – and is plagued by suicide attempts. There are “things that the mind can't handle,” one former prisoner told me. “I guarantee you that today, somebody tried [suicide] in Camp J.”

Certain accusations against Cain go beyond his treatment of prisoners. Shortly after he took over as warden, in 1995, he was implicated in a scandal involving a company that used Angola prison labor to relabel damaged or outdated cans of milk and tomato paste. There were allegations of kickbacks, and of retaliation against a prisoner who wrote letters to federal health officials. Both Cain and Corrections Secretary Stalder were held in contempt of court<sup>41</sup> for withholding documents, and Cain was warned to stop harassing the whistleblower.

In another episode, the *Baton Rouge Advocate* reported that in 2007 a grand jury in Baton Rouge subpoenaed documents involving the prison's various businesses, as well as the Angola State Prison Museum Foundation (headed by Sheryl Ranatza, the Cain protégé who is now deputy secretary at the Department of Corrections) and the Angola Prison Rodeo, whose proceeds were once put into a fund for prisoner expenses such as funeral trips, TV and the law library, but are now used to maintain the arena and build prison chapels. Cain is chairman of the committee that runs the rodeo, and he founded and sits on the board of the prison chapel foundation.

The FBI also has been investigating Prison Enterprises, the state outfit that runs all farming and industrial operations in Louisiana's prisons, a probe that has led to several indictments; in October 2010, a contractor named Wallace “Gene” Fletcher<sup>42</sup> pleaded guilty to defrauding Louisiana taxpayers of some \$170,000. [Ed. Note: Fletcher, 70, was sentenced in

Sept. 2011 to serve six months and pay \$247,000 in restitution].

In 2004, Angola Rodeo producer Dan Klein went to the FBI with a complaint that Burl Cain had forced him to contribute \$1,000 to the Chapel Fund. Cain said at the time that Klein made the contribution without any pressuring, and the warden himself has not been named in any of the indictments.

Daniel Bergner also says he was pressured to pitch in for one of Cain's pet projects while writing his book on Angola: Though he initially had broad access to the prison, partway through his reporting Cain asked him to help pay for a new barn for his wife's dressage horses, which he said would cost about \$50,000. When Bergner demurred, Cain made a straight pitch: In return for arranging a "consultancy" payment for Cain, Bergner would get continued access. Bergner refused, whereupon Cain began demanding editorial control over the book and finally barred Bergner from the prison. Bergner only got access again after going to court.

After more than a year of trying to get into Angola, I too turned to a lawsuit. In March 2010, the ACLU agreed to rep-

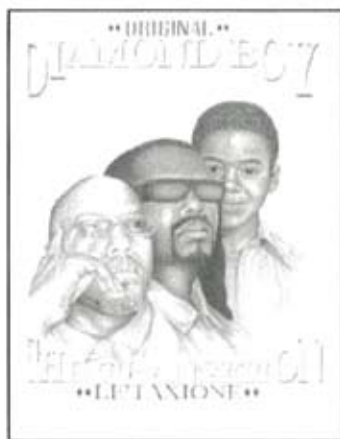
resent me on a First Amendment claim<sup>43</sup> arguing that to keep government information from a reporter merely on the basis of what he's written is an infringement on press freedom. My attorneys asked for a listing of visitors the prison had welcomed in the previous year (not counting the everyday tourists). Without hesitation, Angola provided a 14-page list<sup>44</sup> that included Miss Louisiana, the comedian Russell Brand, the Dixie Dazzle Dolls (a children's beauty pageant group), various groups of high school and college students, judges, representatives from gospel groups and film teams, scouts looking for film locations, criminal justice students, a former member of the Colombo crime family, a French attorney.

Members of the media included a journalist from Switzerland; "Neal Moore, citizen journalist, who was canoeing the Mississippi River"; and a producer getting ready to film a "future movie/documentary on finding happiness." My attorneys dispatched one more letter to Cain urging him to grant me a visit. There was no response. But a month later, as the ACLU prepared to file suit in federal court, Fontenot wrote to them, inviting me down for a tour.

In his memoir, Wilbert Rideau<sup>10</sup> writes about how tightly Cain controls his messaging – a practice that had grim consequences for the *Angolite*, once known for its investigative reporting. At a time when even outside journalists encountered increasing barriers to access at prisons nationwide – it's almost impossible now to interview a prisoner, or even a staffer, at many state and federal prisons – the *Angolite* staffers found their calls monitored and their stories censored. "The only information coming out of Angola," Rideau says, "was what Burl Cain wanted the public to know."

When I asked Fontenot about this, she shook her head and told me that after he started winning journalism prizes and drawing attention from outside Angola, Rideau withdrew from prison life, spending all his time holed up in the *Angolite* offices. His celebrity, she thought, had gone to his head.

Or perhaps Rideau got on the wrong side of Cain by refusing to embrace the dominant story of the warden as Angola's savior, a narrative neatly summed up by prison chaplain Robert Toney in congressional testimony<sup>45</sup> in 2005: Angola "was once the most violent prison in America.



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## God's Own Warden (cont.)

Today, we are known as the safest prison in America. This change began with a warden that believed that change could occur.”

In fact, there is considerable evidence that the turnaround at Angola began two decades before Cain became warden, in the 1970s, when a prisoner lawsuit forced the facility into federal oversight and a series of reforms began. According to Burk Foster,<sup>46</sup> a professor of criminal justice at Saginaw Valley State University in Michigan and the leading historian of Angola, by the mid-1980s Angola was already the most secure prison in the South. Prison violence is down dramatically across the country; the prison murder rate has fallen more than 90 percent<sup>47</sup> nationwide in the last three decades.

Yet the legend of Cain persists – and not just because Cain and his team (the formidable Cathy Fontenot included) are so skilled at PR. Cain does a job that no one else much wants to do, dealing with a group of people that no one else much wants to think about. Rather than face that reality, most of us prefer to believe in a miracle.

Aside from the high-level escort, my tour of Angola had covered pretty much what the tourists see, except for the closing lunch – Fontenot took me to the Ranch House, a sort of clubhouse where the wardens and other officials get together in a convivial atmosphere for chow prepared by prisoner cooks. (It's traditional for Ranch House cooks to go on and work at the governor's mansion, but Gov. Bobby Jindal had spurned that tradition). The house is built low, with a long porch and

white board fence; we sat down to barbecue chicken, red beans and rice, and sweet potato pie, all of it quite good.

After lunch, I accompanied Fontenot to her office in the administration building. When we'd scheduled the tour, she'd promised me an interview with Cain provided he was at Angola when I visited, which she expected him to be. But when I asked, "Where's the warden?" she said matter-of-factly, "Oh, he's in Atlanta today."

On the way back over the line to the free world, I asked Fontenot whether the warden might consider talking to me on the phone. She suggested I follow up once I got home, and I did, thanking her for the tour and the fine luncheon. After several weeks and multiple inquiries – including a few questions submitted via email, at her request – I got this reply:

*The warden respectfully declines to*

## Angola: A Prison Passion Play

*by John E. Dannenberg*

The New Testament recounts Jesus' plight as a prisoner: "Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me." (Matthew 25:36).

Spurred on by Bible-banging Warden Burl Cain of the Louisiana State Penitentiary at Angola, a cast of 70 male and female prisoners from both Angola and the Louisiana Correctional Institute for Women – accompanied by a bevy of animals that included two horses, a lamb and a camel – put on a 3½-hour passion play, *The Life of Jesus Christ*, at Angola's rodeo grounds. With an attentive audience of prisoners, relatives, church groups and ticket holders, the fully-costumed theatrical production ran for three days in May 2012.

In this unusual alliance of male and female prisoners, who were allowed to touch one another during the course of the performance, Jesus was played by Bobby Wallace, a lifer who committed a string of armed robberies, while the young Virgin Mary was portrayed by a woman who robbed a Mexican restaurant. A teenager who had killed his girlfriend and infant daughter played Joseph.

Gary Tyler, the prisoner who directed the play, has served 38 years for murder. Perhaps unknowingly, he drew parallels between himself and Christ. "Jesus was executed because of an allegation," he said. "People vented their hatred on him." Originally sentenced to death, Tyler was convicted of killing a white youth during a 1974 attack by a mob of whites on a bus full of black students when his high school was racially integrated. Convicted by an all-white jury, he has steadfastly maintained his innocence.

Judas, who, as a snitch, was not a popular character, was

played by a murderer who talked about his character's unbearable burden of guilt. The prisoner who portrayed Pontius Pilate compared his character to a judge who had sentenced an innocent man to death, while the actress playing Mary Magdalene recounted that she, too, had been "used" by men.

Warden Cain proclaimed, "Jesus Christ was innocent. There are innocent people in this prison. Believe me, there are." Cain's iron-fisted control over Angola has often been criticized by prisoners and prison reformers alike, while the ACLU has claimed Cain's belief in Christian redemption results in religious bias reflected in the management of his prison.

Mitigating concerns about separation of church and state, Louisiana prison officials said that participation in the play was voluntary and that funds for the production were donated by individuals and charitable groups (notably, local Christian churches). Associate Warden Cathy Fontenot opined that the production – which portrayed the life and death of Christ – did not push a particular religious message but rather one of moral redemption.

However, with over 4,000 of Angola's 5,329 prisoners serving sentences of life without parole, they may well be inspired by Warden Cain's crusade to have them accept Jesus as their only hope of salvation. Indeed, for those doing time at Angola, *The Life of Jesus Christ* may not be just an act. As for Cain, if he truly believes there are prisoners who are innocent just as Christ was, then perhaps he should run his prison, and treat "the least of these," accordingly. ■

Sources: *New York Times*, *Democracy Now!*



participate in this article. As he says often, its all of us at Angola that have caused the positive changes. Thanks again James. It really was a pleasure to meet you in person. Stay warm during these cold days of winter.

Much peace to you,  
Cathy

When I interviewed John Thompson, the exonerated death-row prisoner, about his time in Angola, he mentioned what he believes is one of the public's biggest misconceptions about prisons. Most people look at the fence around the perimeter and think its purpose is to keep prisoners from escaping. But the barrier "isn't there to keep prisoners in," Thompson said. "It's to keep the rest of you out."

*James Ridgeway is a senior correspondent at Mother Jones. This article first appeared in the July/August 2011 issue of Mother Jones magazine (www.motherjones.com), and is reprinted with permission.*

#### Endnotes/Links:

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# From the Editor

by Paul Wright

For the past 22 years, PLN has been at the forefront of reporting on the gouging of prisoners' families by prisons, jails and the telecommunications industry as prisoncrats and corporations profit by charging families exorbitant phone rates for the ability to communicate with their incarcerated loved ones. PLN's groundbreaking report on the prison phone industry last year – see our April 2011 cover story – has led to a growing movement that seeks real change regarding this issue. To date, we are the only news media organization to tackle this topic on a national level.

To end the injustice of unfair prison phone rates, the Human Rights Defense Center, the Center for Media Justice and Working Narratives have launched a national campaign to end the kickback “commissions” routinely provided to prisons and jails by prison phone companies. We have launched two websites, [www.phonejustice.org](http://www.phonejustice.org) and [www.kitescampaigns.org/campaign/prison-phone-justice](http://www.kitescampaigns.org/campaign/prison-phone-justice), where we have massive amounts of information on prison phone rates, contracts and corruption; these sites also include resources for people affected by prison phone rate gouging to tell their story and take action.

In March 2012 I was among a number of advocates on the topic of prison phone justice who met in Washington, DC with Federal Communications Commission (FCC) Commissioner Mignon Clyburn to seek FCC action on this issue. Since 2005, a petition called the Wright petition has been pending before the FCC, requesting that that agency cap phone rates charged for interstate calls made by prisoners (the FCC can only regulate interstate, not intrastate, phone calls). HRDC and more than 4,800 organizations and individuals

have submitted formal comments on the Wright petition. Thus far the only ones seeking to maintain the unjust system of exploitation and corruption by gouging consumers who communicate with prisoners is the telecom industry, its lobbyists and lawyers, and some prison and jail officials.

Along with Kay Perry from CURE, who directs the eTc Campaign, I outlined the concerns of prisoners and their families on this issue. Commissioner Clyburn was both receptive and sympathetic. She said one thing that would help spur the FCC to action would be to hear from people affected by prison phone rates in regard to why this is a burden and an outrage, and why the FCC should take action to end the kickbacks and impose caps on the rates charged to prisoners and their families for the cost of making interstate phone calls.

This issue of *PLN* has a full-page ad with relevant information on whom you can write and points to make in your letter. Just because you are in prison does not mean your voice is not important and cannot be heard. If you are tired of being exploited and having your family exploited because you make phone calls from prison, take a few minutes and contact the FCC to express your concerns about how excessively high phone rates, driven by kickbacks to prison and jail officials, have negatively impacted you and your family.

People outside prison can send letters and make comments on the public docket for the Wright petition, too. Your family members and friends can mail the FCC copies of their phone bills that reflect the high cost of prison phone calls, for example. We need to educate the FCC about the scope and devastating impact

of these corrupt and anti-consumer practices. Having many affected people send letters to the FCC urging them to take action will have a larger impact than just a few organizational advocates telling them the same thing. The phone justice campaign includes a helpful toolkit, which is available online at this link: <http://bit.ly/K8BUy0>.

We will be running the prison phone justice campaign ad in *PLN* until the FCC takes action on the Wright petition, and will report updates as they occur in the campaign in future issues of *PLN*. If you can make a donation to support this project, please do so now.

Additionally, we have made some changes to our book list and added new titles as we strive to offer books to our readers that they can use to help and educate themselves. Please check out our book list in the back of this issue for the new additions.

If you are not a *PLN* subscriber and are receiving *PLN* for the first time, this is a complimentary sample copy. If you wish to continue receiving the magazine, you must order a subscription using the attached subscription card, or you can subscribe by letter or by having a family member contact us by phone or online. If you are a subscriber and you received two copies, one is a sample – please give it to someone else who might have an interest in *PLN*, and encourage them to subscribe.

Thank you and enjoy this issue of *PLN*. ■

## CORRECTION!

Thanks to an alert *PLN* reader for pointing out this error. An article in the January 2012 issue of *PLN*, titled “Typewriters Alive and Well in American Prisons Despite Reports of Their Demise,” stated the Michigan DOC permits typewriters with 128k of internal memory. In fact, typewriters with internal memory were removed from the Michigan DOC’s prisoner personal property list in Policy Directive 04.07.112, though existing typewriters with internal memory were grandfathered in. *PLN* regrets the error. ■

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**If you received an intrastate telephone call from an inmate in a Washington State Department of Corrections facility between June 20, 1996 and December 31, 2000, you may be a member of a class in an action against AT&T.**

A court in King County, Washington, has certified a class action against AT&T. The case alleges that AT&T violated the Washington State Consumer Protection Act by failing to provide information, including rate information, during collect calls originating from inmates at Washington Department of Corrections ("DOC") facilities between June 20, 1996 through December 31, 2000. If you are a member of the class, you have the right to opt out of the class action lawsuit. This notice explains how to do so. It also explains how to receive more case information.

**Who's Included?**

You may be a member of the class if you accepted a long-distance, intrastate, collect call from an inmate at a Washington DOC facility between June 20, 1996 through December 31, 2000 that was carried by AT&T. Most, but not all, Washington DOC facilities are covered. A list of covered facilities and types of covered telephone calls are detailed at [www.ratedisclosure.com](http://www.ratedisclosure.com).

**What's This About?**

In this lawsuit, recipients of collect telephone calls from inmates at Washington DOC facilities allege that AT&T failed to provide certain information, including a rate disclosure, required by law. They allege that for each call that did not contain the required information, Washington law requires AT&T to pay the recipient \$200 plus the cost of the call. They also allege that the court should triple any award under the Washington Consumer Protection Act, and award interest, costs and attorney fees.

AT&T denies that it did anything wrong.

The Court has not decided who is right. By establishing the Class and authorizing this Notice, the Court is not suggesting who will win or lose the case. The Class must prove their claims at trial. The trial date is October 29, 2012.

**What Are My Rights?**

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The class action case is titled *Judd, et. al. v. AT&T, et. al.*, King County Cause No. 00-2-17565-5 SEA.

# No Budget Cuts for Federal Prisons

by James Ridgeway and Jean Casella

In the midst of an epic budget battle that could transform the American landscape for decades to come, the White House and Republicans in Congress appear to agree on one point: Federal prisons need more money.

With more people and a higher percentage of the population locked up than any other country, the United States would seem more than ripe for cuts in both its incarceration rate and its prison spending. A number of states have initiated such measures, and a growing chorus of critics on the right and left are decrying the devastating fiscal costs of mass incarceration. Yet the Obama administration's combined budget requests for FY 2011 and FY 2012 call for a full 10 percent increase over 2010 levels in funding for the federal Bureau of Prisons (BOP), to more than \$6.8 billion, which includes funding for a new federal supermax. The increase, says the BOP, is necessary to accommodate a still-growing federal prison population. And the latest budget deal reached with the Republican leadership indicates that this particular category of discretionary spending will emerge from the budget battles comparably unscathed.

There is ample precedent for an expansion of federal prisons under a Democratic administration. According to analyses by the Sentencing Project and the Pew Center on the States, the growth rate in the BOP's population has far outstripped that of the states (which itself has increased by more than 700 percent in the past 40 years). BOP growth was most dramatic during the Clinton years, when a host of new offenses were federalized: Since 1995 alone, the number of federal prisoners has more than doubled, to over 211,000. More than half of these prisoners are serving time on drug charges, and another 10 percent are held on immigration violations. In all, more than 72 percent are nonviolent offenders with no history of violence, and 34 percent are first-time nonviolent offenders.

What's more, the federal government is now bucking a state trend toward decreasing prisoner population levels and closing prisons. The Pew Center found that in 2009, in the wake of the financial crisis, the overall state prison population fell for the first time in 38 years. States as tough on crime as Texas, Georgia and Florida are now pushing reforms that

range from lighter sentences to early release programs – all under the leadership of Republican governors. In contrast, the BOP population continues to rise, with an increase of 11,000 projected in 2011, according to Attorney General Eric Holder.

No wonder, then, that federal prisons are overcrowded, and the government is still opening new ones. According to the Justice Department's FY 2012 budget request for the Bureau of Prisons:

*The biggest challenge facing the BOP is managing the ever increasing federal prison population and providing for their care and safety, while maintaining appropriately safe and secure prisons required to ensure the safety of BOP staff, prisoners, and surrounding communities, which is why the requested base resources for BOP's operations budget (S&E) and for modernization and repair are vital.*

*BOP anticipates finalizing the construction of Federal Correctional Institution (FCI) Aliceville, AL, a secure female facility in FY 2012. This facility will add 1,792 more beds to rated capacity. Assuming the requested FY 2012 funding is received, the BOP will begin the activation process of FCI Berlin, NH and the acquisition and renovation process of administrative maximum U.S. Penitentiary (ADX USP) in Thomson, IL. If realized, FCI Berlin, NH will add 1,280 beds and ADX USP Thomson, IL will be activated as a federal institution and add up to 1,600 high security cells after modifications.*

The "activation" of the new ADX ("administrative maximum") prison in 2012 depends upon the purchase of that prison from the state of Illinois, and its retrofitting as a federal supermax. This has been by far the most controversial facet of the BOP's future plans, since the new ADX in Thomson was originally proposed as a new home for Guantanamo detainees.

Obama's plans to close Gitmo and move its residents to the American mainland were stymied by Congress, but the White House decided to buy Thomson nonetheless. In a letter sent in April 2011, Eric Holder assured Illinois' Democratic Senator Dick Durbin and Republican Senator Mark Kirk that "consistent with current law, we will not transfer detainees from Guantanamo to Thomson, or otherwise house Guantanamo detainees at Thomson. The

Thomson facility would only house federal inmates and would be operated solely by the Bureau of Prisons."

What the White House is calling for, then, is the creation of a second federal supermax on the model of the notorious Florence ADX in Colorado – a place where solitary confinement has been raised to a torturous art, and prisoners seldom, if ever, see another human being. Conditions at this "Alcatraz of the Rockies" are so harsh that the European Court of Human Rights initially refused to extradite terrorism suspects to the United States lest they end up in ADX. [Ed. Note: On April 10, 2012 the European Court of Human Rights ruled that terrorism suspects could be extradited to the U.S. even if they might be held at the Florence ADX]. Yet this new prison has also become the centerpiece of Obama's plans for prison expansion. The letter from Holder to Durbin and Kirk continues:

*As you know, the Department wishes to acquire the Thomson facility in order to provide critically needed high security bed space for the federal Bureau of Prisons. The current population of high security federal penitentiaries is 51% above rated capacity, and continues to grow ... I appreciate your leadership in addressing the dangers of prison overcrowding, and in fostering community support for the federal government's acquisition of this unused state facility.*

*The President's FY11 budget requested \$237 million for the acquisition, renovation, and operation of the Thomson facility. However, under the FY11 Continuing Resolutions, the Department lacks sufficient money to purchase or activate Thomson using currently available funds. We look forward to working with you to obtain additional appropriated funds for this important and needed project.*

So far, this new prison remains a sticking point in the latest budget deal. With \$6.3 billion for the BOP, it includes much of the other prison funding requested by the White House, and represents a significant increase over 2010 levels. But it is still \$239 million below the White House's 2011 request, and doesn't contain funding for the Thomson purchase. Durbin and Kirk have not given up on the plan, however, and will continue pressing the Justice Department to come up with funds to finance the new prison.



The BOP's standing in the House Republicans' 2012 budget proposal is less clear. Budget Chair Paul Ryan's "Path to Prosperity" calls for more than \$10 billion in cuts to programs that fall under the broad spending category "Administration of Justice." But the plan, which is more of a manifesto than an actual budget, doesn't specify where these cuts should be made. History would suggest that civil rights prosecutions and the like would be more obvious targets for Republican cuts than prison spending. In another rare show of bipartisan unity, House Judiciary Committee Chair Lamar Smith (R-TX) and ranking member John Conyers (D-MI) have already joined in writing to the House Budget Committee, warning them against making cuts to federal law enforcement in 2012.

What belies all this agreement on increasing federal prison spending is a bipartisan trend that calls for precisely the opposite. Fall 2010 saw the birth of the group Right on Crime, spearheaded by the likes of Newt Gingrich, Grover Norquist and Ed Meese, making the "conservative case for criminal justice reform" – including a reduction in prison populations. Norquist also joined the NAACP to endorse its Smart and Safe Campaign for criminal justice reform, and publicize its new report *Misplaced Priorities: Under Educate, Over Incarcerate*. Another recently formed coalition, calling itself Smart on Crime, brings together the Heritage Foundation, Manhattan Institute and Prison Fellowship with the Innocence Project and the ACLU. Smart on Crime advocates for criminal justice reforms that are "fair, accurate, effective, proven, and cost efficient," and makes a particularly sharp critique of the "overcriminalization of conduct" and "overfederalization of criminal law."

What think tanks and pundits do, of course, is quite a different matter from what elected officials are willing to undertake. Few politicians will risk being declared "soft on crime" in the next election. And in the end, the generous funding for prisons makes a grim kind of sense, in the context of a budget that slashes education, health care and social services: A country that can't spare the funds to properly educate its children or care for its sick, poor or unemployed is destined to remain an incarceration nation.

**Update from PLN:** Unsurprisingly, things have not greatly improved since this article was first published in April

2011. Although the nation's state prison population dropped in 2010 for the second year running, the BOP population has continued to increase, to 218,261 as of May 2012. The Department of Justice's budget for prisons and detention was funded at \$7.6 billion in 2011 and \$8.38 billion in 2012, and the department has requested \$8.6 billion for 2013 (including \$6.9 billion allocated for the BOP – a 4.2% increase). FCI Aliceville and FCI Berlin received partial activation funding in 2012; the BOP's 2013 budget request, if approved, would bring both facilities

on-line. The BOP also plans to expand its residential drug abuse treatment program (RDAP), which allows up to a one-year sentence reduction upon completion, "to all eligible inmates" as part of its 2013 budget. The BOP's 2013 budget request does not, however, include funding for the purchase and conversion of the Thomson prison into another federal supermax. ■

*This article originally appeared in Mother Jones (www.motherjones.com), and is reprinted with permission. Additional source: www.justice.gov.*

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# Death Sentences, Executions Remain at Low Levels

by Justin Miller

According to a report released by the Death Penalty Information Center last December, there were 78 new death sentences imposed in 2011, down significantly from 104 in 2010 and the fewest new death sentences since capital punishment was reinstated in 1976.

The number of new death sentences reached its peak in 1996 when 315 prisoners were sentenced to death, and averaged 295 annually in the 1990s. Since 1996 the average number of death sentences imposed each year has decreased by about 75 percent.

Leading the way in the decline in 2011 was the state that carries out the most executions. Texas, which has averaged 34 new death sentences per year, had only 8 in 2011. Other death penalty states, including Maryland, Missouri and Indiana, had no new death sentences imposed in 2011.

The number of people sitting on death rows across the nation has also reached a new low. As of the end of 2011, the death row population nationwide was 3,251, down from 3,625 in 1999. In the years preceding 1999, the size of the death row population nationally had increased every year. But while the number of people sentenced to death on the state level has decreased, the number of prisoners on death row in the federal system has more than tripled over the past decade, from 19 to 61.

The number of executions nationwide also declined, from 46 in 2010 to 43 in 2011. However, the drop is largely attributed to problems with obtaining drugs used in lethal injections. [See: *PLN*, June 2011, p.1]. The economic downturn, which has focused attention on budget deficits vis-à-vis the high cost of capital punishment, is likely another contributing factor.

Additionally, James Alan Fox, a criminology professor at Northeastern University, pointed to historically low crime rates and U.S. Supreme Court decisions that prevent juveniles and mentally disabled prisoners from being executed.

"The pool of offenders who are eligible for execution is smaller," Fox said in regard to the latter factor – although the bar is set fairly low in terms of death row prisoners with mental disabilities.

Of the 34 states with the death penalty at the end of 2011, only 13 carried out executions that year. Texas had the most

executions (13), followed by Alabama (6) and Ohio (5). Since the death penalty was reinstated by the U.S. Supreme Court in 1976, a disproportionate majority of executions have occurred in the Southern states of the former Confederacy.

The State of Illinois abolished the death penalty effective July 1, 2011 following a lengthy moratorium, and the sentences of all death row prisoners were commuted to life without parole. "I have concluded that our system of imposing the death penalty is inherently flawed," said Illinois Governor Pat Quinn. "The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right." [See: *PLN*, April 2012, p.36].

Also, Oregon Governor John Kitzhaber declared a moratorium on executions in that state on November 22, 2011. "I am convinced we can find a better solution that keeps society safe, supports the victims of crime and their families and reflects Oregon values," Kitzhaber said. "I refuse to be a part of this compromised and inequitable system any longer; and I will not allow further executions while I am Governor."

Another prominent death penalty event occurred on September 21, 2011 when Georgia executed Troy Davis, despite national and international condemnation due to strong claims of innocence in Davis' case.

Public support for the death penalty appears to be waning. When presented with alternatives, 61 percent of the respondents in a 2011 Gallup poll said they opposed the death penalty. A May 2010 poll by Lake Research Partners had similar results, and found that voters "would continue to support elected officials if they voted to replace the death penalty with a sentence of life without parole."

Reasons cited for opposing capital punishment included fears of executing people who are innocent and the high costs associated with the death penalty. In regard to the death penalty ensnaring the innocent, the total number of death row prisoners exonerated since 1973 now stands at 140.

For example, former Texas death row prisoner Anthony Graves was freed from prison in October 2010 after serving 16 years. According to special prosecutor Kelly Sigler, "[W]e found not one piece of credible evidence that links Anthony Graves to the commission of this capital murder.... He is an innocent man." That did not stop Texas officials from initially denying him compensation for his wrongful conviction, nor did it stop the state from hounding him for back child support that had accrued during his incarceration. [See: *PLN*, April 2012, p.22].

The most recent exoneration was that of Joe D'Ambrosio, an Ohio prisoner who served 23 years for murder before his habeas petition was granted and the charges against him were dismissed after the U.S. Supreme Court refused to hear the state's appeal in his case on January 23, 2012.

"It's a thrill to hear this good news, but to wait 23 years for this day is inexcusable," said Rev. Neil Kookoothe, who advocated for D'Ambrosio's release. "Justice denied this long isn't justice, but it also shows the system works ... even if it is too slow of a process."

In 2011, New York Governor Mario Cuomo, former San Quentin prison warden Jeanne Woodford, and former California prosecutors Don Heller and Gil Garcetti were among notable public officials who spoke out against the death penalty.

Several prominent former corrections officials had criticized the death penalty in 2010, too. Ron McAndrew, a former Florida warden who oversaw executions, said "Many colleagues turned to drugs and alcohol from the pain of knowing a man had died at their hands. And I've been haunted by the men I was asked to execute in the name of the state of Florida."

Former Ohio corrections director Reginald Wilkinson stated, "I'm of the opinion that we should eliminate capital punishment. Having been involved with justice agencies around the world, it's been somewhat embarrassing, quite frankly, that nations just as so-called civilized as ours think we're barbaric because we still have capital punishment."

There have been 18 executions nationwide in 2012 as of mid-May. Connecticut abolished capital punishment in April

2012, becoming the fifth state to do so in five years, with Governor Dannel Malloy citing the “unworkability” of the death penalty system. Voters in California will

consider a ballot initiative to abolish the death penalty in November 2012. ■

Sources: “*The Death Penalty in 2011:*

*Year End Report*” & “*The Death Penalty in 2010: Year End Report*,” *Death Penalty Information Center* ([www.deathpenalty-info.org](http://www.deathpenalty-info.org)); CNN; *Chicago Tribune*

## Dallas County Passes Jail Inspections ... Finally

It took eight tries over seven years, but the nation’s seventh-largest jail system, located in Dallas County, Texas, has finally started passing inspections by the Texas Commission on Jail Standards (TCJS), most recently in March 2012.

Adam Munoz, executive director of the TCJS, announced the first successful inspection of the Dallas County Jail on August 11, 2010. The jail system had last passed a TCJS inspection in 2003 – one year before current Dallas County Sheriff Lupe Valdez was elected.

Despite having spent over \$100 million on improving fire safety systems, maintenance and staffing ratios in recent years, the jail remained under a federal court order to improve medical and mental health services. The court order was issued after a 2006 investigation by the U.S. Department of Justice revealed that serious health care issues had contributed to the deaths or serious injuries of several prisoners. [See: *PLN*, May 2011, p.16; Nov. 2007, p.14].

Dallas County’s jail system had failed a surprise TCJS inspection as recently as March 2010, largely due to inadequate smoke detection and removal equipment in the north tower jail, the county’s largest and most populous facility. Also, three high-ranking sheriff’s officials did not have a jailer’s license, among other problems.

The August 2010 inspection focused on \$20 million worth of smoke detection and removal equipment installed in the

north tower. Smoke detection and removal is especially important in high-rise jails like those in Dallas because the multi-story configuration makes it difficult to evacuate prisoners. The west tower and George Allen jails had previously been retrofitted with similar equipment.

“Dallas County took the time to invest,” Munoz stated. “It’s a testament to Dallas County for the effort they made to get this jail back into compliance.” However, he also warned that a rapidly-rising prisoner population may make future inspections of the jail system more difficult to pass.

“Now the challenge for Dallas County is to stay in compliance,” said Munoz, who noted that the TCJS has the power to force the county to transfer prisoners to other facilities, at a cost of millions of dollars, should its jail system become overcrowded or fall below a ratio of one staff member per 48 prisoners.

Continued compliance is indeed the question, but the county has thus far managed to maintain required jail standards and stay in compliance.

Dallas County passed its second TCJS inspection in April 2011, with

inspectors giving high marks to the jail system. “It is one of the best inspections we’ve had in 7 years!” remarked TCJS Assistant Director Shannon Herklotz, who said the jails had passed all standards in key areas such as medical care, staffing and sanitation.

The county’s jails also received a favorable inspection from the U.S. Dept. of Justice in September 2011, which was the last in a series of court-ordered inspections related to medical and mental health care.

Most recently, Dallas County’s jail system passed a TCJS inspection in March 2012, for the third time in a row. “I can’t say enough how clean this place was,” said Herklotz. “It’s definitely a model for a lot of people to look at.”

Of course it took a federal lawsuit, over \$100 million in improvements and seven years to reach that point, while thousands of prisoners were held in the county’s jails in conditions that repeatedly failed state inspections during that time period. ■

Sources: *Dallas Morning News*, [www.my-foxdfw.com](http://www.my-foxdfw.com), [www.wfaa.com](http://www.wfaa.com)

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# California Lifers: Deaths Exceed Parole Releases

by John E. Dannenberg

Between 2000 and 2010, 775 California lifers died in prison while 674 were granted parole. Those statistics, released by the California Department of Corrections and Rehabilitation (CDCR) pursuant to a public records request, reflect the grim reality that parole-eligible lifers are more likely to die in prison than to be granted release.

A good deal of the downward pressure on the number of lifer paroles, and the concomitant upward pressure on the number of deaths, can be attributed to two initiatives enacted by California voters. The first, in 1988, politicized the parole process by giving the governor unprecedented unilateral power to reverse grants of parole to life-sentenced prisoners. Between 1988 and 2010, all California governors have abused this power to reverse 75 to 99 percent of the few such grants of parole.

The second initiative, effective in 2009, tripled the intervals between parole hearings from a range of 1-5 years to a range of 3-15 years following an unfavorable parole decision, with a presumption of a 15-year delay until the next parole hearing unless a prisoner shows by "clear and convincing evidence" that he or she is deserving of a shorter interval. [See: *PLN*, May 2009, p.12].

Compounding these voter enactments is a 1996 legislative amendment to California's good-time credit laws which eliminated all such credits towards lifers' initial parole eligibility dates.

There are currently over 30,000 lifers in California's prison system, including approximately 17,000 with murder convictions who are eligible for parole. An estimated 7,000 are "three-strikes" lifers, many with third-strike offenses that were neither serious nor violent crimes. Lifers serving time for murder, whose sentences are either 15 to life (2nd degree murder) or 25 to life (1st degree) are serving an average of 24 to 27 years (and growing) before being paroled, assuming they are paroled at all.

This is in spite of the fact that of the 988 lifers who have been released in the past two decades, only 6 have reoffended by committing violent or serious crimes (none of which were murder or sex offenses).

However, the trend for California lifers could be changing. Under pressure from state courts that increasingly have been granting habeas petitions challenging denials of parole by the Board of

Parole Hearings (BPH) and reversals of parole grants by the governor, more lifers have been gaining their freedom.

The most recent BPH statistics show that lifers are being granted parole in about 10% of hearings. Further, recent (2011) statistics from the governor's office indicate that 82% of such grants of parole have been left untouched; that is, they have not been reversed by Governor Jerry Brown, unlike his predecessors.

The opposing forces of (a) political pressure to keep lifers in prison until they

die, and (b) economic pressures that might force pragmatic increases in parole grant rates for lifers, will likely continue to compete. One can only hope that the concept of "human dignity" for state prisoners, invoked by Justice Anthony Kennedy in the Supreme Court's decision in *Brown v. Plata*, will eventually infuse reason into the parole decision-making process for California lifers. ■

Sources: *California Department of Corrections and Rehabilitation*, [www.kalwnews.org](http://www.kalwnews.org)

## Michigan Sex Offender's Suicide Results in Changes to Sex Offender Registry Law

by Matt Clarke

When 17-year-old Justin Fawcett admitted to having consensual sex with a 14-year-old student at the same high school he attended in West Bloomfield, Michigan, he probably never thought that that youthful dalliance would lead to his death, but it did.

Justin and three other teens who separately had sex with the girl were prosecuted for felony criminal sexual conduct. They were allowed to plead guilty to a lesser charge of seduction, and told they would not be listed on the state's sex offender registry. However, a year after the plea deal, Justin was informed by his probation officer that he was going to be included on the registry after all.

Hounded by the public shame that he would be listed on the state's sex offender registry website for more than two decades, Justin despaired of ever having a normal life. Who would hire, or date, a registered sex offender? Despite his father's assurances that the registration law would eventually be changed, Justin saw no future ... no life for himself. Which led him to commit suicide when he was 20.

Seven years after Justin's parents found his body in his bedroom, dead from an overdose, they received a letter addressed to Justin from Michigan's Sex Offender and Registry Enforcement Unit. The letter indicated that his name would be excluded from the public part of the registry and he might be eligible to have it removed altogether.

One might view this as a typical

bureaucratic error except for the fact that Justin's parents, David and Gayle Fawcett, had become activists for reform of the state's sex offender registry statute following Justin's death, which became a focal point of their successful efforts to change the law. David Fawcett testified before the state legislature and his family's tragedy was the force that pushed through much-needed reforms.

When asked why Justin's name remained on the sex offender registry seven years after his death, state police spokeswoman Shanon Banner said that names are not removed unless a family member sends the registry enforcement unit a death certificate. She speculated that the Fawcetts had not done so. However, this puts the responsibility for keeping the registry current in the hands of citizens who have no obligation to take such action. Which is a questionable practice, as it is the responsibility of the state police to maintain the accuracy of the registry, not families of deceased sex offenders.

Including the names of people who are no longer living is not the only problem with Michigan's sex offender registry. The amendments to the state's sex offender registration law, enacted on July 1, 2011, removed Justin's name and the names of certain other offenders from the registry website, but also required each registered sex offender (RSO) to provide additional information. Such newly-required information included the phone numbers for any phones regularly used by the RSO, the



RSO's passport or immigration document numbers and a copy of any business or professional licenses held by the RSO.

The amendments also required RSOs to notify police within three days of any changes related to their name, address or employment; vehicle ownership or long-term use; school enrollment status; and email addresses and online identity, or if they intended to reside outside their homes for more than seven days. Failure to comply could result in arrest and imprisonment.

Each RSO in the registry, both living and dead, was sent a letter explaining the new requirements and informing them they had until July 15, 2011 to provide the newly-required information. The overwhelming majority of RSOs complied. However, police departments were not prepared for the flood of registered sex offenders seeking to update their registry details.

Meanwhile, the enforcement unit decided to flag every RSO in the state as "non-compliant" on the registry until their information was updated. This led to a flood of complaints from RSOs who had submitted their updated information in a timely manner, yet were nonetheless flagged as being "non-compliant" due to delays in having the information processed

by law enforcement officials.

"What's an employer supposed to think when he finds that the state police have publicly identified one of his workers as a non-compliant sex offender?" asked Oakland County attorney Cheryl Carpenter, after receiving phone calls from over a dozen RSOs who were concerned about the erroneous registry entries.

"We did underestimate the volume of information we had to process," Banner acknowledged. "We underestimated how well [RSOs] were going to carry out their new duties."

In other words, after state officials sent RSOs a letter threatening to put them in prison if they didn't provide updated information, they were surprised when most RSOs complied with that demand.

Still, Banner said it was good that errors – including deceased people listed in the sex offender registry – came to light as a result of the amendments to the registration law. Also, after receiving numerous complaints, the "non-compliant" status of RSOs whose updated information had not yet been processed was changed to "compliant."

"Obviously, the registry is only useful if the information listed there is accurate," Banner stated. "If anything positive comes

of this, it is that this process is cleaning up a number of problems." [See related article in the May 2012 issue of *PLN*, "Report Deconstructs Urban Legend of 100,000 Missing Sex Offenders"].

That may be so, but the clean-up is temporary and long overdue, and comes at a steep price – Justin Fawcett's needless suicide, which was the impetus for the changes to the state's sex offender registration law. ■

Sources: *Detroit Free Press*, [www.abcnews.go.com](http://www.abcnews.go.com)



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# Background Checks that Bar Employment of Ex-offenders May Violate Civil Rights

A report by the National Employment Law Project (NELP) released in March 2011 concluded that the growth in background checks by employers, combined with a lack of enforcement of civil rights and consumer protections for an estimated 65 million people with criminal records, subjects ex-offenders to a lifetime of social and economic disadvantage. In response to such concerns, the U.S. Equal Employment Opportunity Commission (EEOC) issued new background check guidelines in April 2012.

The NELP report begins by pointing out that as background checks have become more popular and inexpensive, “the share of the U.S. population with criminal records has soared to over one in four adults.” A 2010 survey by the Society of Human Resources Management, the largest association of human resources personnel in the nation, found that 92 percent of their members – mostly large employers – perform background checks on some or all job candidates.

“Across the nation there is a consistent theme: people with criminal records ‘need not apply’ for available jobs,” the NELP report states. The report lists companies that impose overbroad background checks, including Bank of America, Aramark, Lowes, Accenture, Domino’s Pizza, Adecco USA, Burlington Northern Santa Fe Railroad Co., RadioShack and Omni Hotels.

Although many companies require background checks for the purpose of determining the safety or security risk of a prospective employee, the existence of a criminal record as a predictor of negative work performance is debatable.

Ensuring that all workers have job opportunities is a matter of public concern, and is critical for the struggling economy. Studies show that ex-offenders who have stable employment have lower recidivism rates. Moreover, “[n]o healthy economy can sustain such a large and growing population of unemployable workers, especially in those communities already hit by joblessness,” the NELP report notes.

“Stable employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole,” said Hilda L. Solis, Secretary of the U.S. Department of Labor.

Yet even getting a job interview can be tough for those with the stigma of a criminal record. One prominent researcher found that reporting a past conviction on a job application “reduces the likelihood of a job callback or offer by nearly 50 percent, an effect even more pronounced for African American men than for white men.”

Using arrest and conviction records to screen potential employees invites scrutiny under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, gender, national origin and other protected categories. In 1987 the EEOC issued policy guidelines which recognized that barring job applicants who have criminal records “disproportionately excludes African Americans and Latinos because they are overrepresented in the criminal justice system.”

To pass muster under Title VII, the EEOC required employers to make an individual assessment of 1) the nature and gravity of the applicant’s offense or offenses, 2) the time that has passed since the conviction and/or completion of sentence, and 3) the nature of the job position held or sought.

Yet as a 2010 lawsuit against Accenture alleged, many companies “reject[] job applicants and terminate[] employees with criminal records, even where the criminal history ... has no bearing on the ... fitness or ability to perform the job.” See: *Arroyo v. Accenture, LLP*, U.S.D.C. (S.D. NY), Case No. 1:10-cv-03013.

Additionally, background check companies are using software that systemically excludes people with criminal records.

“ChoicePoint, which accounts for an estimated 20 percent of the U.S. background check industry conducting more than 10 million annually, played an integral role in designing and implementing” RadioShack’s policy of excluding job applicants “convicted of a felony in the past 7 years,” by creating “an online application system that automatically dismissed anyone who self-disclosed a criminal record history.”

The NELP report argues that not only do such overbroad criminal background checks constitute civil rights violations, they also disadvantage employers by artificially limiting the pool of job candidates, because they eliminate qualified persons whose “crim-

inal record empirically may be shown to be irrelevant as a factor in a hiring decision.”

The report cites a major study of people with felony convictions which found that 18-year-olds arrested for burglary had the same risk of being arrested again as same-aged persons with no criminal record after 3.8 years had passed since their first arrest (for aggravated assault it was 4.3 years, while for robbery it was 7.7 years).

A “criminal record can be a blunt, misleading tool” in determining the risk a worker poses on the job. A criminal record is difficult to interpret, as it can include arrests for which there was an acquittal or dismissal of the charges. Commercial background checks may contain inaccuracies; even the FBI’s checks are out of date 50 percent of the time.

According to the EEOC, “an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.” Lawsuits challenging such exclusionary employment practices have seen a resurgence in the past several years; for example, at least five major civil rights actions were filed in 2010 against large employers.

Still, criminal background checks continue to be widely used to exclude people from work. NELP conducted a survey of Craigslist, a website that offers free classified ads in approximately 400 geographic areas in the United States. Craigslist receives over one million new job ads per month. The survey found four categories for employers’ no-hire policies: 1) no arrests/clean or clear records, 2) no felony or misdemeanor convictions, 3) no felony convictions, and 4) no convictions within a specified time frame. These hiring policies were listed by anonymous employers, large companies and staffing firms.

The Craigslist survey indicates that the threat of litigation has not changed the widespread practice of excluding job applicants based solely on criminal records.

The NELP report makes several recommendations. The first is for the federal government to enforce civil rights and consumer protection laws that apply to criminal background checks for employment in both the public and private sectors. The federal government should also be a model for employers by adopting fair hiring policies in federal employment and contracting.

Next, state and local governments should certify that their hiring policies comply with federal civil rights standards, and should launch employer outreach and education campaigns. Finally, the employer community needs to assume a leadership role to meet the mutual interests of job applicants and the employers seeking to hire them, in terms of implementing fairer policies related to criminal background checks.

On April 25, 2012, the EEOC released new guidelines on criminal background checks to help employers comply with Title VII when refusing to hire people with criminal records, since minorities are over-represented among ex-offenders. "The ability of African-Americans and Hispanics to gain employment after prison is one of the paramount civil justice issues of our time," stated Stuart Ishimaru, one of the EEOC Commissioners.

PLN had submitted formal comments to the EEOC following a July 2011 meeting in which the Commission addressed the issue of employment barriers for ex-offenders; that meeting resulted in the release of the new guidelines. [See: *PLN*, Sept. 2011, p.32].

The updated guidelines recommend

that employers give applicants an opportunity to explain their criminal records rather than reject them automatically. This will let ex-offenders point out any inaccuracies in the background check, such as dismissed charges, and try to convince a prospective employer that they are rehabilitated. In some cases, they can explain that businesses that hire certain former prisoners may qualify for the Work Opportunity Tax Credit.


The EEOC also recommends that employers not ask about arrest histories on job applications, since arrests are not tantamount to convictions. While the guidelines are not mandatory, and although a felony conviction does not constitute a "protected class" for purposes of job discrimination, the guidelines provide a framework that businesses use in order to comply with federal anti-discrimination laws based on race, national origin and other applicable factors.

"For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record," according

to the EEOC.

"The new guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders," said EEOC Chair Jacqueline A. Berrien. ■

Sources: "65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment," *National Employment Law Project* (March 2011); *Associated Press*; EEOC press release (April 25, 2012)



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# Hawaii ACLU Files Suit on Behalf of Women Who Want to Marry Prisoners

by Alex Friedmann

On May 15, 2012, the ACLU of Hawaii filed a lawsuit in federal court accusing the state Department of Public Safety (DPS) of unlawful discrimination by prohibiting four women from marrying Hawaii prisoners housed at a mainland facility.

According to the complaint, the women submitted multiple applications to wed their fiancés, who were incarcerated at the CCA-operated Saguaro Correctional Facility in Eloy, Arizona. Their applications were denied. State officials sent form letters to the prisoners, informing them that “[a]s a Ward of the State incarcerated in a correctional facility, you are incapable of providing the necessary emotional, financial and physical support that every marriage needs in order to succeed.”

The letters also stated, “We believe that a healthy relationship effort (marriage) established at this time while you are in prison and unable to work and communicate effectively face-to-face with your fiancée will be detrimental to any future re-integrative efforts.” Which is fairly ironic: First the DPS ships Hawaii prisoners to a distant mainland prison, then denies them the right to marry because they cannot “communicate effectively face-to-face” with their would-be spouse who remains in Hawaii.

The U.S. Supreme Court held 25 years ago that prison officials may not prohibit prisoners from marrying absent a legitimate penological reason. In that case, prisoners wanting to marry had to obtain permission from the warden, which was rarely granted. The Supreme Court found there is “a constitutionally protected marital relationship in the prison context,” and that “where the inmate wishes to marry a civilian, the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one.” See: *Turner v. Safley*, 482 U.S. 78, 96-98 (1987).

“We just want to get married because we love each other. We’ve been trying for years. We gave up on the system, but we never gave up on each other,” said Lenora Santos, one of the plaintiffs in the ACLU suit. The other plaintiffs include Junell Faith Aliviado, Jamiqia Glass and Margaret Amina.

The ACLU had previously communicated with DPS officials regarding denials of marriage applications, and DPS agreed to make changes. The department issued

a revised policy on marriage applications in June 2011 that stated prisoners’ right to marry could be restricted when “the proposed marriage presents a threat to the security or the good government of the institution or to the protection of the public.” However, prison officials reportedly continued to deny marriage applications using the same form letter, plus other contrived justifications for the denials.

“The Constitution prohibits government officials from imposing their morals and judgment on others,” said ACLU senior staff attorney Daniel Gluck. “DPS’s practices are not only illegal – they hinder prisoners from developing committed relationships that can help their rehabilitation and improve their chances of being productive when they complete their

sentences and re-enter society.”

The ACLU is seeking a preliminary injunction to “compel Defendants to cease interfering with Plaintiffs’ fundamental right to marry ...,” because the “Defendants’ ongoing and persistent violations of Plaintiffs’ constitutional rights have caused, and continue to cause, irreparable injury to Plaintiffs.”

The lawsuit seeks declaratory and injunctive relief, attorney fees and costs, and monetary damages for emotional distress, psychological harm, humiliation, and pain and suffering. See: *Santos v. Kimoto*, U.S.D.C. (D. Hawaii), Case No. 1:12-cv-00259-SOM-BMK. ■

Additional sources: *ACLU of Hawaii press release*, *Star Advertiser*

## Class-Action Settlement Cures Constitutional Violations at Pennsylvania Prison

A settlement has been reached in a class-action lawsuit challenging conditions at Pennsylvania’s Northumberland County Prison (NCP). Since the suit was filed in February 2008 on behalf of 12 prisoners by the Lewisburg Prison Project, NCP officials had disputed claims that the 134-year-old facility was unsafe and failed to provide adequate medical care.

The parties concluded that a settlement would be the best result and the County Commissioners approved a settlement agreement, arrived at following adversarial negotiations, in October 2010. The class received notice of the proposed settlement in February 2011, which was approved by the district court on April 29, 2011.

The first issue addressed in the 37-page settlement is the provision of medical and dental care. Under the agreement, a physician, physician assistant or certified nurse practitioner must be on site at NCP at least six hours per week when the average daily population is below 200 prisoners, and seven hours a week when the population exceeds 201 prisoners for six consecutive months. Medical personnel must also be on call seven days a week, 24 hours a day for emergencies.

A full-time registered nurse is to be on duty 40 hours per week, as well as a licensed practical nurse seven days a week for the first two work shifts. Newly

admitted prisoners are to receive an intake medical screening within 24 hours of admission. A mental health screening and suicide risk assessment must be conducted at the time of the medical screening, and a physical health assessment and mental health evaluation will be conducted within 14 days of arrival at NCP.

The agreement also requires a psychiatrist to be available four hours per week when the population is under 200 and five hours a week when it exceeds 201 for six consecutive months. This requirement may be satisfied via a telemedicine service. A full-time healthcare professional with at least a bachelor’s degree will be available at NCP for 40 hours per week. Sick call will be held for general population prisoners three times a week and for segregation prisoners weekly.

The intake screening must include a dental component. An “extraction only” policy for dental care is prohibited, nor may multiple cycles of antibiotics and/or pain medications for dental abscesses and other dental problems associated with infections or pain be routinely prescribed by a non-dental professional.

The settlement includes provisions for confidential sick call settings, prescriptions and distribution of medications, maintenance of written policies and protocols related to the provision of

medical care, handling of medical records, and a requirement for a sanitary, well-lit examination room and infirmary at the facility. Dental care can be provided on- or off-site.

To fulfill the provisions for medical and psychiatric services, NCP contracted with Prime Care Medical, Inc. The contract costs \$650,000 annually and NCP added on-site dental services for \$3,756 per month.

The settlement agreement also addresses conditions for prisoners in "Basement cells" and "Cell 3." Prisoners may not be mechanically restrained in those segregation cells for the purpose of punishment. No more than two prisoners may be housed in each cell unless a documented emergency situation exists. Such prisoners must be provided an opportunity to shower three times weekly and shall receive clothing, bedding and a blanket unless they pose a risk of suicide, in which case they will get a smock to wear and suicide-proof blankets. Segregated prisoners are to receive one hour of out-of-cell recreation five times a week.

In addition to provisions concerning care by nurses and mental health staff for prisoners in segregation cells, the agreement requires guards to factually describe the prisoners' behavior every 30 minutes. In the event guards have to physically extract a prisoner from a cell, the incident must be videotaped with the video maintained for two years. Finally, guards must turn the water on in segregation cells or take a prisoner to a working sink or toilet within a reasonable amount of time upon request.

The use of four-point restraints and restraint chairs is also covered by the settlement. Such restraints "may only be used when other control techniques such as officer presence, verbal commands,

and soft hands have not been effective." Prisoners placed in restraint chairs or four-points must be evaluated by a nurse every four hours and by the shift commander every two hours.

As to general conditions at NCP, air temperature units to reduce heat and humidity in warm months and a heater for cold months must be installed. An outside exterminator is to treat the prison, and standpipes for fire safety are to be installed. A maximum of 28 prisoners may be housed in the female dormitory and no more than 12 prisoners in the trustee unit.

The agreement provides for a 15-month monitoring period, which includes inspections and document reviews by class counsel. The Pennsylvania Institutional Law Project was awarded \$300,000 in attorney fees and costs – substantially less than half the amount incurred. "We didn't do it for the fees," said Jennifer Tobin, an attorney with the Law Project. Meanwhile, the county spent about \$500,000 on its own legal fees.

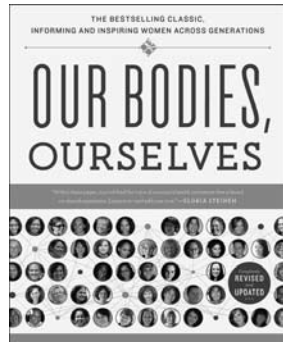
The county attorney acknowledged the settlement was a positive step. "In the beginning there was no real enthusiasm to fix the conditions," said Robert Hamma of Lavery, Faherty, Young & Patterson. But the settlement "brings the county prison up to par. It brings it up to constitutional and state Department of Corrections standards."

Indeed, when approving the agreement the district court noted, "[T]his settlement will chart a course that resolves myriad substantial problems that have existed for far too long within the Northumberland County Prison." See: *Inmates of the Northumberland County Prison v. Reish*, U.S.D.C. (M.D. Penn.), Case No. 4:08-cv-00345-JEJ. ■

Additional source: *The Daily Item*



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# Guard Who Identified Over 100 Prison Rioters Pleads Guilty to Contraband Charge

A Kentucky prison guard who identified more than 100 prisoners who allegedly participated in a 2009 riot was later arrested for bringing contraband into the same facility where the riot occurred. *PLN* previously reported on the riot at the Northpoint Training Center, which resulted in the destruction of numerous buildings and injuries to eight prisoners and eight guards. [See: *PLN*, April 2010, p.10; Oct. 2009, p.40].

Following the August 21, 2009 riot at Northpoint, guards identified over 170 prisoners who took part in the disturbance. Prison guard Jesus Cabrera, 38, identified 124 of those prisoners, including six of ten who were criminally charged.

However, Cabrera's own July 28, 2010 arrest for introducing 12 Diazepam (AKA Valium) pills – used for anxiety relief and as a muscle relaxer – into the facility put his credibility into question. "I'm very concerned that an officer who claims to have identified over 100 inmates in this event has, within a matter of months, himself been charged," said attorney Theodore Shouse, who represents prisoner Aaron Fisk. "It clearly causes anyone to doubt his credibility."

Fisk contends he did not participate in the riot, but faces charges of first-degree arson, first-degree riot and being a persistent felony offender. Cabrera identified Fisk as having taken part in the disturbance.

"It's concerning that someone who is, in some cases, the only witness against someone, has also been arrested himself and charged with a crime," said public defender Stacy Countz, who represents two prisoners charged in the Northpoint riot.

A September 8, 2009 report by Kentucky State Police detective Monte Owens said Cabrera was working in the visitation room when the riot began. He responded to a call of a fire in a dormitory and helped evacuate prisoners. He then moved about the yard. Eventually, other prisoners and Cabrera were chased by prisoners involved in the riot. One of them, Kurt Smith, pleaded guilty to first-degree riot and third-degree assault for hitting Cabrera on the chin with a piece of concrete. Smith received concurrent five-year sentences.

Once the riot was quelled, "Cabrera was able to provide an extensive list of inmates involved in the riot and their ac-

tions," the report stated. "Cabrera advised that he knew many of the inmates. When the yard was secured, Cabrera sat down and made notes of what he saw and their actions. He also used the institution mug book to identify those whose names he did not know."

Even before Cabrera's arrest for smuggling the Diazepam pills, prisoners' families and friends challenged the veracity of his identifications. One family member, Suzette Raybeck, said DOC officials should "stand up, admit that our loved ones were unjustly punished – physically, mentally and emotionally – and we want reparation for the harms done to them." That, of course, is unlikely to happen.

The DA who is prosecuting prisoners charged with participating in the Northpoint riot said he no longer intended to call Cabrera as a witness. "I have no plans to use him. We have no cases un-

der indictment that depend only on his testimony," remarked Commonwealth Attorney Richie Bottoms, who noted that Cabrera's own criminal charges "complicated things."

Cabrera pleaded guilty on November 3, 2011 to first-degree promoting contraband, in exchange for a recommendation that he receive a one-year jail sentence. He had been fired by the Kentucky DOC following his arrest. Upon being sentenced in January 2012, he received five years' probation.

Some of the prisoners charged in connection with the Northpoint riot did not fare as well. On January 3, 2012, for example, prisoner Newell Stacy, 40, was sentenced to an additional 20 years for rioting. ■

Sources: *Lexington Herald-Leader*, [www.kentucky.com](http://www.kentucky.com), [www.centrankynews.com](http://www.centrankynews.com)

## Wrongful Convictions Prove Costly, Especially for the Wrongly Convicted

by Matt Clarke

On June 6, 2011, the Better Government Association (BGA) and the Center on Wrongful Convictions (CWC) at Northwestern University School of Law released a joint report on the cost of wrongful convictions. The report, which examined 85 wrongful convictions in Illinois since the advent of modern DNA testing in 1989, is the first study to examine the economic and societal costs of convicting the innocent.

The people who paid the highest price for wrongful convictions were the 83 men and 2 women who spent a total of 926 years in prison for crimes they did not commit. Some have received varying amounts of monetary compensation for the loss of years of their lives, but others struggle to find work and many suffer from chronic physical and mental illness. None said they felt whole after being released.

"The anger never goes away," remarked Alton Logan, who served 26 years in prison after being wrongly convicted of homicide. His case was overturned in 2009 only because the man who actually committed the murder, a convicted cop killer,

gave his lawyer a sworn confession which the attorney was prevented from making public until he was released from attorney-client privilege by the man's death.

Logan received \$40,000 in compensation from the Illinois Court of Claims – about \$30 per week of incarceration. He also filed a federal lawsuit against Chicago police officials, including former police Lt. Jon Burge, who is serving a 4½-year sentence for lying about torturing suspects into giving confessions. Logan's suit remains pending, with the district court granting in part and denying in part the defendants' motion for summary judgment in April 2012. See: *Logan v. Burge*, U.S.D.C. (N.D. Ill.), Case No. 1:09-cv-05471.

In another federal lawsuit, Jerry Miller, an honorably discharged Army veteran wrongfully convicted of rape, robbery and assault who spent 25 years in prison, received a \$6.3 million settlement in 2010. See: *Miller v. Lenz*, U.S.D.C. (N.D. Ill.), Case No. 1:08-cv-00773.

Miller alleged that the Chicago police crime lab had withheld evidence that



would have cleared him; he was convicted based largely on mistaken eyewitness identification. Miller served his entire sentence and was cleared by DNA testing while on parole. His case was the 200th exoneration in the nation based on DNA evidence and the 27th in Illinois, according to the Innocence Project.

The cost of compensation – including settlements and awards in lawsuits filed by the wrongly convicted – is an expense that taxpayers must pay. The BGA/CWC study reported over \$164 million in payments in the 85 wrongful conviction cases examined, plus \$31.6 million in attorney fees. Additionally, taxpayers had to foot \$18.5 million in incarceration costs for locking up people who were later exonerated. Thus, the total price tag for the wrongful conviction cases was estimated at \$214 million, though the actual cost may reach \$300 million after 16 pending lawsuits are resolved, including Logan's.

High as the monetary costs may be, there are people who pay an even higher price for wrongful convictions – the victims of subsequent crimes committed by the actual perpetrators. After all, when someone is wrongly convicted, the real criminal remains free to commit more

crimes. The BGA/CWC study reported that the actual perpetrators in some of the wrongful conviction cases (who were identified based on the same DNA evidence used to exonerate the innocent) went on to commit at least 94 felonies, including 11 sexual assaults and 14 murders.

"These numbers are dramatically high," said Thomas P. Sullivan, a former U.S. Attorney who chaired the Illinois Capital Punishment Reform Study Committee. "If they are correct, or anywhere near correct, it certainly is another indication of why special care is needed in these prosecutions to avoid convicting someone who is innocent and failing to convict someone who is guilty."

Yet police officials, prosecutors and the state's own experts were largely responsible for the wrongful convictions. According to the BGA/CWC report, misconduct or errors by public officials contributed to 81 of the 85 wrongful convictions. The study found misconduct or mistakes by police in 66 cases, by prosecutors in 44 cases and by the prosecution's forensic experts in 29 cases (more than one type of misconduct or error may have occurred in each case).

Cook County Judge Tommy Brewer

noted that such misconduct "remind[s] us that what we call the criminal justice system is often anything but just. And to the extent justice is lacking in our criminal justice system, it is not because of human frailties but often the deliberate malfeasance of those we entrust to run the system."

The BGA/CWC report noted that in many of the cases, the actual perpetrator was never investigated even when the police had clues to his identity. One possible reason for this was a fear by police officials that investigating the actual perpetrator after a wrongful conviction had been discovered could reveal evidence of police incompetence or misconduct that would prove damaging in subsequent lawsuits.

The BGA/CWC study recommended banning testimony by jailhouse informants, videotaping all interrogations related to violent crimes, reforming lineup procedures to reduce errors and increasing the transparency of investigations into police abuses as ways to help prevent future wrongful convictions. ■

Sources: *New York Times*, *Chicago Tribune*, [www.chicagonewscoop.org](http://www.chicagonewscoop.org), [www.bettergov.org](http://www.bettergov.org)

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# Oregon Increases Sex Offender Registration Requirements

The State of Oregon posts online, in a publicly-accessible registry, information related to around 700 “predatory” or sexually violent sex offenders. A bill introduced in the state legislature in 2011 would have increased the number of sex offenders listed online to more than 14,000. That legislation failed to pass, but another bill, which expanded certain sex offender registration requirements, did.

There are nearly 18,000 convicted sex offenders living in Oregon at any given time. About 3,100 are juvenile offenders. All must register with the state, but less than four percent currently have their information posted on the website of the Oregon State Police (OSP).

That would have changed under Senate Bill 67 (2011 session). According to SB 67, the OSP could post information on the Internet about all of the state’s registered sex offenders, whether they are on active supervision or not and whether or not they are classified as predatory or violent.

For adult offenders who are not designated predatory, SB 67 would have allowed the OSP to post their name, date of birth, city of residence, zip code, physical description, a contact name and telephone number at the supervising agency, and the name of any higher education institutions where the offender may be working or attending classes. Online information about juvenile sex offenders would not include a physical description or photo, and only a birth year would be listed.

The intent of SB 67 was to make information about all registered sex offenders publicly available by city, county or zip code, according to OSP Registry Manager Vi Beaty. However, unlike predatory sex offender information, which is mapped within a 1-mile radius of their registered address, the postings for non-predatory sex offenders would not be made available in map form.

“The public can pull their own lists,” said Beaty. But if they want more specific information about a particular non-predatory offender, they would need to call the OSP and provide a public safety justification for their request.

SB 67 was referred to a committee upon adjournment of the Oregon legislature in June 2011, and did not pass. Similar legislation will likely be introduced in the future.

Another bill related to sex offender

registration requirements in Oregon did pass, however. House Bill 3204 (2011 session) requires sex offenders to register in Oregon if they were convicted of a sex offense in a different state and are required to register in that state. Further, sex offenders who do not reside in Oregon, but who work or attend school in the state, also have to register.

Sex offenders must register within 10 days following their “discharge, release on parole, post-prison supervision or other supervised or conditional release”; within 10 days of a change of residence; annually within 10 days of their birth date; and within 10 days of working at or attending an institution of higher learning, or of a change in work

or attendance status at an institution of higher learning.

HB 3204 also created an affirmative defense to a charge of failure to report or register as a sex offender: If the person “reported, in person, within 10 days of a change of residence to the Department of State Police, a city police department or a county sheriff’s office, in the county of the person’s new residence,” provided that they have “otherwise complied with all reporting requirements.”

HB 3204 was signed into law by Governor John Kitzhaber on August 2, 2011, and went into effect the same day. ■

Sources: *The Statesman Journal*, [www.katu.com](http://www.katu.com), [www.leg.state.or.us](http://www.leg.state.or.us)

## Washington Prison Video Surveillance Recordings Exempt from Disclosure Under Public Records Act

by Mike Brodheim

In an unpublished opinion, the Court of Appeals of the State of Washington affirmed a trial court’s order dismissing an action filed by a state prisoner who alleged that the Department of Corrections (DOC) had violated the Public Records Act (PRA) when it refused to release prison surveillance video recordings. In so doing, the appellate court held the DOC had established that the recordings included intelligence information that was essential to effective law enforcement, and therefore were statutorily exempt from disclosure.

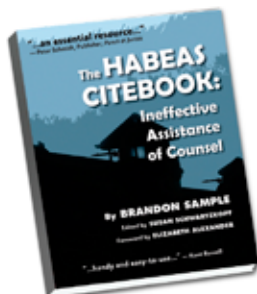
Through counsel, Frederick Fischer, a state prisoner confined at the Monroe Correctional Complex, submitted a request under the PRA for copies of surveillance video recordings which purportedly showed that he had been assaulted in the prison law library on November 20, 2007. Why Fischer needed the video footage was not reported. After the DOC denied his PRA request, Fischer filed for relief in state court, which took evidence at a show cause hearing in October 2009 and then dismissed the action.

On appeal, the appellate court noted that, upon request, public records must be disclosed unless specifically exempted by statute. It further noted that RCW 42.56.240(1) exempted from disclosure

intelligence information gathered by law enforcement agencies if disclosure of such information would compromise effective law enforcement activities. Fischer contended that the specific recordings he had requested were not exempt under that provision because the monitor on which the recordings were displayed could be viewed in “real time” by prisoners in the library, and hence were not “essential to effective law enforcement.”

The Court of Appeals rejected Fischer’s argument. The Court noted that “real-time images do not reveal which cameras are [actually] recording, the hours of recording, the resolution and field of view of recording cameras, or staff members’ ability to control specific cameras.” Nor do such images reveal “which cameras are not being actively monitored, the location of hidden cameras, which cameras are not working, or which camera housings are empty.”

“Concealment of the full recording capabilities of [the DOC’s video surveillance] systems,” the appellate court concluded, “is critical to its effectiveness.” See: *Fischer v. Washington State Dept. of Corrections*, 159 Wash.App. 1039 (Wash. App. Div.1 2011); 2011 WL 300253, *review denied*. ■



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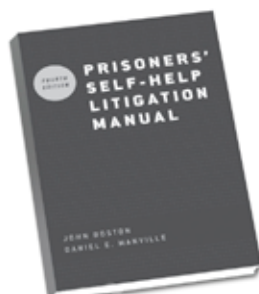


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# Florida Closes Oldest Boy's School, Best Known for Abusive Past

Despite a reputation for brutality, the Arthur G. Dozier School for Boys in Marianna, Florida remained in operation until budget cuts forced its closure in June 2011. The facility, which opened in 1900 as the Florida State Reform School, housed youthful offenders ages 13 to 21. While the public came to know the school for abuses inflicted on young prisoners at the facility, the 50,000 residents of Jackson County, located in a rural area of the panhandle, viewed it as an economic engine that drove their community.

Four years ago the state placed a plaque in front of the Dozier School that acknowledged its dark history. During the 1950s and early 1960s, staff members would beat boys in a small building known as the White House. Offenses as minor as having a "bad attitude" or talking to black prisoners at the segregated facility would result in employees hitting youths up to dozens of times with a three-foot leather strap, often leaving them bloodied and bruised. Boys were forced to lie on a blood- and urine-stained cot while they

were beaten, and an industrial fan was turned on to drown out their screams. There were also accusations of rape and sexual abuse by school officials.

Further, it was initially alleged that 31 graves on the school grounds contained bodies of young prisoners who had died as a result of abuse at the facility; however, the Florida Department of Law Enforcement investigated and found no evidence supporting that claim. [See: *PLN*, March 2009, p.22].

"There's been 111 years of child abuse at this place," said Bryant Middleton, 66, who was held at the school in the 1960s. Middleton and other men who served time at the facility filed an unsuccessful class-action lawsuit over abuses at the Dozier School, which was dismissed in 2010. See: *Middleton v. Florida Dept. of Agriculture*, Circuit Court for Leon County (FL), Case No. 37 2010 CA 000001.

State Senator Mike Fasano has since introduced several claims bills seeking compensation for victims abused at the school, but the bills failed to pass, most recently in March 2012 at the close of the legislative session.

In a deposition, former Dozier School administrator Troy Tidwell acknowledged that he disciplined boys with a leather strap in the White House, but argued they were "spankings" that did not constitute abuse. In defending his actions he said, "I just did what I was told to do."

Supporters of the school claimed it later changed its direction and treatment of young prisoners. "The employees that were there now, the administration that was there now, were working hard to help those residents better themselves and return home," said state Representative Marti Coley. "I visited and was pleased with what I saw."

In recent years the population at Dozier, which was renamed the North Florida Youth Development Center, dwindled from several hundred to around 90. Less costly facilities that are better able to handle such small populations made the school's closure inevitable. "It's old," said Coley. "They showed me the numbers after they made their announcement and it is costly to maintain."

When the school shut its doors in June 2011 almost 200 employees were put out of work, which made a significant

dent in the local economy. Several family generations had spent their working lives at the facility.

As a final nail in the Dozier School's coffin, on December 2, 2011 the Civil Rights Division of the U.S. Department of Justice (DOJ) released a report that criticized state officials for failing to protect residents at the school and at other state juvenile facilities. The report found that staff members used excessive force and imposed excessive discipline for minor infractions; that staff lacked appropriate training; that juveniles did not receive appropriate rehabilitative services; and that youths were subject to unconstitutional frisk searches.

"Although Dozier and JJOC [the Jackson Juvenile Offender Center on Dozier's campus] are now shuttered, these problems persist due to the weaknesses in the state's oversight system and from a correspondent lack of training and supervision," the report stated. "Our findings remain relevant to the conditions of confinement for the youth confined in Florida's remaining juvenile justice facilities."

The DOJ report found "reasonable cause to believe that the state of Florida was engaged in a pattern or practice of failing to have proper measures of accountability that led to serious deficiencies" in its juvenile justice system.

C.J. Drake, a spokesman for the Florida Department of Juvenile Justice, said the state had taken action to address the problems identified in the DOJ report. "The issues at Dozier occurred long before this administration took office and it was this administration that closed that facility," he noted. "We ... do not tolerate misconduct or poor performance. If we identify it we seek to correct it, and if it's not corrected it's closed."

In addition to the Dozier School, the Hillsborough Juvenile Detention Center East in Tampa, the Osceola Juvenile Detention Center in Kissimmee, the Desoto Juvenile Correctional Facility in Arcadia and the Seminole Juvenile Detention Center in Sanford were closed in 2011 due to budget cuts. ■

Sources: *Associated Press*, *Orlando Sentinel*, *CNN*, [www.tampabay.com](http://www.tampabay.com), <http://thewhitehouseboys.com>

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# The Yale Law Journal

## PRISON LAW WRITING CONTEST

*The Yale Law Journal* welcomes submissions for our first Prison Law Writing Contest. If you are or recently have been in jail or prison, we invite you to write a short essay about your experiences with the law. The three top submissions will win cash prizes, and we hope to publish the best work.

### 1. *Background*

The *Journal* is one of the world's most respected and widely read scholarly publications about the law. Our authors and readers include law professors and students, practicing attorneys, and judges. The Contest offers people in prison the chance to share their stories with people who shape the law and to explain how the law affects their lives. Where permitted by state law, the authors of the winning essays will receive prizes: \$250 for first place, \$100 for second place, and \$50 for third place.

### 2. *Topics*

Please write an essay addressing **one** of the following questions:

- What does fair treatment look like in prison?
- How does your institution deal with inmates who are violent or disruptive? Are people sent to solitary confinement? Is the disciplinary system fair, and does it help to maintain order?
- Tell us about a notable or surprising experience you've had with another person in the legal system—whether a judge, a lawyer, a guard, or anyone else. What did you learn from it?
- The goals of criminal punishment include retribution (giving people what they deserve), deterrence (discouraging future crimes) and rehabilitation (improving behavior). What purpose, if any, has your time in prison served? Should one of these purposes be emphasized more?
- Have you ever filed a grievance with jail or prison authorities to complain about conditions? Tell us about it, and explain how the grievance process works. Are grievances effective? How do prison authorities respond to them? How do you feel about federal law's requirement that prisoners file grievances before suing about prison conditions in court?
- If you have been released from prison, what challenges did you face in reentering society?
- How, if at all, do you maintain relationships with your family while in prison? Describe the prison rules that govern how much contact you can have with your family. How has being in prison affected your family relationships?

Please do **not** discuss your innocence or guilt or ask for legal assistance with your case. Submissions are **not** confidential. Whatever you write will not be protected by attorney-client privilege. If you have an attorney, please speak with your attorney before submitting your work.

### 3. *Rules*

You may submit an essay if you have been an inmate in a prison or jail at any point from January 1, 2010, through September 30, 2012. We welcome essays of about 1000-5000 words, or roughly 4-20 pages. Please type your submission if possible. If you must write by hand, please be sure your writing is readable. Feel free to work together with others, but your essay should be in your own voice.

Essays must be received by **October 1, 2012**. Email your submission to [YLJprisonlaw@gmail.com](mailto:YLJprisonlaw@gmail.com) if possible. If you do not have email access, please mail your work to: The Yale Law Journal, ATTN: Prison Law, P.O. Box 208215, New Haven, CT 06520-8215. Please include your name and the name of the institution where you are or were imprisoned, and tell us the best way to reach you now.



# Federal Investigation, Prosecution Targets Indiana Sheriff's Officers

by Derek Gilna

Several Lake County, Indiana Sheriff's Department employees were the subject of a federal investigation into a gun-running scheme that resulted in criminal charges.

Lake County Sheriff John Buncich placed six staff members on administrative leave and stripped them of their law enforcement powers in May 2011 after they were served with subpoenas in the investigation. Those employees were Lt. Michael Reilly, Sgt. Joseph R. Kumstar, Capt. Marco Kuyachich and officers Ronald D. Slusser, Edward O. Kabella and Scott Shelhart.

The federal investigation culminated in the September 23, 2011 indictments of Kumstar, Kabella and Slusser on charges that they used their positions with the Sheriff's Department to buy and sell fully automatic machine guns for personal profit. Kumstar was a former deputy chief, while Slusser was a SWAT officer; both Slusser and Kabella had federal firearms licenses. All three were charged with conspiring to provide false information to a federal firearms licensee, conspiring to defraud an agency of the United States and making false statements under oath on a tax return.

Kumstar, Kabella and Slusser were accused of ordering dozens of machine guns and laser sights from firearms manufacturers, such as H&K, by claiming they were for law enforcement use by the Sheriff's Department. Instead, they sold parts from the guns online for tens of thousands of dollars. Although Kumstar, Kabella and Slusser used county letterhead and purchase orders to obtain the weapons, they apparently paid for them using their own funds.

Kuyachich stated in a letter to the Sheriff's Department that he was subpoenaed as a witness in the investigation, not as a suspect. Shelhart was cleared and reinstated to active duty in October 2011.

Kumstar, Kabella and Slusser agreed to plead guilty to the federal charges in September and October 2011, and resigned. They have not yet been sentenced. See: *United States v. Kabella*, U.S.D.C. (N.D. Ind.), Case No 2:11-cr-00134-JVB-PRC. The federal investigation included the FBI, IRS, ATF, Department of Defense and the FDA, which regulates laser devices.

It was initially thought the investigation involved the Sheriff's Department's discretionary fund, which might have been used to buy the weapons in the gun-running scheme. Under Indiana state law, a sheriff has sole discretion on how to spend profits from jail commissary and telephone funds, though he is required to submit reports regarding the fund to the county council twice per year.

According to former councilman and county financial consultant Larry Blachard, the Lake County Sheriff's Department has not complied with the law. "We never received any reports. I can't really say what was purchased was good or bad because I really don't know. When I was on the council, my own feelings were that they were tax dollars.... The majority of council [members] thought the law should be changed a little, so there's some oversight by the fiscal body."

Lt. Reilly and Sgt. Kumstar were reportedly in charge of discretionary fund

audits that were criticized by the State Board of Auditors. State audits dating back to 2004 cited the department's failure to provide accurate statements for the discretionary fund. In 2009, the auditors noted that "No individual in the Sheriff's Department appears to have the responsibility of monitoring the fiscal activity or record keeping for the Sheriff's Department." However, there was no evidence that the discretionary fund was used to purchase the guns that Kumstar, Kabella and Slusser bought and sold.

Accountability problems with the Lake County Sheriff's Department's discretionary fund are apparently longstanding. During his previous term as sheriff in the 1990s, Sheriff Buncich was criticized for spending jail commissary funds on everything from steak dinners to conferences in Miami and Las Vegas. ■

Sources: [www.nwtimes.com](http://www.nwtimes.com), <http://posttrib.suntimes.com>

## Failure to Advise Defendant of Ineligibility for Early Release Credits Renders Guilty Plea Invalid

A trial court's failure to advise a defendant of his or her ineligibility for early release credits renders a guilty plea unknowing and involuntary, the Division Three Court of Appeals for the State of Washington held in an unpublished ruling.

Michael Duke Coombes pleaded guilty to first-degree murder. Under Washington law, defendants convicted of first-degree murder must serve a mandatory minimum of 20 years before becoming eligible for earned release credits. RCW 9.94A.540(1)(a).

Coombes was not advised of this restriction prior to entering his guilty plea, and did not realize that he was ineligible for early release credits until he began serving his 300-month sentence. In fact, his judgment and sentencing orders left blank a section regarding the mandatory minimum, and a similar provision was struck from the plea agreement. Coombes subsequently filed a personal restraint petition seeking to withdraw the guilty plea.

Recognizing that "a defendant must be informed of all direct consequences

of a guilty plea," the Court of Appeals granted Coombes' personal restraint petition and remanded the case to allow him to withdraw the plea.

"A recognized direct consequence of a guilty plea is the statutory prohibition against earned release credit during the period of the mandatory minimum sentence," the appellate court wrote. As Coombes was not advised of the restriction on earned release credits, his guilty plea was unintelligent, involuntary and invalid, the Court of Appeals held.

The state argued that the trial court's failure to advise Coombes of the statutory restriction on earned release credits was not material or prejudicial. The appellate court, however, rejected that argument based on materiality.

"A reviewing court cannot determine how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to that decision," the Court of Appeals wrote. See: *In re Coombes*, 159 Wash.App. 1044 (Wash.App. Div.3, 2011); 2011 WL 240687. ■



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# CCA Anti-Prison Rape Shareholder Resolution Fails to Pass

As previously reported in *Prison Legal News*, PLN associate editor Alex Friedmann, who owns a small amount of stock in Corrections Corporation of America (CCA), filed a shareholder resolution with the company in November 2011. The resolution requested that CCA issue reports every six months on its efforts to reduce incidents of prisoner rape and sexual abuse at its for-profit facilities, including statistical data related to all such incidents during each reporting period. [See: *PLN*, April 2012, p.14; March 2012, p.18].

According to Friedmann, who served six of his ten years in prison at a CCA-operated facility in Tennessee in the 1990s, the resolution was intended to prompt the company to focus on the issue of sexual assaults, particularly by CCA employees.

"If CCA has to report this information they will have a greater incentive to reduce rape and sexual abuse because it will make the company look bad if they have very high numbers," he said. "And if they have to report this, the public, i.e., CCA shareholders, will be able to judge the effectiveness" of the company's efforts.

In a letter to CCA's board of directors, Friedmann wrote, "My resolution could not be filed with any other company outside the private prison industry because in no other industry do a company's employees consistently engage in rape and sexual abuse." Noting that CCA claims it has a zero-tolerance policy for sexual abuse, "this is an opportunity to prove it," he stated.

Instead, CCA petitioned the Securities and Exchange Commission (SEC) to exclude the shareholder resolution, saying it planned to voluntarily produce less detailed reports related to rape and sexual abuse, claiming that reports on prison rape were part of the company's ordinary business operations, and questioning Friedmann's motives behind his resolution to have the company report on its efforts to reduce prison rape.

Friedmann obtained pro bono assistance from the law firm of Stroock & Stroock & Lavan LLP, and filed a response to CCA's objections. The SEC rejected CCA's arguments in February 2012, which led to the resolution being included in the company's proxy materials – along with a lengthy opposition statement from CCA.

"It's a sad commentary when the nation's leading private prison company, which routinely brags about being the fifth-largest corrections system in the

country, strongly opposes a resolution that would require reporting on its efforts to reduce prison rape and sexual abuse," observed PLN editor Paul Wright.

Friedmann drafted a formal solicitation statement in favor of the resolution, and, under SEC rules, required CCA to distribute it to approximately 4,600 shareholders at his expense. He also contacted a number of CCA's institutional stockholders, asking them to support the resolution because it had an impact on investors.

"Shareholder resolutions are often framed in terms of risk, and indeed there are risks if CCA fails to reduce prisoner rape and sexual abuse, which include liability, adverse publicity and loss of business," Friedmann said. "There is also the human cost to prisoners who are sexually assaulted at CCA facilities," he noted.

After ISS Governance, one of the nation's leading proxy advisory services, recommended that shareholders vote for the resolution, CCA took the deliberate step of issuing supplemental proxy materials urging shareholders to reject the resolution. Another proxy advisory firm, ProxyTell, also recommended a "for" vote on the resolution while a third, Glass Lewis, recommended an "against" vote.

Friedmann attended CCA's annual shareholder meeting on May 10, 2012, and was afforded two minutes to formally present the resolution. During his presentation to the company's executives and board members, Friedmann referred to CCA's opposition to the resolution as "shameful" and "an affront not only to the reputation of this company and its employees and board members, but also to prisoners who have been sexually assaulted at CCA facilities."

He noted that the resolution provided CCA with an opportunity to demonstrate it was willing to be transparent and publicly accountable in regard to its efforts to reduce incidents of rape and sexual abuse at its facilities, but that the company had failed to do so. CCA's board of directors – including Thurgood Marshall, Jr., who served as Cabinet Secretary under President Clinton, and former U.S. Senator Dennis DeConcini – had unanimously recommended that shareholders vote against the resolution.

Other activists attending the CCA annual meeting also made statements to the company's executives and board members, including representatives from the Jesuits,

the Sisters of Charity of the Blessed Virgin Mary, and a DC-based church with a number of ex-prisoner members. Outside CCA's corporate office, several faith-based organizations staged a small protest during the meeting.

After Friedmann presented the resolution, CCA announced that it had failed to pass. The voting results, filed with the SEC several days later, indicated that 14.6 million shares voted in favor of the resolution and 64.35 million shares voted against, with 7.89 million shares abstaining and 5.33 million recorded as broker non-votes. Therefore, of the shares voting, around 18.5 percent voted for the resolution – or more than one in six of the voting shares.

"The results are significant," said Friedmann, "particularly considering the public policy subject matter of the resolution and the fact that it was backed by a limited campaign initiated by a single shareholder – who is a former CCA prisoner, at that." He commended the stockholders who voted 14.6 million shares for the resolution.

"Since almost 20% of the voting shares were in favor of this resolution, CCA's management team should take notice – and action – accordingly," added Wright, who noted that the SEC considers a 3% favorable shareholder vote to be successful enough to reintroduce a resolution the following year.

A number of national groups had expressed support for the resolution, including Just Detention International ([www.justdetention.org](http://www.justdetention.org)), the nation's leading organization working to stop prison rape and sexual assault. Other supporting organizations included the National Center on Domestic and Sexual Violence; National Organization for Women; Justice Policy Institute; National Council of Women's Organizations; National Center for Transgender Equality; Citizens United for the Rehabilitation of Errants (CURE); Justice Fellowship; National Lawyers Guild; Detention Watch Network; Partnership for Safety and Justice; and Enlace – an alliance of worker centers, unions and community organizations that works against corporate abuses.

The CCA shareholder resolution also generated a moderate amount of media coverage, including articles in *Truthout*, *Mother Jones*, the *Guardian* (UK), the *Nashville Business Journal*, the *Tennes-*

sean, the *Nashville Scene* and *Seven Days* – a Vermont-based weekly publication.

Friedmann indicated that he intends to introduce future shareholder resolutions, though whether he would reintroduce the anti-prison rape resolution would depend on CCA's compliance with

the Prison Rape Elimination Act (PREA) standards, which were released by the U.S. Department of Justice on May 17, 2012 – one week after CCA shareholders voted down the resolution.

In regard to CCA's successful efforts to derail the resolution, Friedmann had

this to say: "It's hard to appeal to the consciences of people who don't have one, the kind of people who keep their conscience locked in a jar on their desk." ■

Sources: *SEC filings*, *HRDC press releases*, *Nashville Scene*, *Mother Jones*

## Ninth Circuit Rules that Washington DOC Religious Contractor Not a "State Actor"

Congregation Pidyon Shevuyim, N.A., a private Jewish organization that contracted with the Washington Department of Corrections (DOC), may not be sued under 42 U.S.C. § 1983 or the Religious Land Use and Institutionalized Persons Act (RLUIPA), the U.S. Court of Appeals for the Ninth Circuit held, as the organization is not a "state actor."

Dennis Florer, a Washington state prisoner, sued the Congregation after his requests for a Torah, Jewish calendar and consultation with a rabbi were denied. Florer had contacted the Congregation for assistance with his requests for religious materials and services. The Congregation, however, refused to help him until he proved he was Jewish.

For example, Florer was asked to fill out a form so the Congregation could determine whether he was born to a Jewish mother or had undergone a proper conversion to Judaism. The Congregation's decision to send Florer the form was the result of extensive talks between the Congregation and the DOC about limiting access to Jewish services to only those prisoners who were considered "really" Jewish. Florer, however, refused to complete the form.

In his subsequent lawsuit, he alleged that the Congregation's refusal to provide him with access to Jewish religious mate-

rials violated his First Amendment rights and RLUIPA. The district court dismissed Florer's suit, finding the Congregation was not a state actor for the purpose of liability under § 1983 or RLUIPA. Florer appealed and the Ninth Circuit initially reversed.

According to the appellate court, the Congregation acted under color of state law because the DOC "employed" the Congregation "to facilitate [its] policies for Jewish prisoners."

For example, Florer's access to Jewish religious materials and services was entirely contingent on approval by the Congregation, part of which depended on the "Congregation's voluntarily offered determination that Florer was not Jewish."

Thus, the Ninth Circuit held, the "Congregation assumed the DOC's obligation and maintained control over Florer's access to Jewish materials and services." See: *Florer v. Congregation Pidyon Shevuyim, N.A.*, 603 F.3d 1118 (9th Cir. 2010).

On July 14, 2010, however, the appellate court granted the DOC's motion to rehear the case, and the initial ruling was withdrawn pending the rehearing. The issues on rehearing included: 1) Is there a genuine issue of material fact as to whether Florer could only get Jewish religious materials and instruction from the Congregation? and 2) Does evidence in the record support the conclusion that Florer exhausted the DOC's grievance process before

suing the Congregation? See: *Florer v. Congregation Pidyon Shevuyim, N.A.*, 611 F.3d 1097 (9th Cir. 2010).

Following rehearing, the Court of Appeals issued a superseding decision on April 15, 2011. The appellate panel reversed itself, finding that the denials of Florer's requests for religious materials and services were not pursuant to a governmental policy, and that the defendants were not state actors. The issue of exhaustion was not reached.

The Ninth Circuit held that, "As relevant to this appeal, our inquiry to determine whether a defendant acted 'under color of state law' is the same under RLUIPA as it is under § 1983." The Court then examined whether the Congregation met the standards for being considered a state actor, and found it did not under either the "public function" or "joint action" tests. Further, "There is nothing in the record that indicates that Defendants blocked [Florer's] access to other religious communities or his ability to request religious materials and information from other individuals and organizations."

Accordingly, the district court's grant of summary judgment to the defendants was affirmed. Florer's petition for a writ of certiorari to the U.S. Supreme Court was denied on January 9, 2012. See: *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916 (9th Cir. 2011), *cert. denied*. ■

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# Ohio Wrongful Conviction Results in \$2.59 Million Settlement

On April 25, 2011, Raymond D. Towler, 53, received a settlement of \$2,592,571 after serving almost 29 years for a rape he didn't commit. The award included a \$600,000 annuity to provide ongoing monthly payments plus a \$1.91 million lump sum payment; \$78,800 of the settlement went to Towler's attorneys for fees and costs.

The Ohio Controlling Board agreed to settle Towler's claim, which will be paid from the state's Wrongful Imprisonment Fund, after he was declared innocent by a Cuyahoga County judge.

Towler was convicted in 1981 of rape, felonious assault and kidnapping, and sentenced to life plus 12-40 years. DNA testing of semen recovered from the 11-year-old female rape victim's underwear revealed that Towler was not the perpetrator, and he was released in May 2010. "They had the wrong person and it took them a while to work it out," he remarked. Both of his parents had died while he was incarcerated.

Towler had been convicted based on eyewitness testimony from the victim and her 12-year-old cousin. Eyewitness testimony has been shown to be highly unreliable, and is a factor in a substantial number of wrongful convictions.

Another former Ohio prisoner who was exonerated based on DNA evidence, Clarence Elkins, attended Towler's court hearing when he was freed. Elkins served almost 8 years in prison before being exonerated, and filed a lawsuit that resulted in settlements totaling \$6.3 million. [See: *PLN*, July 2011, p.11].

"You can't make up for 30 years with any amount, but I plan to keep moving forward," Towler stated. He was employed as a mailroom clerk at Medical Mutual of Ohio and said he intended to keep working. "I don't want this money to change who I am or what I become. I was lucky to find a job when I got out, and I'm not going to run out on them."

State Rep. Clayton Luckie apologized for Towler's nearly three decades of wrongful imprisonment. "Too many individuals are found guilty by association or are in the wrong place at the wrong time," said Luckie. "We should apologize when we make a mistake and lock up an innocent person. I hope this is a step in the healing process for Mr. Towler."

Towler said that he wants "to be smart with the money, but life is too short to

center my world around money." Despite his years in prison, Towler expressed that he has "no hate for anyone."

Only a few other prisoners exonerated by DNA testing have served more time than Towler. The Ohio legislature passed sweeping legislation in the wake

of Towler's exoneration in an effort to prevent further wrongful convictions. See: *Towler v. State of Ohio*, Ohio Court of Claims, Case No. 2010-7148-WI. ■

Sources: *The Columbus Dispatch*, [www.blog.cleveland.com](http://www.blog.cleveland.com)

## Ninth Circuit Holds No Due Process Right Created by California's Parole Scheme

The Ninth Circuit Court of Appeals has decisively dismissed any lingering hopes that the federal courts might continue to review denials of parole to California prisoners, in order to determine whether such denials were supported by "some evidence" of the prisoner's current dangerousness as required by state law.

Echoing the words of an appellate panel that had ruled similarly a week earlier, the Ninth Circuit stated that, in the recent decision of *Swarthout v. Cooke*, 131 S.Ct. 859 (2011) [*PLN*, March 2011, p.40], the U.S. Supreme Court "was unequivocal in holding that if an inmate seeking parole receives an opportunity to be heard, a notification of the reasons as to denial of parole, and access to their records in advance, that should be the beginning and the end of the inquiry into whether the inmate received [federal] due process."

California prisoner Kenneth Roberts was convicted in 1986 of second-degree murder. He was denied parole at a 2006 hearing, due to the parole board's professed concerns about the nature of his offense – at the time, the judicially-approved standard for such denials.

Roberts unsuccessfully sought relief in state courts, claiming that the parole board's decision was not supported by sufficient evidence that he currently posed an unreasonable risk of danger to society. By 2008, this had become the new standard for parole denials, as clarified by the California Supreme Court in *In re Lawrence*, 44 Cal.4th 1181, 190 P.3d 535 (Cal. 2008), and as subsequently adopted by the Ninth Circuit in an *en banc* decision, *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) [*PLN*, June 2010, p.24]. Roberts then filed a habeas petition in federal court.

Following then-existing precedent, the district court granted habeas relief. Subsequently, however, the Supreme Court decided *Cooke*, which in turn compelled

the Ninth Circuit to reverse the district court's ruling in Roberts' favor. Driving the proverbial last nail into the coffin, the appellate court emphasized that it "is no part of the Ninth Circuit's business" whether, in denying parole, California follows its own statutory standards. See: *Roberts v. Hartley*, 640 F.3d 1042 (9th Cir. 2011).

Two months later, on June 6, 2011, the Ninth Circuit issued a similar ruling in a case involving another parole-related issue for California prisoners, holding that "the Due Process Clause does not require that the Governor hold a second suitability hearing before reversing a parole decision."

In 2005, 23 years after his conviction for first-degree murder (for which he received a sentence of 27 years to life with the possibility of parole), California state prisoner Robert E. Styre was found suitable for release by the parole board. Several months later, however, the Governor, exercising his authority under the state constitution, reversed the board's finding of suitability.

Styre filed for habeas corpus relief. In 2007, after his state court petitions had been denied, he filed a habeas petition in federal court, alleging that his due process rights had been violated because the Governor's reversal of the board's decision was not supported by "some evidence" that Styre's release posed an unreasonable risk of current dangerousness. The district court granted his petition.

On appeal, the Ninth Circuit reversed. As in *Hartley*, the appellate court held that beyond the due process requirements for parole hearings described in *Cooke*, no other process was due under the U.S. Constitution for parole denials.

As a "second and separate reason" for denying relief, the Ninth Circuit wrote that "because there is no Supreme Court



precedent holding that a state governor must conduct a second parole hearing before reversing a parole board's favorable decision," the Antiterrorism and Effective

Death Penalty Act (AEDPA) precluded granting Styre's habeas petition. See: *Styre v. Adams*, 645 F.3d 1106 (9th Cir. 2011). ■

## Arizona Jails Refuse to Incarcerate Some Offenders

In 2007, Glendale, Arizona resident Robert Ortis, 41, had an appetizer and a few drinks at a business lunch. Driving from the lunch to his nephew's house, he began to feel weak and turned red. He recognized a high blood pressure event and was able to get off the highway but collapsed in the front seat before he could get out of his car.

Paramedics were called; they told Peoria police that Ortis smelled of alcohol. That led to a DUI conviction with a mandatory jail sentence in 2008. Ever since then, Ortis has been trying to serve his sentence. The only problem is that the jail refuses to accept him as a prisoner.

Peoria is in Maricopa County; thus, as instructed by his trial judge, Ortis reported to the Lower Buckeye Jail for booking into the Maricopa County Jail (MCJ) system. That's when the problems began.

Medical screening revealed that Ortis' blackout had been caused by run-away high blood pressure. He still suffers from uncontrollable high blood pressure and a rare ear disease that rendered him nearly deaf. That left county authorities unwilling to book him into the jail system despite multiple attempts by Ortis to serve his sentence.

MCJ Lt. Brian Lee said county medical staff determine "whether a person is not physically worthy of jail, because once in, they become our liability." As a result, some people convicted of minor offenses are rejected at intake. Lee said the Sheriff's Office may "make reasonable accommodations" for medical conditions, and people are rejected only when supported by medical evaluations. This includes "rare instances where people had skyrocketing blood pressure or someone detoxing off of alcohol or drugs." Serious offenders are booked into the jail system regardless of their medical condition.

Phoenix's top prosecutor, Aarón J. Carreón-Aínsa, said jail rejections are not a big problem but can occur for medical reasons, when court paperwork is incomplete or when a defendant shows up late or doesn't have government-issued photo

ID. Rejections made up almost 10% of the offenders who surrendered themselves at the MCJ in 2010, for example.

Peoria City Attorney Steve Kemp would like to see home detention with electronic monitoring implemented in cases of jail rejections. He believes that would provide "greater accountability over defendants' whereabouts" than simply rejecting them and sending them away. According to Kemp, it would also allow such offenders to address their medical issues at home. In other words it would save the county money that otherwise would be spent to provide medical services if those people were jailed.

Arizona cities that already use home detention for certain misdemeanor offenders include Phoenix, Glendale, Scottsdale, Goodyear and Surprise. Scottsdale Court Administrator Janet Cornell said home detention is a useful tool for when the jail rejects offenders due to medical conditions, though its appropriateness is determined by the court on a case-by-case basis.

Unfortunately home detention would not help Ortis. He asked for it during his most recent attempt to be booked into jail, but DUI carries a mandatory minimum jail term and home detention is only possible after serving a minimum amount of time in jail. Thus, despite his best efforts, he cannot complete his sentence.

"I'm just tired of getting chucked around," he said. ■

Source: *Arizona Republic*



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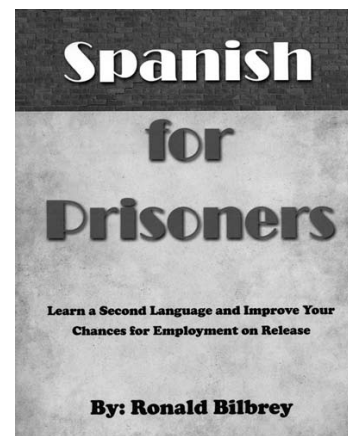
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# California Study Finds State Prison Overcrowding Driven by County Policy Decisions, Not Violent Crime Rates

A June 2011 study by Santa Clara University criminal law professor W. David Ball examines the extent to which overcrowding in California's prisons is a function of decisions made at the county level about how to deal with crime. Ball's report compiles data from a ten-year period (2000-2009) to show that California's 58 counties use state prison resources at dramatically different rates, and that 18 counties in particular – dubbed “high use” counties – send many more felons to state prisons than their violent crime rates would seem to justify.

Ball's report asks whether the citizens of one county should subsidize the decisions made by officials of another county, including district attorneys, judges, police and probation officers (all elected or appointed locally), to address crime with prison (as opposed to jail or probation) more often than their own law enforcement officials may deem appropriate. Given differences in local policy choices – and the fiscal impact of those differences – Ball argues that state officials should “create incentives for counties to behave differently” in terms of their response to crime.

The report proposes the use of a new metric, the “violent crime coverage rate” – the ratio of new felon admissions (NFA) to reported violent crime (murder, rape, robbery and aggravated assault) for a given county during a given year – to measure “justifiable” incarceration; that is, incarceration driven by violent crime as opposed to county policy choices. Ball suggests that defining “justified incarceration” in this way will enable state officials to devise policies to manage county use of state prison resources “without either penalizing crime-ridden areas or rewarding prison-happy ones.”

The report found state-wide annual averages of 185 NFA and 820 violent crimes, both calculated per 100,000 adult population at risk (APAR), yielding a statewide violent crime coverage rate of 22.5%.

In the 18 “high use” counties, which include Fresno, Orange, Riverside, San Bernardino, Santa Barbara and Santa Clara, the report found annual averages of 224 NFA and 623 violent crimes per 100,000 APAR, yielding a high use coverage rate of 35.9%.

By contrast, in 14 “low use” counties, which include Alameda, Marin, Sacramento, San Francisco, Santa Cruz and San Diego, the report found annual averages of 122 NFA and 836 violent crimes per 100,000 APAR, yielding a low use coverage rate of just 14.6%.

Ball segregated Los Angeles County for separate analysis; with a population of 10 million people, it is too large to include within any of the other categories without skewing the results. With a violent crime coverage rate of 18.8%, Los Angeles would otherwise have fallen within the low use category.

In the remaining 25 California counties, deemed by Ball to be “middle use,” the report found an average annual coverage rate of 27.6%.

Significantly, using regression analysis, Ball determined that changes in violent crime rates account for only 3% of the variance in NFA rates. In other words, violent crime rates have little bearing on the number of state prison sentences meted out by the counties.

Ball illustrates this point by compar-

ing Alameda (a low use county) with San Bernardino (high use). The two counties have similar population sizes and similar amounts of reported violent crime, as well as similar amounts of reported property crime. Yet from 2000 to 2009, San Bernardino sentenced 3.5 times as many felons to prison as Alameda County.

To put this in perspective, if all California counties incarcerated at the high use rate (35.9%), the state would have to find room to house an additional 26,000-plus NFAs each year and the cost to taxpayers, Ball estimates, would be an additional \$890 million during the first year alone. Conversely, if all counties adopted the low use coverage rate (14.6%), 15,000-plus fewer prisoners would be sent to state prisons each year, with first-year savings estimated at more than \$500 million. ■

Sources: *California Watch*; “Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates – And Why it Should,” by W. David Ball, *Santa Clara School of Law* (June 2011)

## ***The Last Gasp: The Rise and Fall of the American Gas Chamber*, by Scott Christianson (University of California Press, 2011).**

**344 pages, \$18.95 paperback**

***Book review by Julie Etter***

Scott Christianson's new book, released in paperback in July 2011, continues the author's prolific examination of the history of the U.S. criminal justice system. *The Last Gasp* looks at the American gas chamber by juxtaposing the gruesome specifics of this form of capital punishment against the social and political influences surrounding the chamber's popularity and eventual decline as a means of execution.

Christianson's research illustrates how the development of chemical warfare in World War I encouraged the “chemical-warfare-industrial-education complex” to lobby for the creation of peacetime uses for lethal gas after the war. Commercial uses included fumigation of immigrants at Ellis Island, and pesticides for agriculture

as an efficient way to kill off pests and reduce threats of disease. Unfortunately, the concurrent popularity in the belief of eugenics and euthanasia led policymakers to reason that lethal gas could also be used as a form of capital punishment. Pseudo-scientific support helped influence the public to romanticize the use of hydrogen cyanide as a “painless” way to carry out executions.

The American gas chamber was first used in Nevada in February 1924, when murderer Gee Jon was executed. During the time the chamber was in use, 594 men and women met their deaths within it. North Carolina used the gas chamber most often, with 197 executions. As professional reports and eyewitness accounts collected over the decades revealed the agonized, brutal deaths of its

victims, the public began to doubt the gas chamber's purported humanity. Also, the early instability of the chamber's structure put the safety of observers in question. In one infamous incident, all observers to an execution were ordered out of the adjoining rooms due to fears that the gas had leaked out of the chamber. While the Supreme Court declined to rule on the constitutionality of lethal gas, intense international pressure made the 1999 gassing of Walter LeGrand in Arizona the last such execution in the United States to date.

The idea of eugenics is pervasive in Christianson's examination of the gas chamber. He shows how the advent of lethal gas executions in the United States in the 1920s and 1930s had a troubling parallel: American inventors and lawmakers championed the humanity of the gas chamber for condemned prisoners, while the Nazis used gas chambers as a form of mass murder in their pursuit of a pure Aryan nation through eugenics.

*The Last Gasp* offers evidence of American and German chemical patent exchange during the rise of the Nazi Party, which resulted in little to no criminal

prosecution of the American business executives involved. While sometimes Christianson's connection between the U.S. and Nazi use of lethal gas is tenuous, the implication is shocking and begs a long-overdue examination of U.S. racism and anti-Semitism, and how the atrocity of the Holocaust might be more familiar to American penology than most people care to acknowledge.

Advocacy for eugenics among prominent U.S. citizens and the implied link to the Nazis' use of eugenics in the Final Solution puts into perspective what it means to give a government unchecked power to kill off its own citizens – even those who have committed heinous crimes. Today, even a rudimentary examination of the U.S. justice system demonstrates the prevailing influence of eugenics: those deemed unfit for society are disproportionately poor, people of color and mentally disabled, as evidenced by the sprawling mass of our nation's prison system.

Despite its topical focus, *The Last Gasp's* analysis of eugenics raises arguments that could apply to the increasingly questionable use of lethal injection. The book also summarizes and discusses

some of the landmark Supreme Court cases dealing with the concept of cruel and unusual punishment, and supplies great insights for the amateur legal reader seeking historical and social analysis of some of the best-known landmark cases regarding the 8th Amendment. *The Last Gasp* provides a new angle to argue against the death penalty; the book is filled with facts that you'll want to read out loud to anyone willing to listen, and offers compelling insights and original research detailing the rise and fall of the American gas chamber. ■

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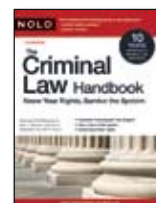
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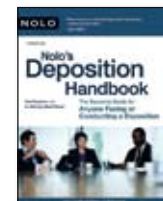
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## Former BOP Guard Convicted, Sentenced in Murder-for-Hire Case

Michael Eugene Rudkin, 41, a former BOP guard employed at the Federal Correctional Institution (FCI) in Danbury, Connecticut, apparently did not learn his lesson following his first conviction.

In 2008, Rudkin pleaded guilty to engaging in oral sex with a female prisoner at FCI Danbury in exchange for candy, cigarettes and alcohol. He had also plotted with the prisoner to kill his wife, offering her \$5,000 from his wife's life insurance policy. Rudkin was charged after the prisoner gave investigators a cup that she had been using to save his semen. As a result, he received a 180-month prison sentence. [See: *PLN*, May 2009, p.1].

While serving his sentence at FCI Coleman in Florida, Rudkin solicited other prisoners to find someone willing to kill his ex-wife, her new boyfriend, the female prisoner he had sex with at FCI Danbury, and a federal investigator.

Rudkin gave one of the prisoners a handwritten note that listed the locations of each of the victims and how he wanted them to suffer. As a down payment, he mailed \$500 from his prison account to the "hit man."

He was subsequently charged with a multitude of offenses, including attempted murder of an employee of the United States, attempted retaliation against a witness by murder, and use of mail and an interstate commerce facility with intent to commit murder-for-hire. He was convicted on all counts following a jury

trial in April 2010.

Rudkin was sentenced to 1,080 months (90 years) in prison for the murder-for-hire plot on July 16, 2010, to run consecutive to his prior federal sentence and to be followed by 3 years on supervised release, assuming he lives that long. See: *United States v. Rudkin*, U.S.D.C. (M.D. Fla.), Case No. 5:09-cr-00049-MSS-TBS.

Rudkin appealed his convictions, which were affirmed by the Eleventh Circuit on May 27, 2011; the Court of Appeals rejected his argument that he had been "entrapped" by other prisoners, who acted as the government's agents, and had only played along with the murder-

for-hire plot. "The evidence adduced at trial showed that Rudkin initiated the contact regarding the murder for hire and tenaciously pursued the [hit-man] contact that his fellow inmates procured for him," the appellate court stated. See: *United States v. Rudkin*, 427 Fed.Appx. 824 (11<sup>th</sup> Cir. 2011).

This case draws some interesting parallels to another recent case involving a BOP guard, employed at FCI Coleman, who was convicted of arranging an assault that resulted in a prisoner's murder (see related article in this issue of *PLN*, pg. 44). ■

Additional source: *Orlando Sentinel*

## Pennsylvania County Prisons Not Reporting Critical Incidents

The Pennsylvania Department of Corrections (PDOC) requires county prisons to submit monthly "extraordinary occurrence" reports as part of the department's duty to inspect local lock-ups and identify deficiencies. However, the accuracy of the self-reported data has been faulty in some cases and many county prisons fail to file the reports, according to a July 2011 series of news articles.

The PDOC has required "extraordinary occurrence" reports for over a decade. County prisons were required to submit the reports annually until the PDOC began demanding monthly reports in 2009. The reports quantify use-of-force incidents by guards, plus assaults, suicides,

homicides, escapes, fires and other unusual events at the state's 69 county prisons, which are equivalent to jails.

There is no penalty for failing to file the reports, as the PDOC has no jurisdiction over local prisons. "If reports are not received," said PDOC spokeswoman Susan Bensinger, "it is listed as a deficiency for the upcoming inspection. When the county is deficient, they must provide a plan of action to remedy the deficiency."

Two-thirds of all Pennsylvania county prisons failed to submit reports for one or more months in 2009 and 2010. In the first two months of 2011, 17 prisons did not submit reports for one or both months. The prison in Cambria County has failed

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to file reports since 2009, and the Beaver County Prison did not report in 2010. The Lancaster County Prison missed two reports in 2009 and one in 2010.

"What does it mean if they don't take serious[ly] reporting requirements about crimes taking place in their facilities?" asked Grayfred Grey, a retired attorney and member of Have a Heart, a group concerned about jail operations.

The fact that county prisons lose points on PDOC inspections if they fail to file reports seems to be of little consequence to local officials. Their bigger concern is being compared to non-reporting facilities. "I don't want to be compared unfairly to other prisons that aren't reporting numbers," stated Lancaster County Prison Warden Vincent Guarini.

The PDOC says the reports are necessary, even if they have no way to enforce compliance. "Our inspectors use the statistical information provided to determine if there are any trends developing," said Bensinger. When a spike in suicides is identified, for example, the PDOC offers training resources to prevent such occurrences.

One potential trend is an increasing number of use-of-force incidents at the Lancaster County Prison. Such incidents increased from 254 in 2009 to 284 in 2010. The prison reported 109 use-of-force incidents during the first two months of 2011 alone.

"Lancaster County Prison is the ninth-largest county prison in Pennsylvania," noted Jean Bickmire, a staff member with Justice & Mercy, a non-

profit prison advocacy organization. "Yet its extraordinary occurrence reports place it much higher than we'd expect." Some, however, question the accuracy of the county prisons' self-reported data for the facilities that do file reports with the PDOC. "I suspect that there may be more incidents than are self-reported," observed Mary Steffy, director of Mental Health America of Lancaster County.

Incidents at the Lancaster County Prison are representative of such concerns. PDOC records reflect two occasions when guards used batons against prisoners while subduing them. Guarini said guards at the prison do not carry batons, and that the PDOC "entered incorrectly" the information regarding those incidents. Bensinger replied that the information about the batons was included in the prison's own report.

Another issue raises doubts about the accuracy of self-reporting by the county prisons. From 2008 to early 2011, Lancaster County Prison did not report any assaults by guards on prisoners. Yet in 2008, prison guard Silvestre Villarreal, Jr. assaulted a prisoner shackled to a bed at a local hospital, repeatedly punching him until nurses intervened. He was later charged and convicted. [See: *PLN*, Nov. 2009, p.1].

Another Lancaster County prison guard also was convicted of abusing prisoners, and two other guards were fired or resigned amid allegations of abuse. Yet apparently none of those incidents were included in reports submitted to the PDOC.

Further, a number of lawsuits have

been filed against the county alleging excessive force or brutality by prison staff. In one of those cases, two former Lancaster County prison guards, Cindy Heistand and Betty Jane Robinson, testified at trial in October 2010 about abuses at the facility in a lawsuit filed by prisoner Paul Barbacano. Barbacano alleged that guards had slammed his head into doors and walls, and punched him in the head and face. The federal jury deadlocked, and the case settled for \$75,000 in December 2010 before a retrial was held. See: *Barbacano v. Guarini*, U.S.D.C. (E.D. Penn.), Case No. 5:08-cv-05098-AB.

One state lawmaker said changes were needed to ensure accurate reporting. "I'm not pleased that Lancaster County Prison is not reporting statistics every month. There's no excuse not to report every single month. This is true for all counties. They need to report every month on time," said state Senator Mike Brubaker. "I'm committed to changing that legislatively, if that is indeed something I can do. If we need to offer new legislation, including penalties for non-reporting, I'm prepared to do that." ■

Source: <http://llancasteronline.com>

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# Iowa Supreme Court Holds Billing for Fraudulent Prisoner Phone Calls Not a State Law Violation

On October 14, 2011 the Iowa Supreme Court held that a prison telephone company did not commit a “cramming” violation by improperly billing a third party for fraudulent collect calls made by a prisoner.

Evercom Systems, Inc. provides phone services to more than 2,900 detention facilities nationwide, including the Bridewell Detention Center (Bridewell) in Bethany, Missouri.

On January 25, 2006, Evercom informed Iowa resident Ken Silver that on the previous day “over fifty dollars of collect calls had been accepted by his (Des Moines, Iowa) business line and that Evercom was placing a temporary block on his line.”

Silver denied accepting or having any knowledge of the calls. Evercom agreed to investigate and get back with him in 7-10 days. The next day, however, the company sent Silver a letter stating the charges would not be removed because “a thorough investigation” found no system deficiencies. Silver did not receive the letter because Evercom mailed it to an incorrect address; his local telephone company billed him \$78.21 for the collect calls.

After several unsuccessful attempts to get Evercom to remove the charges, on February 27, 2006, Silver filed a complaint with the Iowa Attorney General’s office. Evercom quickly investigated and “concluded that the calls were not made to Silver’s business but [were] the result of glare fraud” perpetrated by a Bridewell prisoner and an outside third party.

“Glare fraud occurs when one caller dials into a telephone number associated with a particular telephone line (called a trunk) at the same time a caller is dialing out over the same trunk ... the two callers will simultaneously seize the ends of a single trunk and the charges will be billed to the number being dialed out over the trunk rather than to either of the persons on the call, even though the owner of the outgoing number will never actually be involved in the call.”

Evercom finally credited Silver’s account on March 22, 2006. Eight days later, Silver’s complaint was forwarded to the Iowa Utilities Board (Board). “The Office of Consumer Advocate (OCA) petitioned the Board for a determination that Evercom had committed a violation

of a statute or rule regarding cramming and requested that the Board impose a civil penalty.”

Cramming “is the addition of a product or service to a customer’s account, for which a separate charge is made, without that customer’s verified consent.”

An administrative law judge found “it was undisputed that Silver did not receive or accept the [fraudulent] collect calls from Bridewell ... ‘there is no question that a cramming violation occurred and that Evercom violated Iowa Code section 476.103 [rule 199-22.23]’ when it billed Silver for five unauthorized calls.” As a result, the Board imposed a \$2,500 civil penalty against Evercom.

The company appealed, and a state district court determined that there was no

cramming violation, no statute or rule had been violated and the civil penalty should be rescinded. The Iowa Court of Appeals reversed and reinstated the penalty.

Evercom then appealed to the Iowa Supreme Court, which reversed the appellate court, holding that “a proper reading of the rule excludes all disputes regarding billing for collect calls from the definition of cramming.” As defined in rule 199-22.23(1), cramming “cannot include mistaken or improper billing of collect calls, particularly when it is the result of third-party fraud.” Therefore, the Supreme Court concluded that “the district court properly invalidated the Board’s decision and rescinded the civil penalty.” See: *Evercom Systems, Inc. v. Iowa Utilities Board*, 805 N.W.2d 758 (Iowa 2011). ■

## No “Strike” Under PLRA When Some Claims are Heard on the Merits

by Brandon Sample

A prisoner does not incur a “strike” under the Prison Litigation Reform Act (PLRA) unless his or her suit is dismissed entirely as frivolous, malicious or for failure to state a claim, the U.S. Court of Appeals for the Seventh Circuit held on November 2, 2010. On remand, the district court denied the defendants’ motion for summary judgment, crediting the plaintiff’s testimony that he had tried to exhaust the prison’s grievance process.

The PLRA prohibits prisoners from proceeding in forma pauperis (IFP) if they have “brought” three or more actions or appeals that were dismissed by a court as frivolous, malicious or for failure to state a claim. 28 U.S.C. § 1915(g). The only exception to this three-strikes denial of IFP status is if the prisoner can show that he or she is in “imminent danger of physical injury.”

Gregory J. Turley, an Illinois state prisoner housed at the Menard Correctional Center, sued various Illinois prison officials alleging retaliation for grievances that he had filed. The district court denied Turley’s request for IFP status on the basis that he had accumulated at least three “strikes” under the PLRA.

The court based this conclusion on three lawsuits that Turley had filed

previously, each of which included some claims that were dismissed for failure to state a claim or for failure to exhaust administrative remedies. In one of the suits, though, Turley settled his claims that were not dismissed. In another case he lost on summary judgment. In the third lawsuit, the court granted summary judgment to the defendants after holding that Turley had failed to exhaust his administrative remedies under the PLRA.

Turley appealed the district court’s denial of IFP status in his grievance retaliation case, arguing that he had not “brought” three or more suits or appeals that were dismissed as frivolous, malicious or for failure to state a claim. The Seventh Circuit agreed.

“Section 1915(g) literally speaks in terms of prior actions that were dismissed as frivolous, malicious, or for failure to state a claim,” the appellate court wrote. “The statute does not employ the term ‘claim’ to describe the type of dismissal that will incur a strike.”

Consequently, the Court of Appeals found that a PLRA “strike” is only “incurred for an action dismissed in its entirety on one or more of the three enumerated grounds” in § 1915(g). In so holding, the Seventh Circuit joined the

Fifth, Sixth, Eighth and D.C. Circuits, which had reached similar decisions.

The appellate court also held that because “failure to exhaust administrative remedies is statutorily distinct from [dismissal for] failure to state a claim,” a “dismissal for failure to exhaust [] does not incur a strike.”

The judgment of the district court denying Turley’s motion for IFP status was accordingly reversed, and the case remanded for further proceedings. See: *Turley v. Gaetz*, 625 F.3d 1005 (7th Cir. 2010).

Following remand, on February 11, 2011 the district court considered Turley’s IFP motion and found he had alleged a facially valid retaliation claim, noting that “Prison officials may not retaliate against inmates for filing grievances or otherwise complaining about their conditions of confinement.” Claims against several of the defendants were dismissed, however, and the court declined to grant a temporary restraining order or preliminary injunction. See: *Turley v. Gaetz*, 2011 WL 615342.

The defendants filed a motion for summary judgment, alleging that Turley had failed to exhaust administrative reme-

dies as required by the PLRA. The district court held a hearing pursuant to *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), then issued a ruling on March 23, 2012 denying the defendants’ summary judgment motion. The court found that Turley’s testimony – that he had filed grievances but never received a response from prison officials – was reliable and “backed by the evidence in the record.”

The district court held that Turley was “not required to further exhaust his remedies when he failed to receive a response from Defendants,” citing *Walker v. Sheahan*, 526 F.3d 973, 979 (7th Cir. 2000) and *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) [PLN, July 2007, p.39], and found that grievance record-keeping at Menard was “inaccurate and unreliable.” However, as there was no evidence that Turley had filed a grievance related to his claim that the defendants retaliated against him by denying him prison job assignments, that claim was dismissed.

Turley’s lawsuit remains pending on the defendants’ second motion for summary judgment, which was filed on April 23, 2012. He is litigating the case pro se. See: *Turley v. Gaetz*, U.S.D.C. (S.D. Ill.), Case No. 3:09-cv-00829-SCW. ■



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## \$47,500 Awarded to Massachusetts Prisoner Held in Segregation without Hearing

On January 27, 2012, a Massachusetts U.S. District Court awarded \$47,500 to a prisoner for due process violations that resulted in 375 days of solitary confinement.

Massachusetts state prisoner Albert Ford filed a civil rights action alleging that his placement in the Department Disciplinary Unit (DDU) at MCI-Cedar Junction without a hearing, as a pretrial detainee and later as a convicted prisoner, violated his substantive and due process rights under the U.S. Constitution and the Massachusetts Declaration of Rights.

Ford began serving time at MCI-Cedar Junction in 1980 and was placed in the DDU in or about 1992 or 1993. While in the DDU on July 1, 2002, he was involved in an altercation that resulted in guards being stabbed and a nurse being taken hostage. Consequently, Ford was sanctioned with ten years in the DDU, which is a restricted solitary confinement unit.

Ford was later indicted in state court for armed assault with intent to murder for the incident involving the guards and nurse. With his sentence set to expire on January 7, 2007, the local sheriff's office obtained approval from the district attorney for Ford to remain at MCI-Cedar Junction as a pretrial detainee, which is permitted under Massachusetts law.

Ford remained in the DDU upon expiration of his sentence until he was granted, and posted, bail in March 2007. On June 26, 2007, his bail was revoked on a charge of mailing heroin to a prisoner at MCI-Cedar Junction. Upon his return to prison, Ford was again placed in the DDU to continue serving his original ten-year sanction. He was continued on that status after pleading guilty to the armed assault and heroin charges, receiving a 4-5 year sentence.

In his civil rights complaint, Ford alleged that placing him in the DDU after his original sentence expired, after his bond was revoked and after his new conviction, without a hearing, violated his due process rights. Cross-motions for summary judgment were filed and the district court entered judgment in favor of Ford on November 16, 2010. The court found that James Bender, Deputy Commissioner of the Massachusetts Department of Correction, and Peter St.

Amand, Superintendent of MCI-Cedar Junction, had violated Ford's rights by keeping him in the DDU without a new hearing after he had completed his original sentence.

The district court held a damages trial in July 2011. The court found that Ford was only released from the DDU after the defendants were ordered to hold a hearing to determine if he should remain in DDU status. Ford was awarded \$100 per day for each of the 375 days he was held in the DDU illegally, totaling \$37,500. Further, the court awarded him \$10,000 for mental anguish caused by being housed in the DDU after his bail was revoked.

The district court made a significant finding as to 42 U.S.C. § 1997e(e), which prohibits a prisoner from bringing a claim for mental or emotional injury while

in custody without a prior showing of physical injury. The court held that is an affirmative defense that must be raised in the defendants' answer, and their failure to do so constituted a waiver. Additionally, the court found that § 1997e(e) does not preclude recovery for injuries caused by the deprivation of due process constitutional rights, as they are distinct injuries from claims for mental and emotional harm. See: *Ford v. Bender*, U.S.D.C. (D. Mass.), Case No. 1:07-cv-11457-JGD; 2012 WL 262532.

The defendants subsequently filed a motion to vacate the judgment or to alter or amend the judgment in their favor, which was denied by the district court on April 19, 2012. They have since appealed to the First Circuit, which remains pending. ■

## Tenth Circuit Voids Albuquerque's Attempt to Ban Sex Offenders from Libraries

by Derek Gilna

In a case of first impression, on January 20, 2012 the Tenth Circuit Court of Appeals affirmed a district court's judgment invalidating an ordinance of the City of Albuquerque, New Mexico that prohibited registered sex offenders from entering the City's public libraries.

The district court had granted summary judgment in favor of a John Doe plaintiff, ruling that the ban "burdened Doe's fundamental right to receive information under the First Amendment and that the City failed sufficiently to controvert Doe's contention ... that the ban did not satisfy the time, place, or manner test applicable to restrictions in a designated public forum."

The Court of Appeals noted that had the City of Albuquerque presented evidence as to the reasons or justifications for the ban, or whether the ban was narrowly tailored to specifically deal with the interest sought to be protected, or whether there was any alternative method for the banned class to obtain information available in libraries, the result might have been different.

Doe filed the lawsuit in response to a March 4, 2008 "Administrative Instruction" that barred all registered sex

offenders from using Albuquerque public libraries. The suit, filed in October 2008, alleged violations of his civil rights under 42 U.S.C. § 1983, specifically violation of the right to receive information under the First Amendment and violation of the right to equal protection under the Fourteenth Amendment. Doe sought declaratory relief in the form of a ruling that the ban was unconstitutional, and injunctions barring the City from denying him access to its public libraries.

The City's motion to dismiss was denied, and Doe filed a motion for summary judgment citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which set forth various tests as to the time, place and manner of access to public forums such as libraries. The City's response argued that since Doe raised a "facial" challenge to the constitutionality of the ban, he had to show that the law could not be constitutionally applied under any circumstances, and thus *Ward* did not apply. The district court disagreed and granted summary judgment to Doe in March 2010. See: *Doe v. City of Albuquerque*, U.S.D.C. (D. N.M.), Case No. 1:08-cv-01041-MCA-LFG.



On appeal, in reviewing the denial of the City's motion to dismiss, the Tenth Circuit noted that Doe's complaint had met the tests established by *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The appellate court also noted that *Stanley v. Georgia*, 394 U.S. 557 (1969) and its progeny held "It is now well-established that the Constitution protects the right to receive information and ideas [and] ... is fundamental to our free society." As such, there was no presumption of constitutionality for the sex offender library ban.


In its review of the district court's summary judgment order, the Court of Appeals found that the ban "can survive constitutional scrutiny only if the City, as the party with the burden of proof, makes a showing that the ban is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication."

The Tenth Circuit said attempts to argue that Doe's challenge must meet the test set forth in *United States v. Salerno*, 481 U.S. 739 (1987) or *Citizens United v. FEC*, 130 S.Ct. 876 (2010) did not apply under this set of facts, where there was no "tailoring" done by the City. "By prohibiting registered sex offenders from ... the ... public libraries, the City's ban precludes these individuals from exercising ... a fundamental right," the appellate court wrote.

What decided the case, however, was the Tenth Circuit's determination that the City had not met its "summary judgment burden." The City "provided no justification or reasons for its ban ... the City did not present any evidence that its ban was narrowly tailored to serve its interest in providing a safe environment for library patrons.... By not making any showing as to alternative channels of communication, the City failed to meet its Rule 56 burden in responding to Doe's motion ... we must conclude ... that the City's ban does not constitute a permissible time, place, or manner restriction under the *Ward* test ... [and] affirm the district court's grant of summary judgment in favor of Doe." See: *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012). 🐼

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## Seven Florida Prison Guards Arrested

Seven Florida state prison guards, employed at two facilities at opposite ends of the state, have been charged with criminal misconduct in unrelated incidents.

The first four arrests occurred on June 10, 2011, when U.S. Marshals arrested South Florida Reception Center (SFRC) guards Alexander McQueen, 30, Guruba Griffin, 31, Scott Butler, 32, and Steven Dawkins, 30. All were indicted on federal charges of conspiring to violate the civil rights of prisoners at SFRC.

The four guards were accused of attacking juvenile prisoners in "Bravo" dorm with a broom and mop in February 2009. They then forced the prisoners to fight each other. When an unidentified guard walked by and saw injuries to one prisoner, the guards who were later indicted told him, "You need to go."

McQueen was also charged with trying to "corruptly persuade" the guard who had walked by, who became a witness in the case. Additionally, McQueen and Dawkins were charged with obstructing an investigation by filing false reports that claimed one of the prisoner's injuries resulted from a fall in the shower.

"I have ordered the immediate termination of the officers arrested today at the South Florida Reception Center," said then-Florida Department of Corrections (FDOC) Secretary Edwin Buss.

Griffin pleaded guilty to one count of deprivation of rights under color of law, and was sentenced on February 22, 2012 to 12 months in prison and one year on supervised release.

The other three SFRC guards went to trial on October 18, 2011. Dawkins was convicted on one count of filing a false report, and sentenced on January 30, 2012 to one month imprisonment plus one year on supervised release. McQueen, convicted of conspiracy and filing a false report, was sentenced to concurrent terms of 12 months plus one year on supervised release on January 30, 2012. Butler was acquitted of one count of deprivation of rights under color of law.

In a separate case, three FDOC guards, employed at the Wakulla Correctional Institution, were arrested on July 6, 2011 by state law enforcement officers.

Major Joseph Garrison, 39, was charged with one count of official misconduct, Captain Megan Dillard, 31, was charged with 13 counts of official misconduct and guard Andrew Gazapian,

23, was charged with one count each of official misconduct, battery and fabricating evidence.

The official misconduct charges were related to false disciplinary reports filed against 13 prisoners. Another prisoner was beaten during a prison-to-prison transfer after making a disparaging remark about Dillard; he was later sprayed with chemical agents by Gazapian. Gazapian then filed a false report claiming the prisoner had bitten him on the thumb, but an investigation revealed that Gazapian bit himself.

"I have no tolerance for the kind of

behavior they are accused of," said Buss, who praised other FDOC employees who reported their co-workers' misconduct to the prison system's inspector general. "Those officers refused to allow bad behavior. They have the courage and integrity worthy of the corrections profession."

The charges against the trio of Wakulla guards remain pending; if convicted, they risk losing their accrued retirement benefits. ■

Sources: *Miami Herald*, *Associated Press*, *FDLE press release*, [www.wtxl.com](http://www.wtxl.com)

## Second BOP Guard Convicted in Connection with Prisoner's Murder

by *Brandon Sample*

A second federal Bureau of Prisons (BOP) guard who helped arrange an assault on a prisoner that resulted in the prisoner's death has been convicted of federal civil rights violations.

On July 8, 2010, Michael Kennedy was found guilty of violating the civil rights of Richard Delano, a former prisoner at the U.S. Penitentiary I in Coleman, Florida. Delano was killed in 2005 after his cellmate, John Javilo "Animal" McCullah, attacked him in exchange for a pack of cigarettes provided by Kennedy.

Kennedy helped arrange the assault after one of his BOP coworkers, Erin Sharma, was injured a month earlier by Delano. Delano had allegedly grabbed Sharma's arm through the food trap in his cell door, leaving her with bruises.

As payback, Sharma and Kennedy conspired to have Delano assaulted; for example, they lied to the shift lieutenant in order to have him moved into a cell with McCullah. McCullah, who was serving a life sentence, beat Delano into a coma in exchange for the pack of smokes and because Delano had a reputation as a snitch. Delano died 13 days later and McCullah was transferred to the BOP's supermax facility in Florence, Colorado.

Sharma was convicted in July 2009 of violating Delano's civil rights, and sentenced to life in prison. [See: *PLN*, Jan. 2010, p.30]. She appealed her conviction and sentence, which were affirmed by the Eleventh Circuit Court of Appeals in an August 24, 2010 ruling that found

her actions were "the proximate cause of Delano's death." See: *United States v. Sharma*, 394 Fed.Appx. 591 (11<sup>th</sup> Cir. 2010), *cert. denied*.

Kennedy, convicted of conspiracy against rights and deprivation of rights under color of law, was sentenced on December 16, 2010 to 108 months in federal prison plus two years on supervised release and 50 hours of community service. See: *United States v. Kennedy*, U.S.D.C. (M.D. Fla.), Case No. 6:09-cr-00217-ACC-DAB.

Kennedy appealed the district court's application of a vulnerable victim enhancement used to increase his sentence, which was affirmed by the Eleventh Circuit on September 23, 2011. "[I]nmates can be vulnerable victims ... by virtue of being confined in a cell with another inmate, and therefore unable to escape his assault," the appellate court wrote. See: *United States v. Kennedy*, 441 Fed.Appx. 647 (11<sup>th</sup> Cir. 2011). ■

Sources: [www.ocala.com](http://www.ocala.com), [www.digitaljournal.com](http://www.digitaljournal.com), *Department of Justice press release*

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# Washington Prisoners Have No Right to Inspect Records Under Public Records Act

by Brandon Sample

Prisoners who request records from the Washington Department of Corrections (DOC) under the Public Records Act (PRA) do not have a right to inspect records without cost, the Court of Appeals, Division II held in a corrected ruling entered on March 4, 2011. The appellate court's opinion joins a similar, earlier decision reached by the Court of Appeals, Division III.

DOC prisoners Derek E. Gronquist and Byron A. Mustard requested that they be allowed to inspect various records maintained by the DOC. The PRA allows requesters to ask for inspection instead of copies of records, but the DOC only allows prisoners to inspect their central file and medical file. Gronquist and Mustard wanted to inspect other records.

The DOC offered to provide Gronquist and Mustard with copies of the requested records, but they refused to pay for the copies, insisting that they be allowed to inspect the records instead. The DOC declined to permit inspection.

Gronquist and Mustard then filed suit, arguing that the DOC's refusal to allow them to inspect the requested records without cost violated the PRA. The trial court entered judgment in favor of the DOC, and Gronquist and Mustard appealed.

Citing the decision of the Court of Appeals, Division III in *Sappenfield v. Department of Corrections*, 127 Wash. App. 83, 110 P.3d 808 (Wash.App. Div. 3 2005), *review denied*, the Court of Appeals, Division II held that the PRA did not require the DOC to honor Gronquist


and Mustard's request for inspection.

"The unique nature of prisoner requests for PRA disclosures," the appellate court wrote, "entitled [the DOC] to adopt reasonable rules to protect both the records and its essential agency functions."

The Court of Appeals, Division II noted that the DOC did not deny the prisoners' "requests or fail to identify withheld documents." Rather, Gronquist and Mustard "simply refused to pay for the copies."

The judgment of the trial court was accordingly affirmed. See:

*Gronquist v. Department of Corrections*, 159 Wash.App. 576, 247 P.3d 436 (Wash. App. Div. 2 2011), *review denied*. ■



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# Pennsylvania Prison Guard Convicted in Drug Probe, Testifies Against Coworkers

Former Luzerne County Correctional Facility guard John Gonda, known as “G-Unit,” was the subject of an investigation called Operation Avalanche after authorities received tips he was selling “large quantities [of drugs] in the Wilkes-Barre area.” The probe targeted the Outlaws Motorcycle Club, and Gonda was among 22 people charged in connection with a \$3.6 million cocaine distribution ring.

When investigators raided Gonda’s home they found six bags of cocaine, a marijuana pipe, a digital scale and seven firearms. The charging affidavit said he was an “associate” of the Outlaws. He was convicted on charges of participating in a corrupt organization, conspiracy to deliver cocaine and delivery of cocaine.

Sentenced in November 2010 to one-to-two years in prison, Gonda was made immediately eligible for work release by Luzerne County Senior Judge Chester B. Muroski. Gonda obtained a job as a property manager, which permitted him to leave prison during the work week from 8:00 a.m. to 7:00 p.m.

Shortly after Gonda was sentenced, Judge Muroski also granted his request for weekend furloughs, which allowed him to be released from 8:00 a.m. to 4:00 p.m. on weekends for “family care hours.” His furlough request noted that before being jailed he cared for his totally disabled father.

Of course, Gonda’s willingness to testify against other Luzerne County prison employees may have helped him receive a lenient sentence, work release and weekend furloughs. Gonda, described as a key witness, testified in March 2011 that he had purchased cocaine from former Luzerne County prison guard Christopher J. Walsh, 29. Another guard, Joseph Ciampi, 43, who was named in grand jury records as buying cocaine but not charged, also testified against Walsh.

In addition to Walsh, prison guard Jason D. Fierman, former prison nurse Kevin D. Warman and former prison Capt. John M. Carey were charged on March 10, 2011 with drug-related offenses as part of Operation Broken Trust. Carey was accused of receiving cocaine from other prison employees, including Gonda, and from former prisoners. Fierman allegedly sold cocaine and prescription drugs

inside the prison, while Warman was accused of using fake names or the names of prisoners to obtain prescription drugs from pharmacies. Warman and Carey had previously been fired; Walsh and Fierman were suspended following their arrests.

“Any allegations that individuals in positions of authority are using their powers to commit crimes or compromise law enforcement activities are an extremely serious matter,” said Acting Attorney General Bill Ryan. “These crimes are not only a violation of the public trust but also a clear threat to public safety.”

Although not criminally charged, Ciampi was suspended without pay for 18 days and later demoted in April 2011. “He was not arrested, but we believe some of his actions were of poor judgment. He accepted the demotion,” said Assistant County Solicitor Stephen Menn. Ciampi resigned the following month.

Despite the damning testimony from Gonda and Ciampi, Walsh was acquitted at trial on March 7, 2012, with the jury

deliberating for just over an hour. According to Walsh’s attorney, Walsh will seek to regain his job as a prison guard.

Carey pleaded guilty to a misdemeanor charge of possession of a controlled substance and was sentenced in January 2012 to 18 months’ probation. Warman pleaded guilty to fraudulently obtaining prescription drugs; he was sentenced on May 11, 2012 to 18 months in an intermediate punishment program that includes house arrest with electronic monitoring. Warman had implicated former Luzerne County deputy warden Sam Hyder, saying the deputy warden had received prescription drugs, but Hyder denied the accusations and was not charged.

Fierman, the last Luzerne County prison employee charged with drug offenses, is scheduled to go to trial in June 2012. ■

Sources: [www.standardspeaker.com](http://www.standardspeaker.com), [www.citizensvoice.com](http://www.citizensvoice.com), [www.timesleader.com](http://www.timesleader.com), [www.attorneygeneral.gov](http://www.attorneygeneral.gov)

## Judge, Not Jury, Must Resolve Questions about Administrative Exhaustion

Factual disputes surrounding whether a prisoner properly exhausted administrative remedies under the Prison Litigation Reform Act (PLRA) prior to filing suit must be resolved by the court, not a jury, the U.S. Court of Appeals for the Second Circuit held on July 26, 2011. In so ruling, the Second Circuit aligned itself with similar decisions from the Third, Fifth, Seventh, Ninth and Eleventh Circuits.

Rafael Messa sued numerous New York Department of Correctional Services (NYDOCS) employees after he was injured during an altercation with guards. Messa did not file any grievances about the incident before filing his lawsuit. Instead, he argued that he was not required to exhaust because he had been threatened with further violence by guards if he complained about the incident. Additionally, he alleged that NYDOCS staff refused to assist him in preparing his grievances. Messa contended that he needed help because he spoke only Spanish and was illiterate.

Messa’s case was set for trial after the district court denied summary judgment

to the defendants. However, several days prior to trial, the court decided *sua sponte* to conduct a hearing on the exhaustion issue. After considering testimony from Messa and NYDOCS officials, the district court found that Messa’s excuses for failing to exhaust were contrary to the evidence. Accordingly, the court dismissed Messa’s suit due to non-exhaustion.

On appeal, Messa argued that the district court violated his Seventh Amendment right to a jury trial by refusing to submit the exhaustion issue to a jury. The Second Circuit disagreed.

While the Seventh Amendment guarantees the right to a jury trial “[i]n suits at common law, where the value in controversy shall exceed twenty dollars,” this right does not apply to all factual disputes that may arise in a case, the appellate court held.

Instead, the Seventh Amendment’s guarantee of a jury trial applies only to “the ultimate determination of issues of fact by the jury.” Exhaustion of administrative remedies, according to the Court of Appeals, does not go to the ultimate issue

of fact in a case, but rather is “a matter of judicial administration” unrelated to “the merits of the underlying dispute.” As such, the Seventh Amendment’s jury trial guarantee does not extend to the resolution of

factual matters related to exhaustion.

This conclusion is reinforced by the text and purpose of the PLRA, the Second Circuit explained, as exhaustion of administrative remedies “is a condition

that must be satisfied before the court can act on an inmate plaintiff’s action.” The judgment of the district court was therefore affirmed. See: *Messa v. Goord*, 652 F.3d 305 (2nd Cir. 2011). ■

## \$500,000 Settlement in Pennsylvania Jail Prisoner’s Medical-Related Death

A \$500,000 settlement has been reached in a federal lawsuit involving the death of a prisoner at Pennsylvania’s Fayette County Prison. Terry Johnson, 48, died in his cell in February 2007 after he was denied medical care.

The suit, filed by Johnson’s wife, Lorraine, named several prison employees and the facility’s medical contractor, PrimeCare Medical, as defendants. Shortly after Johnson’s arrest on February 22, 2007 for violating a restraining order against trying to contact his wife, he began complaining of abdominal pain.

He had developed a perforation in his intestines and contracted peritonitis, an infection of the membrane that covers the inner wall of the stomach. The perforation was a complication of gastric

bypass surgery that Johnson had had in 2002. Although he required immediate medical attention, guards ignored his pleas for help. He died in his cell at 9:00 a.m. on February 23, 2007.

The lawsuit claimed that Johnson endured “30 hours of unnecessary and excruciating pain, suffering, and agony” prior to his death. The \$500,000 settlement, reached in December 2011, will be paid by an insurance liability fund run by the State County Commissioners Association.

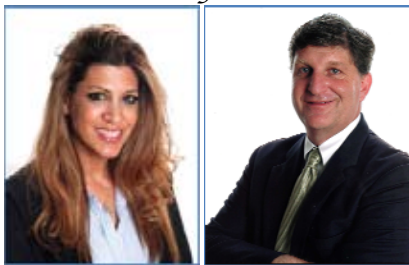
The settlement came after several days of

testimony at trial; no admission of liability was made by the prison or its employees. The jury subsequently entered a verdict in favor of PrimeCare Medical, which was not a party to the settlement. See: *Johnson v. Medlock*, U.S.D.C. (W.D. Penn.), Case No. 2:09-cv-00234-LPL. ■

Additional source: [www.pittsburghlive.com](http://www.pittsburghlive.com)

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# ACLU Report Proves Smart Criminal Justice Policy Reform is Possible

by David M. Reutter

The American Civil Liberties Union released a report in August 2011 that calls for reforming the U.S. criminal justice system. The report makes recommendations for systematic reforms, front-end reforms and back-end reforms; it reviews policy changes and their results in six states that have successfully implemented bipartisan criminal justice reforms, and details similar efforts in four other states.

"Since President Richard Nixon first announced 'the War on Drugs' forty years ago, the United States has adopted 'tough on crime' criminal justice policies that have given it the dubious distinction of having the highest incarceration rate in the world," states the report's introduction. "These past forty years of criminal justice policy making have been characterized by over-criminalization, increasingly draconian sentencing and parole regimes, mass incarceration of impoverished communities of color, and rapid prison building."

However, recent budget deficits of historic proportions have caused some policy makers to look for ways to reduce the enormous expense of the justice system. The ACLU report describes how states with long histories of being "tough on crime" have embraced alternatives to imprisonment with less punitive measures. Such reforms "not only make more fiscal sense, but also better protect our communities."

The rate of incarceration in the United States grew 700% between 1970 and 2010. As a result, our nation has "almost a quarter of the world's prisoners in the entire world, although we have only 5% of the world's population."

Before discussing successes in Texas, Kansas, Mississippi, South Carolina, Kentucky and Ohio as a result of implementing bipartisan criminal justice reforms, the report recommends three major types of reforms. These "evidence based" practices are backed by social science and economic evidence that proves their success and demonstrates that mass incarceration is not necessary to protect public safety.

Systemic reforms "affect criminal justice policies at large, undertaking a holistic evaluation or reform of a state's criminal justice system." Requiring evidence-based criminal justice practices and risk assessment instruments ensure that policies are "crafted based on criminology or science rather than fear or emotion."

To prove that policies actually achieve their stated goals, states should implement other policies to obtain research on results and effect. A commission should periodically review new or existing policies and require agencies to issue reports on the progress and success of policies after they are implemented.

Mississippi, Kentucky and Ohio are examples of the successful application of "risk assessment instruments to individuals throughout the criminal justice process, including in the pretrial process, sentencing process, and parole and probation decisions." An accurate fiscal analysis is necessary to examine the impact in years following implementation of new policies, which "are often where cost savings are realized." South Carolina undertook such an analysis when implementing legislation to reform its criminal justice system. The state expects the law will save \$241 million, including \$175 million in construction costs, by reducing the prison population by 1,786 prisoners by 2014.

The ACLU report also advocates for front-end reforms. The purpose of front-end reforms is to "reduce the unnecessary incarceration of individuals in jails and prisons." Such reforms "recognize that prison should be an option of last resort, reserved only for those who really need to be incarcerated."

To reduce the nearly \$9 billion in taxpayer dollars spent to house about 750,000 people in local jails across the nation each year, reliance on pre-trial detention must be curtailed. Kentucky and California have enacted laws that limit pretrial detention only to those who pose high threats to public safety. Kentucky's success came from abolishing commercial, for-profit bail bondsman and establishing a uniform bail schedule for non-violent felonies, misdemeanors and violations.

Of the nearly 1.7 million people arrested in 2009 for nonviolent drug charges, 90% were charged with possession only – draining billions of taxpayer dollars and millions of law enforcement hours with little benefit to public safety. Kentucky and California have decriminalized or defelonized drug possession. Drug treatment and other sanctions for those with substance abuse problems and other low-level offenses are being used in lieu of prison in Kansas, Texas, Mississippi, South Carolina, Kentucky and Ohio. Sentencing disparities between

cocaine and crack have been eliminated in South Carolina and Ohio.


Further, eliminating mandatory minimum sentences or "three strikes" and habitual offender laws helped Ohio, South Carolina and Texas reduce their prison populations without endangering public safety. Reclassifying low-level felonies to misdemeanors eliminated prison time in South Carolina, Kentucky and Ohio for offenders who formerly were sent to prison for crimes such as simple drug possession or non-violent low-level theft.

Back-end reforms aim to "shrink the current and returning incarcerated population and focus on parole and probation reforms." One such policy reform is the elimination of "truth-in-sentencing" laws that require prisoners to serve at least 85% of their sentences before release. Mississippi made 3,000 prisoners eligible for parole in 2008 by partially repealing its 1995 truth-in-sentencing law.

Extending good time credits for program participation and good behavior by prisoners provides incentives for conduct that reduces recidivism. Some states are using non-prison alternatives for technical parole and probation violations, while Louisiana and Ohio are requiring their parole boards to use risk assessment tools and receive training to make parole decisions based on evidence rather than instinct.

Finally, Texas, Kentucky and Ohio require that savings from criminal justice reform policies be reinvested in programs that reduce crime. This results in declines in prison populations and corrections budgets while also protecting the public.

The ACLU report analyzes the acts of each of the six states that have successfully implemented criminal justice policy reforms. Each has seen reductions in their prison populations, saving taxpayers millions of dollars. The report also examines reform efforts in California, Louisiana, Maryland and Indiana, and concludes by outlining the positive and negative trends affecting criminal justice legislation in 2011.

The ACLU report is available on PLN's website and at [www.aclu.org](http://www.aclu.org). 

Source: "Smart Reform is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities," ACLU (August 2011)

## JOIN THE PRISON PHONE JUSTICE CAMPAIGN!

A national coalition of media and criminal justice activists, led by the Human Rights Defense Center, Working Narratives and the Center for Media Justice, invite you to join a campaign to fight the high cost of prison phone calls.

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Send a brief letter to the Federal Communications Commission explaining the impact the high costs of prison phone calls have had on you and your family. Address the letter "Dear Chairman Genachowski," and please speak from your own personal experience. You must state the following at the top of the letter: "This is a public comment for the *Wright* Petition (CC Docket #96-128)." Your letters will be made part of the public docket in the case.

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Only with your support will we end the abusive cost of prison phone calls. Encourage others to join us in this struggle!





## News in Brief

**California:** Saul “Scrappy” Perez, 23, and William Lloyd Coats, 45, incarcerated at the Glenn County jail, were charged with drug-related offenses after being caught smoking pot in the jail’s exercise yard on January 24, 2012. A guard noticed unusual activity near the toilet area on the yard, and a search uncovered an undisclosed amount of marijuana and a lighter. Both Coats and Perez tested positive for marijuana use.

**California:** Zachary William Johnson, 32, escaped from the John Latorraca Correctional Facility in El Nido on February 14, 2012 with help from both his wife and girlfriend. After managing to abscond from the jail, Johnson’s girlfriend, Jeanette Segovia, 40, helped him take a taxi to his wife, Dawn Hathaway, 25. When sheriff’s deputies tried to stop the taxi, the driver got out and Johnson drove off, leading the deputies on a high-speed chase that ended when officers used a spike strip. Johnson was booked into the Merced County Jail and his wife and girlfriend were arrested on charges of aiding and abetting. Sheriff Mark Pazin opined that Johnson had escaped because he “wanted to spend some time with his lady friends on Valentine’s Day.”

**Florida:** On December 28, 2011, the Third District Court of Appeal held that state prisoner Randy Chaviano, 26, serving a life sentence for second-degree murder and drug possession with intent to sell, would receive a new trial because the court reporter in his original trial could not produce a transcript of the proceedings. The court reporter, Terlesa Cowart, ran out of paper in her stenography machine during the trial. She transferred an electronic copy of the transcript from the machine to her computer, but that copy was destroyed by a virus. Thus, almost the entire transcript from the trial was lost, which prejudiced Chaviano’s appeal. Cowart was subsequently fired.

**Florida:** Facebook has led to the undoing of another dangerous criminal. When Steven Mulhall, 21, was in court in Broward County on February 23, 2012 for a misdemeanor theft case, he decided to steal the judge’s nameplate from a courtroom door. A tip led sheriff’s deputies to check Facebook, where a picture of Mulhall holding the purloined nameplate was posted on his girlfriend’s Facebook page. He was consequently charged with felony theft, jailed and later released.

**Florida:** Belle Glade mayor Steve Wilson had a second job until February 2, 2012: He worked as a corrections probation supervisor at the GEO Group-run South Bay Correctional Institution. He retired, however, while under investigation for compromising a confidential FBI database; had he not retired he would have been demoted for violating prison policy. According to FDOC records, Wilson had let another employee log into the National Crime Information Center (NCIC) database using his name and password, to conduct criminal background checks. That employee had not received security clearance to access the database. “Certainly he violated all types of rules,” said retired detective Tom Whatley. Wilson did not face any criminal charges.

**Iowa:** Terrell Lillybridge, 30, headed back to federal court in March 2012 on a petition to have his supervised release revoked. His offense? He was accused of stealing Girl Scout cookies from another resident at a halfway house where he was staying after being released from federal prison. Plus he didn’t report that he had lost his job at a factory. According to a report filed in federal court, Lillybridge took the cookies on February 25, 2012 and the theft was caught on a surveillance camera. On March 16, the court ordered him to serve six months in prison followed by another year on supervised release. Federal officials said the “allegation concerning stolen Girl Scout cookies was not a basis for the revocation,” though it was cited in the revocation petition.

**Montana:** According to a February 14, 2012 news report, two prisoners at the Missoula County Detention Facility, one awaiting trial on a child sex abuse charge and the other a convicted sex offender, got into a fight over the ages of their victims. Shane Maxey, 28, accused of trying to arrange a tryst with an undercover cop posing as a 14-year-old girl online, and Donald Rogers, 47, convicted of sexually assaulting his girlfriend, engaged in a brawl at the jail. Both now face additional assault charges.

**New York:** For some reason, Queens elementary school teacher Melissa Dean thought it was a good idea to have students in her fifth-grade class send holiday cards to her boyfriend, John Coccarelli. Who was incarcerated at the Groveland Correctional Facility. On charges that included child porn. The students thought

the cards were going to people who were sick or staying in homeless shelters. “She didn’t have the school’s permission,” city Special Commissioner of Investigations Richard Condon said in February 2012, after a report concerning an investigation into Dean was released. “She didn’t have the parents’ permission. The children didn’t know they were sending these cards to someone who was an inmate in a correctional facility.”

**Ohio:** Edwin E. Dulaney, Jr., 47, a guard at the Richland County Jail, resigned in February 2012 when he was indicted on five counts of unauthorized use of law enforcement databases. Dulaney was accused of looking up information on the Ohio Law Enforcement Gateway system multiples times over a three-month period. “You’re not permitted to just look people up,” said prosecutor Brent Robinson. “He was looking up people out of curiosity.”

**Paraguay:** An escape from the Tacumbu prison near the capital city of Asuncion was thwarted by a dog, according to a February 2012 news report. Three prisoners had dug a tunnel from their cell to outside the facility and were in the process of escaping at dawn when the dog began barking, which caused a guard to take notice. “Because of a stray dog we couldn’t escape,” said Hilario Villalba, one of the unlucky prisoners. “When I reached the street, sticking my head out, the stupid dog barked and alerted a guard.”

**Tennessee:** On March 4, 2012, Kevin Jerome Cox, 45, director of operations at the Hill Detention Center, a Davidson County Sheriff’s Office facility, was arrested in Murfreesboro on charges of weapons possession and violation of the implied consent law. Cox was found unconscious in a vehicle that was still in drive; his foot was on the brake. He smelled of alcohol and had slurred speech and bloodshot eyes. Two loaded handguns, a Glock and a revolver, were found in the trunk of his car.

**Texas:** Prisoners at the Liberty County Jail had access to soft-porn movies on a cable TV channel for months before jail officials took action, even though guards were documenting the problem. “4 Dorm watching porno channel again,” one guard wrote in a log entry on February 3, 2012. The prisoners had managed to bypass Comcast’s control box to gain access to the adult entertainment channels. Comcast delayed fixing the problem, claiming it

wasn't possible for prisoners to view those channels. "What bothers me is that it went on for so long," said Liberty County judge Craig McNair.

**Washington:** On January 30, 2012, following a brief standoff, police officers arrested Anthony Rodriguez, 33, a state prison guard at the Washington Correc-

tions Center. Rodriguez allegedly choked and threatened to shoot his wife as they were going through a divorce. The next day he accompanied his wife and children

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## News in Brief (cont.)

to Skyline Elementary school, where his wife reported the incident and police were notified. Rodriguez drove off, refused to stop, avoided spike strips and would not leave his car for about 45 minutes after finally stopping before he surrendered. A loaded 9mm handgun was found in his car. Rodriguez was jailed with bail set at \$500,000.

**Washington:** Zane Nixon, a guard at the Remann Hall juvenile facility in Tacoma, was arrested on November 23, 2011 for groping at least eight women near Pacific Lutheran University. He

was charged with one count of rape, two counts of indecent liberties and seven counts of assault with sexual motivation. Nixon reportedly admitted to the incidents, saying he was “depressed and lonely and [he] grabbed a few girls.” He was fired five days after his arrest.

**Washington:** In another Facebook-related news report, Pierce County jail guard Alan L. O’Neill, 41, was busted for having two wives and charged with bigamy in March 2012. O’Neill initially married in 2001 when he was named Alan Fulk, then left his wife in 2009, changed his name and remarried. When his second wife created a Facebook page, the site suggested adding O’Neill’s first wife as a

friend under the “people you may know” feature. After being charged, O’Neill was placed on administrative leave from his job at the jail. “About the only danger he would pose is marrying a third woman,” quipped Pierce County prosecutor Mark Lindquist.

**Zimbabwe:** A guard at the Chikurubi Prison Farm killed himself with a gunshot to the head on January 31, 2012 in front of prisoners at the facility. The guard, identified only as Runatsi, reportedly killed himself after it was discovered that he was having adulterous affairs with other prison employees’ wives. The Zimbabwe Prison Service confirmed that a guard at the camp had shot and killed himself. ■

## Criminal Justice Resources

### *ACLU National Prison Project*

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners’ Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### *Amnesty International*

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### *Center for Health Justice*

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### *Critical Resistance*

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### *Family & Corrections Network*

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### *FAMM*

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### *The Fortune Society*

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### *Innocence Project*

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### *Just Detention International*

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### *Justice Denied*

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### *National CURE*

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### *November Coalition*

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### *Partnership for Safety and Justice*

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### *The Sentencing Project*

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# PRISON

## Legal News

VOL. 23 No. 7

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

July 2012

### Racial Critiques of Mass Incarceration: Beyond the New Jim Crow

*by James Forman, Jr.\**

In the last decade, a number of scholars have called the American criminal justice system a new form of Jim Crow. These writers have effectively drawn attention to the injustices created by a facially race-neutral system that severely ostracizes offenders and stigmatizes young, poor black men as criminals. I argue that despite these important contributions, the Jim Crow analogy leads to a distorted view of mass incarceration. The analogy presents an incomplete account of mass incarceration's historical origins, fails to consider black attitudes toward crime and punishment, ignores violent crimes while focusing almost exclusively on drug crimes, obscures class distinctions within

the African American community, and overlooks the effects of mass incarceration on other racial groups.

#### Introduction

In the five decades since African Americans won their civil rights, hundreds of thousands have lost their liberty. Blacks now make up a larger portion of the prison population than they did at the time of *Brown v. Board of Education*, and their lifetime risk of incarceration has doubled. As the United States has become the world's largest jailer and its prison population has exploded, black men have been particularly affected. Today, black men are imprisoned at 6.5 times the rate of white men.

While scholars have long analyzed the connection between race and America's criminal justice system, an emerging group of scholars and advocates has highlighted the issue with a provocative claim: They argue that our growing penal system, with its black tinge, constitutes nothing less than a new form of Jim Crow. This article examines the Jim Crow analogy. Part I tracks the analogy's history, documenting its increasing prominence in the scholarly literature on race and crime. Part II explores the analogy's usefulness, pointing out that it is extraordinarily compelling in some respects. The Jim Crow analogy effectively draws attention to the plight of black men whose opportunities in life have been permanently diminished by the loss of citizenship rights and the stigma they suffer as convicted offenders. It highlights how ostensibly race-neutral criminal justice policies unfairly target black communities. In these ways, the

analogy shines a light on injustices that are too often hidden from view.

But, as I argue in Parts III through VII, the Jim Crow analogy also obscures much that matters. Part III shows how the Jim Crow analogy, by highlighting the role of politicians seeking to exploit racial fears while minimizing other social factors, oversimplifies the origins of mass incarceration. Part IV demonstrates that the analogy has too little to say about black attitudes toward crime and punishment, masking the nature and extent of black support for punitive crime policy. Part V explains how the analogy's myopic focus on the War on Drugs diverts us from discussing violent crime—a troubling oversight given that violence destroys so many lives in low-income black communities and that violent offenders make up a plurality of the prison population. Part VI argues that the Jim Crow analogy obscures the fact that mass incarceration's impact has been almost exclusively concentrated among the most disadvantaged African Americans. Part VII argues that the analogy draws our attention away from the harms that mass incarceration inflicts on other racial groups, including whites and Hispanics.

Before I turn to the argument itself, I would like to address a question that arose when I began presenting versions of this article to readers familiar with my own opposition to our nation's overly punitive criminal justice system. As an academic, I have written extensively about the toll that mass incarceration has taken on the African American community, and especially on young people in that community.<sup>1</sup> I am also a former public defender who

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*PLN* is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

## **Beyond New Jim Crow (cont.)**

co-founded a school that educates young people who have been involved with the juvenile justice system.<sup>2</sup> This history prompted one friend familiar with this project to ask the following questions: 1) “Don’t you agree with much of what the New Jim Crow writers have to say?” and 2) “Why are you critiquing a point of view that is so closely aligned with your own?” I hope to clarify this article’s broader goals by providing brief answers to those questions here.

*Don’t you agree with much of what the New Jim Crow writers have to say?* In a word, yes. The New Jim Crow writers have drawn attention to a profound social crisis, and I applaud them for that. Low-income and undereducated African Americans are currently incarcerated at unprecedented levels. The damage is felt not just by those who are locked up, but by their children, families, neighbors and the nation as a whole. In Part II, I recognize some of the signal contributions of the New Jim Crow writers, especially their description of how our criminal justice system makes permanent outcasts of convicted criminals and stigmatizes other low-income blacks as threats to public safety. I also single out Michelle Alexander’s contribution to the literature because her elaboration of the argument is the most comprehensive and persuasive to date.

*Why are you critiquing a point of view that is so closely aligned with your own?* Although the New Jim Crow writers and I agree more often than we disagree, the disagreements matter. I believe that the Jim Crow analogy neglects some important truths and must be criticized in the service of truth. I also believe that we who seek to counter mass incarceration will be hobbled in our efforts if we misunderstand its causes and consequences in the ways that the Jim Crow analogy invites us to do. In Part V, for example, I note that the New Jim Crow writers encourage us to view mass incarceration as exclusively (or overwhelmingly) a result of the War on Drugs. But drug offenders constitute only a quarter of our nation’s prisoners, while violent offenders make up a much larger share: one-half. Accordingly, an effective response to mass incarceration will require directly confronting the issue of violent crime and developing policy responses that can compete with the punitive approach that currently dominates

American criminal policy. The idea that the Jim Crow analogy leads to a distorted view of mass incarceration—and therefore hampers our ability to challenge it effectively—is the central theme of this article.

### **I. A Brief History of the “New Jim Crow”**

Though I have not determined who first drew the analogy between today’s criminal justice system and Jim Crow, a number of writers began using the term to describe contemporary practices in the late 1990s. In 1999, for example, William Buckman and John Lamberth declared:

Jim Crow is alive on America’s highways, trains and in its airports. Minorities are suspect when they appear in public, especially when they exercise the most basic and fundamental freedom of travel. In an uncanny likeness to the supposedly dead Jim Crow of old, law enforcement finds cause for suspicion in the mere fact of certain minorities in transit.

Buckman and Lamberth argued that racial profiling was a byproduct of the nation’s strategy to combat drugs, and criticisms of the War on Drugs have remained central to the Jim Crow analogy. That same year, in a widely-quoted speech to the American Civil Liberties Union (ACLU), Executive Director Ira Glasser argued that “drug prohibition has become a replacement system for segregation. It has become a system of separating out, subjugating, imprisoning, and destroying substantial portions of a population based on skin color.”

At the same time that ACLU lawyers were promoting the Jim Crow analogy in the policy and advocacy world, the idea began to gain adherents in the scholarly community. In 2001, Temple University Beasley School of Law hosted a symposium entitled, *U.S. Drug Laws: The New Jim Crow?*, which featured a series of lectures and articles supporting the analogy.<sup>3</sup>

The Jim Crow analogy has gained adherents in the past decade—most prominently, Michelle Alexander in her recent book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Alexander reports that she initially resisted the analogy when she encountered it as a young ACLU lawyer in the Bay Area. Upon noticing a sign on a telephone pole proclaiming that “THE DRUG



## Beyond New Jim Crow (cont.)

WAR IS THE NEW JIM CROW,” she remembers thinking: “Yeah, the criminal justice system is racist in many ways, but it really doesn’t help to make such an absurd comparison. People will just think you’re crazy.”<sup>4</sup> Over the years, however, she has come to believe that the flyer was right. “Quite belatedly, I came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”<sup>5</sup>

### II. The Value of the Jim Crow Analogy

The Jim Crow analogy has much to recommend it, especially as applied to the predicament of convicted offenders. Building on the work of legal scholars who have examined the collateral consequences of criminal convictions, the New Jim Crow writers document how casually, almost carelessly, our society ostracizes offenders. Our mantra is “Do the Crime, Do the Time.” But, increasingly, “the time” is endless, as people with criminal records are permanently locked out of civil society.

Even those most familiar with our criminal justice system may fail to recognize how comprehensively we banish those who are convicted of crimes. I confess that I did not see the scope of the problem myself, even during my six years as a public

defender. During that time, I counseled many clients about the consequences of pleading guilty, and two questions dominated our conversations. First, what were the chances of winning at trial? Second, what was the likely sentence after a guilty plea compared to the likely sentence if we lost at trial? But the Jim Crow analogy has helped me realize how much I overlooked in advising my clients.

Consider all of a conviction’s consequences. Depending on the state and the offense, a person convicted of a crime today might lose his right to vote as well as the right to serve on a jury. He might become ineligible for health and welfare benefits, food stamps, public housing, student loans and certain types of employment.

These restrictions exact a terrible toll. Given that most offenders *already* come from backgrounds of tremendous disadvantage, we heap additional disabilities upon existing disadvantage. By barring the felon from public housing, we make it more likely that he will become homeless and lose custody of his children. Once he is homeless, he is less likely to find a job. Without a job he is, in turn, less likely to find housing on the private market—his only remaining option. Without student loans, he cannot go back to school to try to create a better life for himself and his family. Like a black person living under the Old Jim Crow, a convicted criminal today becomes a member of a stigmatized caste, condemned to a lifetime of second-class citizenship.

While the Jim Crow analogy is most compelling as applied to those convicted of crimes, it applies more broadly as well. Just as Jim Crow defined blacks as inferior, mass imprisonment encourages the larger society to see a subset of the black population—young black men in low-income communities—as potential threats. This

stigma increases their social and economic marginalization and encourages the routine violation of their rights. Intense police surveillance of black youths becomes accepted practice. Their misbehavior in school is reported to the police and leads to juvenile court. Employers are reluctant to hire them. Thus, even young, low-income black men who are never arrested or imprisoned endure the consequences of a stigma associated with race.

Taken together, these two forms of exclusion—making permanent outcasts of convicted criminals while stigmatizing other poor blacks as potential threats—have had devastating effects on low-income black communities. While the New Jim Crow writers are not the first to have raised these issues, their analogy usefully connects the dots: It highlights the cumulative impact of a disparate set of race-related disabilities. Alexander is especially persuasive in this regard. Invoking the “birdcage” metaphor associated with structural racism theorists, she documents in depressing detail how mass incarceration intersects with a wide variety of laws and institutions to trap low-income black men in a virtual cage. Her elaboration of the Jim Crow analogy is also useful because, by skillfully deploying a rhetorically provocative claim, she has drawn significant media attention to the often ignored phenomenon of mass imprisonment.

So, especially for those of us who believe that America incarcerates too many people generally, and too many African Americans specifically, what objection could there be to the claim that our criminal justice system is the New Jim Crow? In stating my objections, I do not mean to suggest that mass incarceration is anything less than a profound social ill, or that racial disparity, racial indifference, and even outright racial animus in the criminal

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justice system are yesterday's concerns. Nor do I argue that the Jim Crow analogy fails because mass incarceration is not *exactly* the same as Jim Crow. After all, the best of the New Jim Crow writers—especially Alexander—acknowledge important differences between the two racial caste systems.

My objection to the Jim Crow analogy is based on what it obscures. Proponents of the analogy focus on those aspects of mass incarceration that most resemble Jim Crow and minimize or ignore many important dissimilarities. As a result, the analogy generates an incomplete account of mass incarceration—one in which most prisoners are drug offenders, violent crime and its victims merit only passing mention, and white prisoners are largely invisible. In sum, as I argue in the Parts that follow, the analogy directs our attention away from features of crime and punishment in America that require our attention if we are to understand mass incarceration in all of its dimensions.

### III. Obscuring History: The Birth of Mass Incarceration

The New Jim Crow writers typically start their argument with a historical claim, grounded in a theory of backlash. The narrative is as follows: Just as Jim Crow was a response to Reconstruction and the late-nineteenth century Populist movement that threatened Southern elites, mass incarceration was a response to the civil rights movement and the tumult of the 1960s. Beginning in the mid-1960s, Republican politicians—led by presidential candidates Goldwater and Nixon—focused on crime in an effort to tap into white voters' anxiety over increased racial equality and a growing welfare state. Barry Goldwater cleared the way in 1964 when he declared, "Choose the way of [the

Johnson] Administration and you have the way of mobs in the street."<sup>6</sup> In 1968, Nixon perfected Goldwater's strategy. In the words of his advisor H.R. Haldeman, Nixon "emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."<sup>7</sup> John Ehrlichman, another advisor, characterized Nixon's campaign strategy as follows: "We'll go after the racists."<sup>8</sup>

There is much truth to this account, and its telling demonstrates part of what is useful about the Jim Crow analogy. Today, too many Americans refuse to acknowledge the continuing impact of race and prejudice on public policy. By documenting mass imprisonment's roots in race-baiting political appeals, the New Jim Crow writers effectively demolish the notion that our prison system's origins are exclusively colorblind.

But in emphasizing mass incarceration's racial roots, the New Jim Crow writers overlook other critical factors. The most important of these is that crime shot up dramatically just before the beginning of the prison boom. Reported street crime quadrupled in the twelve years from 1959 to 1971. Homicide rates doubled between 1963 and 1974, and robbery rates tripled. Proponents of the Jim Crow analogy tend to ignore or minimize the role that crime and violence played in creating such a receptive audience for Goldwater's and Nixon's appeals. Alexander, for example, characterizes crime

and fear of crime as follows:

Unfortunately, at the same time that civil rights were being identified as a threat to law and order, the FBI was reporting fairly significant increases in the national crime rate. Despite significant controversy over the accuracy of the statistics, these reports received a great deal of publicity and were offered as further evidence of the breakdown in lawfulness, morality, and social stability.<sup>9</sup>

In this account, the stress is not on crime itself but on the FBI's reporting, about which we are told there is "significant controversy."<sup>10</sup> But even accounting for problems with the FBI's crime statistics, there is no doubt that crime increased dramatically.

Nor were white conservatives such as Nixon and Goldwater alone in demanding more punitive crime policy. In *The Politics of Imprisonment*, Vanessa Barker describes how, in the late 1960s, black activists in Harlem fought for what would become the notorious Rockefeller drug laws, some of the harshest in the nation. Harlem residents were outraged over rising crime (including drug crime)


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## Beyond New Jim Crow (cont.)

in their neighborhoods, and demanded increased police presence and stiffer penalties. The NAACP Citizens' Mobilization Against Crime demanded "lengthening minimum prison terms for muggers, pushers, [and first] degree murderers."<sup>11</sup> The city's leading black newspaper, *The Amsterdam News*, advocated mandatory life sentences for the "non-addict drug pusher of hard drugs" because such drug dealing "is an act of cold, calculated, premeditated, indiscriminate murder of our community."<sup>12</sup>

Rising levels of violent crime and demands by black activists for harsher sentences have no place in the New Jim Crow account of mass incarceration's rise. As a result, the Jim Crow analogy promotes a reductive account of mass incarceration's complex history in which, as Alexander puts it, "proponents of racial hierarchy found they could install a new racial caste system."<sup>13</sup>

### IV. Obscuring Black Support for Punitive Crime Policy

The Harlem NAACP's push for tougher crime laws raises an important question: If many black citizens supported the policies that produced mass imprisonment, how can it be regarded as the New Jim Crow? The Old Jim Crow, after all, was a series of legal restrictions, backed by state and private violence, imposed on

black people by the white majority. When given the opportunity, blacks rejected it. Three states—Mississippi, Louisiana and South Carolina—had black voting majorities during Reconstruction, and all three banned racial segregation in public schools and accommodations. The Jim Crow analogy encourages us to understand mass incarceration as another policy enacted by whites and helplessly suffered by blacks. But today, blacks are much more than subjects; they are actors in determining the policies that sustain mass incarceration in ways simply unimaginable to past generations.

So what do African Americans think? Various writers have addressed the question of black attitudes toward crime policy, typically through opinion polling. But the question yet to be asked is: What sort of crime policies do black-majority jurisdictions enact? After all, if mass incarceration constitutes the New Jim Crow, presumably a black-majority jurisdiction today would rapidly move to reduce its reliance on prisons.

Of course, one reason no one has asked this question is that, unlike during Reconstruction, there are no states today with black voting majorities. Still, one jurisdiction warrants scrutiny. Washington, D.C. is the nation's only majority-black jurisdiction that controls sentencing policy. The District is 51% African American. Since home rule was established in 1973, all six of its mayors have been black, and the D.C. Council has been majority-black

for most of that time. The police are locally controlled and the mayor appoints the police chief. African Americans are overrepresented in the police force: African Americans make up 66% of the Metropolitan Police Department (MPD), and the MPD has the highest percentage of black officers in supervisory positions of any large majority-black city in the country.

Because of its unique status, the city assumes both state and municipal functions in many aspects of the criminal process. Most important for purposes of this analysis, the D.C. Council and the mayor operate like a state government in terms of sentencing policy; they determine statutory maximums for all offenses, decide whether to impose mandatory minimums, and so on. Similarly, because the mayor appoints—and the Council confirms—the police chief, local officials exercise significant control over policing practices. This control is important because policing practices are a significant source of racial disparity in incarceration rates.

I acknowledge that in a number of important ways, D.C. has less autonomy than a state. For example, while the process for selecting judges for D.C. courts includes significant input from a local commission and from the office of D.C.'s elected representative to Congress (currently Eleanor Holmes Norton), the White House ultimately makes judicial appointments. In addition, although local officials prosecute juvenile offenses, the U.S. Attorney's Office prosecutes most crimes by adults.

And yet, despite these external forces, local black elected officials exert considerable power over crime policy and have the ability to push back against federal actors. For example, if the mayor and the Council think that federal prosecutors are targeting too many low-level drug offenders, or that federally-appointed judges are imposing excessive sentences for drug offenses, they can lower the maximum penalties for these offenses. The D.C. Council has sometimes pushed for sentencing leniency. In 1982, by a vote of 72% to 28%, D.C. residents adopted an initiative providing for mandatory minimum penalties for defendants who distributed controlled substances or who possessed such substances with the intent to distribute them. Twelve years later, in December 1994, the D.C. Council voted to abolish mandatory minimums for nonviolent drug offenses. Councilmembers defended the move as

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a recognition that mandatory minimums had “failed to deter drug use and drug sales.”<sup>14</sup>

So what do incarceration rates look like in this majority-black city with substantial local control over who goes to prison and for how long? They mirror the rates of other cities where African Americans have substantially less control over sentencing policy. Washington, D.C. (a majority-black jurisdiction) and Baltimore (a majority-black city within a majority-white state) have similar percentages of young African American men under criminal justice supervision. Detroit, an overwhelmingly African American city in a majority-white state, has a *smaller* proportion of adults under criminal justice supervision than Washington, D.C. One in twenty-five Detroit adults are in jail or prison, on probation or on parole, compared to one in twenty-one adults in D.C.

These data indicate the limits of the Jim Crow analogy, which attributes mass incarceration entirely to the animus or indifference of white voters and public officials toward black communities. While racial animus or indifference might explain the sky-high African American in-

carceration rates in Baltimore and Detroit, they do not explain those in Washington, D.C. And just as the analogy fails to explain why a majority-black jurisdiction would lock up so many of its own, it says little about blacks who embrace a tough-on-crime position as a matter of racial justice.

When I was a public defender in D.C., my African American counterparts in the U.S. Attorney’s Office often informed me that they had become prosecutors in order to “protect the community.” Since I started teaching, I have met many students with prosecutorial ambitions who feel the same way. And they have a point: If stark racial disparities within the prison system motivate mass incarceration’s critics, stark racial disparities among crime victims motivate tough-on-crime African Americans. Young black men suffer a disproportionate amount of both fatal and nonfatal violence. In 2006, the homicide rate for young black men was nineteen times higher than the rate for young white men. Most crime is intra-racial; more than 90% of black homicide victims are killed by blacks, and more than 75% of all crimes against black victims are committed by blacks. Many of the black prosecutors I

know are very much like Paul Butler, who, though now a critic of American crime policy, originally became a prosecutor to help low-income black communities. As Butler recounts:

My friends from law school thought it was kind of wack that I was a prosecutor. I had been the down-for-the-cause brother who they had expected to work for Legal Aid or as a public defender. I told them I was helping people in the most immediate way—delivering the protection of the law to communities that needed it most, making the streets safer, and restoring to victims some measure of the dignity that a punk criminal had tried to steal.<sup>15</sup>

Butler, writing before his conversion, speaks for people who care deeply about other blacks and see tough-on-crime policies as pro-black. I disagree with them because I view mass incarceration as doing much more harm than good, and I would opt for a radically different approach to combating violence. However, their numbers and their passion have no analogue in the Jim Crow era. The New Jim Crow writers are not oblivious to the fact that

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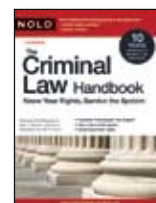
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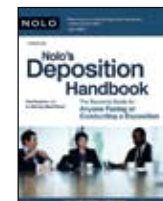
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## Beyond New Jim Crow (cont.)

some blacks support tough-on-crime policies. The standard response is to argue that blacks do not support the policies that sustain mass incarceration, but are simply complicit with them:

In the era of mass incarceration, poor African Americans are not given the option of great schools, community investment, and job training. Instead, they are offered police and prisons. If the only choice that is offered blacks is rampant crime or more prisons, the predictable (and understandable) answer will be "more prisons."<sup>16</sup>

This answer compellingly demonstrates how choice is constrained for residents of the ghetto. But it is not a complete response to the black prosecutor phenomenon. Prosecutors like Paul Butler do not live in a world of constrained choice.

es. They studied at prestigious law schools and received appellate clerkships. They could work to promote alternatives that the New Jim Crow writers and I believe will combat crime more effectively than locking up more black men. Instead, they *choose*—in the most robust and unfettered sense of that word—a different path. And the fact that they make this choice, combined with their (at least in some cases) racial justice orientation, raises an important question about whether the ends they seek can be fairly analogized to Jim Crow.

The Washington, D.C. phenomenon raises a similar challenge. Admittedly, the District's mayor and Council do not have unlimited options in deciding how to fight crime; their choices are not as unconstrained as Paul Butler's choice to become a prosecutor when he graduated from Harvard Law School. Yet they have real choices around criminal justice policy. I know this in part because my former colleagues at the Public Defender Service (PDS) regularly testify against tough-on-crime legislation before the D.C. Council, and they regularly present less punitive alternatives—sometimes including the education, community investment and job training programs that Alexander hypothesizes blacks will choose over prison if given the option. Yet, PDS often fails to persuade the black-majority legislative body.

### V. Ignoring Violence

To this point, I have focused principally on crimes of violence and the state's response to such crimes. I part company with the New Jim Crow writers in this regard. They focus almost exclusively on

the War on Drugs. This approach made sense for early ACLU advocates such as Ira Glasser, whose only objective was to curtail the drug war. It makes less sense for more recent proponents of the analogy, who attack the broader phenomenon of mass incarceration but restrict their attention to punishments for drug offenders. Other crimes—especially violent crimes—are rarely mentioned.

The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow. One of Jim Crow's defining features was that it treated similarly situated blacks and whites differently. For writers seeking analogues in today's criminal justice system, drug arrests and prosecutions provide natural targets, along with racial profiling in traffic stops. Blacks and whites use drugs at roughly the same rates, but African Americans are significantly more likely to be arrested and imprisoned for drug crimes. As with Jim Crow, the difference lies in government practice, not in the underlying behavior. The statistics on selling drugs are less clear-cut, but here too the racial disparities in arrest and incarceration rates exceed any disparities that might exist in the race of drug sellers.

But violent crime is a different matter. While rates of drug offenses are roughly the same throughout the population, blacks are overrepresented among the population for violent offenses. For example, the African American arrest rate for murder is seven to eight times higher than the white arrest rate; the black arrest rate for robbery is ten times higher than

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the white arrest rate. Murder and robbery are the two offenses for which the arrest data are considered most reliable as an indicator of offending.

In making this point, I do not mean to suggest that discrimination in the criminal justice system is no longer a concern. There is overwhelming evidence that discriminatory practices in drug law enforcement contribute to racial disparities in arrests and prosecutions, and even for violent offenses there remain unexplained disparities between arrest rates and incarceration rates. Instead, I make the point to highlight the problem with framing mass incarceration as a new form of Jim Crow. Because the analogy leads proponents to search for disparities in the criminal justice system that resemble those of the Old Jim Crow, they confine their attention to cases where blacks are like whites in all relevant respects, yet are treated worse by law. Such a search usefully exposes the abuses associated with racial profiling and the drug war. But it does not lead to a comprehensive understanding of mass incarceration.

Does it matter that the Jim Crow analogy diverts our attention from violent crime and the state's response to it, if it gives us tools needed to criticize the War on Drugs? I think it does, because contrary to the impression left by many of mass incarceration's critics, the majority of America's prisoners are not locked up for drug offenses. Some facts worth considering: According to the Bureau of Justice Statistics, in 2006 there were 1.3 million prisoners in state prisons, 760,000 in local jails and 190,000 in federal pris-

ons. Among the state prisoners, 50% were serving time for violent offenses, 21% for property offenses, 20% for drug offenses, and 8% for public order offenses. In jails, the split among the various categories was more equal, with roughly 25% of inmates being held for each of the four main crime categories (violent, drug, property and public order). Federal prisons are the only type of facility in which drug offenders constitute a majority (52%) of prisoners, but federal prisons hold many fewer people overall. Considering all forms of penal institutions together, more prisoners are locked up for violent offenses than for any other type, and just under 25% (550,000) of our nation's 2.3 million prisoners are drug offenders. This is an extraordinary and appalling number. But even if every single one of these drug offenders were released tomorrow, the United States would still have the world's largest prison system.

Moreover, our prison system has grown so large in part because we have changed our sentencing policies for *all* offenders, not just drug offenders. We divert fewer offenders than we once did, send more of them to prison, and keep them in prison for much longer. An exclusive focus on the drug war misses this larger point about sentencing choices. This is why it is not enough to dismiss talk of violent offenders by saying that "violent crime is not responsible for the prison boom." It is true that the prison population in this country continued to grow even after violent crime began to decline dramatically. However, the *state's response* to violent crime—less diversion

and longer sentences—has been a major cause of mass incarceration. Thus, changing how governments respond to *all* crime, not just drug crime, is critical to reducing the size of prison populations.

I am sympathetic to the impulse to avoid discussing violent crime. Like other progressives, the New Jim Crow writers are frustrated by decades of losing the crime debate to those who condemn violence while refusing to acknowledge or ameliorate the conditions that give rise to it. "As a society," Alexander writes, "our decision to heap shame and contempt upon those who struggle and fail in a system designed to keep them locked up and locked out says far more about ourselves than it does about them."<sup>17</sup> Since it is especially difficult to suspend moral judgment when the discussion turns to violent crime, progressives tend to avoid or change the subject.

To see how reticent mass incarceration's critics can be regarding the subject of violence, consider how Alexander describes Jarvis Cotton, whose story opens *The New Jim Crow*:

Cotton's great-great grandfather could not vote as a slave. His great-grandfather was beaten to death by the Ku Klux Klan for attempting to vote. His grandfather was prevented from voting by Klan intimidation. His father was barred from voting by poll taxes and literacy tests. Today, Jarvis Cotton cannot vote because he, like many black men in the United States, has been labeled a felon and is currently on parole.<sup>18</sup>



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## Beyond New Jim Crow (cont.)

Cotton is like his ancestors in that he cannot vote. But there is one salient difference between Cotton and his ancestors. They couldn't vote because they were black; Cotton lost his right to vote when he was convicted of murder. But Alexander nowhere mentions Cotton's crime, and her passive construction—Cotton “has been labeled a felon”—suggests that he had no choice in the matter. Now, I agree with Alexander that *even though* Cotton was convicted of murder, his status as a felon should not carry with it a lifetime of disenfranchisement. But Alexander does not strengthen her case, or help us understand the problem of mass incarceration in all of its dimensions, by declining to acknowledge his violent offense.

Avoiding the topic of violence in this manner is a mistake, not least because it disserves the very people on whose behalf the New Jim Crow writers advocate. After all, the same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime. And the two phenomena are mutually reinforcing.

I had long known this as an intellectual matter, but it was driven home for me in 1997, when I helped to open an alternative school for teens from the juvenile court system.<sup>19</sup> Our application asked students to tell us the best and worst aspects of their last school. “Too many fights” was the most common response to the question about the worst aspects, and many students reported that “too many people get jumped,” “school is chaos,” and the environment was “too hectic!” The kids we served were typically considered to be the troublemakers; a good portion had been kicked out of school for fighting.

They had been arrested for drug dealing, auto theft, gun possession, aggravated assault, robbery and, in one case, murder. Yet their applications reminded us that even the “tough” kids seek safety and security. Their acts of violence, we came to understand, had often been closely connected to being in an environment that felt unsafe.

Over time, as we got to know our students better, we began to appreciate the toll that violence had taken, and continued to take, in their lives. For example, Bobby, one of our very first students, described being robbed and watching his friend get killed:

I try not to always do my best too much because I know, why do your best when it can all be taken away from you in mere seconds, over something stupid? Because my friend that got killed in front of me, I mean he didn't do nothing, he didn't do nothing, he was always good, he got killed for his jacket, because he didn't want to give up his jacket....

When he was shot, I was lucky I didn't get shot. I got stabbed. Stabbed with an ice pick. ... Lost a lot of blood and everything, passed out, blood clogged up....

All I kept doing was looking at him, looking at him, and wondering was we both going to be all right, was we gonna be able to think about this, and get back at our person....

That right there I think, inspired me to say man, what the fuck man, if a nigger can get away with killing somebody cold blood straight like that, what can't they get away with? What can't you get away with?

If people can do stuff like that and get away with it, and not be caught, not be arrested, not be locked up, not be killed, or suffer in no type of way, why can't I do that? Why can't I do that? If somebody can take my friend's life from me, somebody that I cared about, if they can take that from me, why can't I do that to about anybody else, to anybody else, and not care about it? Not care about who I hurt, who I make feel my pain. Just don't even care, don't have no sympathy for nobody.

There are no easy answers to the tragedy conveyed by Bobby's story. But those who write about mass incarceration from a racial justice perspective should not avoid the questions it raises. The attack terribly damaged Bobby's psyche. As educators who fervently believed that studying hard was key to a better life for our students, we were haunted by the question, *Why do your best when it can all be taken away from you in mere seconds?* Bobby pleads for accountability; if he is not able to “get back at our person” himself, he wants him arrested and punished. It is this part of Bobby's plea, I suspect, that causes many of the New Jim Crow writers to avoid the topic of violent crime. After all, won't discussing it simply reinforce the case for more punitive crime policy?

But allowing ourselves to hear Bobby's painful story need not mandate “harsh justice” as a response. Instead it might lead us to ask: What does accountability mean? Bobby's assailant should surely be locked up, but for how long? One in eleven American prisoners are serving life sentences, and about a third of those sentences are life without parole. In what conditions? What might we have done to reduce the likelihood that Bobby would

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be attacked in the first place? And what might we do to reduce the likelihood that Bobby will retaliate against his assailant (“get back at our person”) or some future innocent party (“why can’t I do that to anybody else, to anybody else, and not care about it”)? These are supremely difficult questions that I do not attempt to answer in this article. I raise them to highlight their importance and to suggest that, in focusing exclusively on the drug war, the New Jim Crow writers take themselves out of a discussion to which they might make important contributions.

## VI. Obscuring Class

In the previous Part, I argued that one of Jim Crow’s defining characteristics was that it treated similarly situated blacks and whites differently, and that the New Jim Crow writers are forced by the pressure of the analogy to find modern-day parallels. This leads them to overlook violent crime by limiting their inquiry to the War on Drugs. Jim Crow has another distinctive characteristic that threatens to lead us astray when contemplating mass incarceration. Just as Jim Crow treated similarly situated blacks and whites differently, it treated differently situated blacks similarly. An essential quality of Jim Crow was its uniform and demeaning treatment of all blacks. Jim Crow was designed to ensure the separation, disenfranchisement, and political and economic subordination of *all* black Americans—young or old, rich or poor, educated or illiterate.

Indeed, one of the central motivations of Jim Crow was to render class distinctions within the black community

irrelevant, at least as far as whites were concerned. For this reason, it was essential to subject blacks of all classes to Jim Crow’s subordination and humiliation. That’s why Mississippi registrars prohibited blacks with Ph.Ds from voting, why lunch counters refused to serve well-dressed college students from upstanding Negro families, and why, as Martin Luther King, Jr. recounts in his “Letter from Birmingham Jail,” even the most famous black American of his time was not permitted to take his six-year-old daughter to the whites-only amusement park she had just seen advertised on television.

Analogizing mass incarceration to Jim Crow tends to suggest that something similar is at work today. This may explain why many of the New Jim Crow writers overlook the fact that mass incarceration does not impact middle- and upper-class educated African Americans in the same way that it impacts lower-income African Americans. This is an unfortunate oversight, because one of mass incarceration’s defining features is that, unlike Jim Crow, its reach is largely confined to the poorest, least-educated segments of the African American community. High school dropouts account for most of the rise in African American incarceration rates. I noted earlier that a black man born in the 1960s is more likely to go to prison in his lifetime than was a black man born in the 1940s. But this is not true for all African American men; those with college degrees have been spared.

As Bruce Western’s research reveals, for an African American man with some college education, the lifetime chance of going to prison actually *decreased* slightly

between 1979 and 1999 (from 6% to 5%). A black man born in the late 1960s who dropped out of high school has a 59% chance of going to prison in his lifetime whereas a black man who attended college has only a 5% chance. Although we have too little reliable data about the class backgrounds of prisoners, what we do know suggests that class, educational attainment and economic status are powerful indicators for other races as well. Western estimates that for white men born in the late 1960s, the lifetime risk of imprisonment is more than ten times higher for those who dropped out of high school than for those who attended some amount of college.

Class differences have always existed within the black community—but never on anything approaching today’s scale. Large segments of the black community are in extreme distress. Unemployment rates for young black men are high by any measure, even more so if we factor in incarceration rates. In some respects, blacks are no better off than they were in the 1960s, and in others (e.g., proportion of children born to unmarried women) they are much worse off. Yet the black middle class has expanded dramatically—and to be clear, I am not talking about the handful of black super-elites. Too many discussions of class differences within the black community adopt a posture of “Obama and Oprah on the one hand, the rest of us on the other.” But that overlooks a crucial part of the story: the substantial growth of the true middle class.

Consider that in 1967 only 2% of black households earned more than

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## Beyond New Jim Crow (cont.)

\$100,000; today, 10% of black families earn that amount. Going down the income scale from upper middle class to middle class, we also see robust growth. Since 1967, the percentage of black households earning more than \$75,000 a year has more than tripled, from 5% to 18% today. The percentage earning \$50,000 or more a year has doubled—from 17% in 1967 to 33% today. But the percentages alone do not tell the whole story; it is important to appreciate the sheer numbers of African Americans who have earned the perks of middle-class American existence. By 2009, there were 2.65 million African American households in the upper end of the middle-class range—i.e., earning more than \$75,000 a year. The educational attainment numbers reveal a similar pattern. In 1967, 4% of the black population over the age of twenty-five had a four-year college degree; today, 20% do.

Changes of this magnitude require us to modify how we discuss race. In considering mass incarceration, any suggestion that blacks across classes are similarly situated in the face of American racism

should be abandoned. Malcolm X's assertion that a black man with a Ph.D. is still a "nigger" made sense in the context of Jim Crow.<sup>20</sup> So did its equivalent in the legal literature. As Mari Matsuda argued, "[v]ictims necessarily think of themselves as a group, because they are treated and survive as a group. The wealthy black person still comes up against the color line. The educated Japanese still comes up against the assumption of Asian inferiority."<sup>21</sup> In support of her claim, Matsuda pointed out that Japanese Americans across classes all shared a similar fate in internment camps during World War II. But prisons, as we have seen, are precisely the opposite of internment camps in this regard. Scholars concerned with race cannot explore the significance of this reversal until they first acknowledge it—and many still do not.

## VII. Overlooking Race

The Jim Crow analogy also obscures the extent to which whites, too, are mass incarceration's targets. Since whites were not direct victims of Jim Crow, it should come as little surprise that whites do not figure prominently in the New Jim Crow writers' accounts of mass incarceration.

Most who invoke the analogy simply ignore white prisoners entirely. Alexander mentions them only in passing; she says that mass imprisonment's true targets are blacks, and that incarcerated whites are "collateral damage."

Many whites—most of them poor and uneducated—are now behind bars. One-third of our nation's prisoners are white, and incarceration rates have risen steadily even in states where most inmates are white. That's a lot of "collateral damage." Those white prisoners are sometimes subjected to ghastly mistreatment, as an ACLU attorney recently alleged in a lawsuit challenging conditions of confinement in a prison in Idaho, where 77% of the prisoners in state facilities are white. He reported, "In my 39 years of suing prisons and jails, I have never confronted a more disgraceful, revolting and inexcusable case of mass abuse and federal rights violations than this one."<sup>22</sup> For some categories of offenses where our laws are especially severe, such as possession of child pornography, most of the defendants are middle-aged white men. Prosecutions for sexually explicit material offenses have risen by more than 400% since 1996. In addition to the dramatic rise in the number of cases filed, the sentences imposed for all child-pornography related offenses have become increasingly severe, rising from an average of 2.4 years in 1996 to almost 10 years in 2008. Moreover, although whites remain relatively underrepresented as drug offenders, the percentage of drug offenders who are white has risen since 1999, while the percentage of drug offenders who are black has declined.

Hispanic<sup>23</sup> prisoners also receive little attention from the New Jim Crow writers, even though they constitute 20% of American prisoners. The fact that quality data on Hispanics in the prison system is often lacking may be partly to blame for this omission. But it is important to remember that during the Jim Crow years, Hispanics in many jurisdictions were subject to forms of exclusion, segregation and disenfranchisement not unlike those inflicted on African Americans. And given what we do know about current Hispanic incarceration rates, it is clear that Hispanic prisoners deserve the attention of all who write about the prison system. The Hispanic prison population climbed steadily during the 1990s, to the point where one in six Hispanic males born today can expect to go to prison in their lifetime. The available data suggest that Hispanic incarceration

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rates are almost double the rates for whites, and many observers believe that these data undercount the true rate at which Hispanics go to prison. Most Hispanic prisoners, like most blacks and whites, are serving time for violent offenses, and about 20% are in prison for drug offenses.

Thus, the data on white and Hispanic prisoners reminds us that while African Americans are incarcerated in numbers grossly disproportionate to their percentage of the overall population, the fact remains that 60% of prisoners are not African American. As I will argue in the conclusion, anyone analyzing mass incarceration must keep that 60% squarely in mind.

### Conclusion

I conclude by briefly indicating a way forward. What follows is not intended as a set of policy prescriptions; instead, I offer four themes that must remain central if we are to scale back our prison system and reduce the damage that incarceration causes. In offering these ideas I want to reiterate that, despite the critique offered in this article, I share much common ground with the New Jim Crow writers. Without papering over the analytic and

strategic differences that exist between us, these concluding pages seek to clarify how closely my goals overlap with those of the writers I have discussed.

*First, combating mass incarceration will require a multiracial movement.* Some of the New Jim Crow writers understand this, yet they do not appreciate the extent to which the Jim Crow analogy pushes non-black prisoners to the margins. The Jim Crow claim is, at the end of the day, an appeal to the base—a metaphor with great potential to mobilize blacks and racial justice advocates to care about mass incarceration. But it comes at a cost—namely, the analogy does not encourage other racial groups to recognize that, on this issue, black interests coincide with their own. If whites and Hispanics disappear from view in discussions of mass incarceration, they are less likely to see a campaign against it as speaking to and for them. This is a missed opportunity—especially now, when fiscal considerations could motivate large numbers of voters to demand reductions in our bloated prison system.

*Second, an effective response to mass incarceration requires that moral appeals on behalf of mass incarceration's direct targets be combined with broader argu-*

*ments on behalf of community safety.* In questioning the New Jim Crow writers' account of the origins of mass incarceration, I have suggested that some of those who push for tough-on-crime laws, and many of those who support them, do so out of a real concern about safety. To be clear, I hardly think this is the only motivation: The New Jim Crow writers make a powerful case that racial animus and indifference play a role as well. But a substantial number of Americans care primarily about being able to walk home without being mugged or seeing drug sellers lurking on the corner. Progressives should acknowledge such concerns and make the case that mass incarceration is detrimental to community safety, rather than necessary to secure it.

*Third, an effective response to mass incarceration requires increased attention to how we treat prisoners.* Prison conditions receive too little attention among mass incarceration's critics, including the New Jim Crow writers. It is difficult to say why this is so, but at least for the New Jim Crow writers, the explanation may lie in their focus on the War on Drugs. After all, a strong case can be made that drug offenders (especially drug users, who receive

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the bulk of the New Jim Crow writers' attention) should not be incarcerated at all. Having framed the issue in this way, these writers may feel less compelled to focus on improving prison conditions.

But even if the movement to challenge mass incarceration is ultimately successful, America will continue to have an enormous system of prisons and jails for a long time to come. And even if our prison population shrinks substantially, some people will always need to be locked up—hence the urgency of attending to the conditions in which prisoners are held.

How we treat those we incarcerate is a critical front in the battle against mass incarceration. Consider *Brown v. Plata*, in which the Supreme Court recently ruled that California must reduce its prison population in order to mitigate the unconstitutional harms associated with overcrowding.<sup>24</sup> The lower court, in finding for the plaintiffs, had warned that “the state’s continued failure to address the severe crowding in California’s prisons would perpetuate a criminogenic prison system that itself threatens public safety.”<sup>25</sup> Justice Kennedy recognized that concern in his majority opinion, quoting then-Governor Schwarzenegger’s acknowledgement that overcrowding “increases recidivism,” as well as testimony from the acting secretary of the California prison system, who said that she “absolutely believe[s] that we make people worse, and that we are not meeting public safety by the way we treat people.”<sup>26</sup>

The record in *Plata* clearly illustrates that prison conditions are not only a prisoners’ rights issue, but are also a crime prevention issue. Most prisoners, after all, are serving time for violent offenses. And even with longer prison sentences, the vast majority of American prisoners will be released eventually. So we face a choice: Will we take individuals whom we have judged unfit for life in the free world, expose them to further violence, destabilize them psychologically and deny them treatment for addiction, trauma and mental illness? Or will we attempt to create a system of support and rehabilitation for the incarcerated? For their sake, and our own, the answer seems clear.

*Fourth, advocates for a more parsimonious use of punishment must take violence,*

*and the fear of violence, seriously.* There is nothing wrong (and a lot that is right) about emphasizing the profound racial disparities in incarceration rates for drug crimes. But there is everything wrong with accounts of crime policy that fail to mention the fear, disorder and violence that accompanied city life in much of the 1970s, 1980s and early 1990s.

Ta-Nehisi Coates compares life in Baltimore’s black community during the 1980s with his father’s urban experience a generation before:

When crack hit Baltimore, civilization fell. Dad told me how it used to be. In his time, the beefs were petty and stemmed from casual crimes.... The bad end of a beef was loose teeth and stitches, rarely shock trauma and “Blessed Assurance” ringing the roof of the storefront funeral home.

... But as time went on, we forgot ourselves and went cannibal—the next brother became a meal to feed our rep. At night, *Action News* unfurled the daily scroll, and always amid the rescued dogs, the lost toddlers, the scandalous bankers, there was us, buckled by the pop-pop of a .22, laid out on a sad stain of blood.

I didn’t fully get it then, but this was an inglorious turn. The world was filled with great causes—Mandela, Nicaragua, and the battle against Reagan. But we died for sneakers stitched by serfs, coats that gave props to teams we didn’t own, hats embroidered with the names of Confederate states. I could feel the falling, all around. The flood of guns wrecked the natural order.<sup>27</sup>

And it wasn’t just Baltimore. Bodies—mostly black, mostly young and mostly poor—fell all across America. In Washington, D.C., the number of homicides *tripled* in just seven years, as the violence associated with the crack trade ravaged the city. Crime has declined since the era that Coates recounts. But there are neighborhoods where violence remains a daily fact of life. David Kennedy, in his recent book, *Don’t Shoot: One Man, a Street Fellowship, and the End of Violence in Inner-City America*, explains:

Everybody knows crime is down these days, it’s a national success story. America’s homicide rate hit almost 10 per 100,000 in the

peak years; it’s now about half that. But not for black men. Black men are dying, overwhelmingly by gunshot, at a horrendous pace. In 2005, black men aged eighteen to twenty-four were murdered at a rate of 102 per 100,000 (white men of the same age: 12.2 per 100,000). Recent data show that, even as homicide overall continues to decline, black men are dying *more*. Between 2000 and 2007, the gun homicide rate for black men aged fourteen to seventeen went up 40 percent; eighteen to twenty-four, up 18 percent; twenty-five and over, up almost 27 percent.<sup>28</sup>

Kennedy’s response to this crisis consists of programs grounded in what he calls “focused deterrence.” The strategy concentrates police resources on the offenders driving violent crime while also seeking sustained cooperation with the communities most affected by the violence. Police and community members work together to convey a single message to those who are causing the violence: Violent crime will not be tolerated.

Kennedy’s approach is not the only one; criminologist Franklin Zimring, for example, drawing on the story of New York City’s crime reductions, suggests other ways to reduce crime while shrinking prisons. It is too early to tell whether any of these approaches are sustainable at scale. But this is a conversation that we must have, and that racial justice advocates must engage in, if we are to bring the disastrous era of mass incarceration to an end. ■

*A longer version of this article was published as “Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,” 87 NYU L. Rev. 21 (2012). The longer version is available at: [www.law.yale.edu/documents/pdf/Faculty/Forman\\_RacialCritiques.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Forman_RacialCritiques.pdf)*

### Endnotes:

\* Clinical Professor of Law at Yale Law School.

<sup>1</sup> See generally James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150, 151 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that aggressive criminal justice policies, including racial profiling, have affected communities of color disproportionately); James Forman, Jr., *Community Policing and Youth as As-*

sets, 95 J. CRIM. L. & CRIMINOLOGY 1 (2004) (arguing that community policing efforts are undercut because the efforts leave youth out of the model); James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009) (arguing that the expansiveness and harshness of mass incarceration have contributed to even more drastic War on Terror policies); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1006–09 (2010) (reviewing PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009)) (discussing the adverse effects of prison conditions on both inmates and the community at large).

<sup>2</sup> See David Domenici & James Forman, Jr., *What It Takes To Transform a School Inside a Juvenile Justice Facility: The Story of the Maya Angelou Academy*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 283, 283–85 (Nancy E. Dowd ed., 2011) (discussing an effort to improve a school within a juvenile justice facility); James Forman, Jr. & David Domenici, *A Circle of Trust: The Story of the See Forever School*, in STARTING UP: CRITICAL LESSONS FROM 10 NEW SCHOOLS (Lisa Arrastia & Marv Hoffman eds., 2012).

<sup>3</sup> See generally Symposium, U.S. Drug Laws: The New Jim Crow?, 10 Temp. Pol. & Civ. Rts. L. Rev. 303 (2001).

<sup>4</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLIND-

NESS (2010), at 3.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 41 (quoting Barry Goldwater, Peace Through Strength, in 30 VITAL SPEECHES OF THE DAY 744 (1964)).

<sup>7</sup> *Id.* at 43 (citing WILLARD M. OLIVER, THE LAW & ORDER PRESIDENCY 127–28 (2003)).

<sup>8</sup> *Id.* at 44 (quoting JOHN EHRLICHMAN, WITNESS TO POWER 233 (1970)).

<sup>9</sup> *Id.* at 41.

<sup>10</sup> *Id.*

<sup>11</sup> VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 151 (2009).

<sup>12</sup> *Id.*

<sup>13</sup> ALEXANDER, at 40.

<sup>14</sup> Matt Neufeld, *Minimum Terms’ Demise Wins Praise: But Prosecutors Say Bad Message Sent*, WASH. TIMES, Nov. 3, 1994, at C5 (quoting Councilmember William Lightfoot).

<sup>15</sup> PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 24 (2009).

<sup>16</sup> ALEXANDER, at 205.

<sup>17</sup> *Id.* at 171.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> For a more detailed account, see James Forman, Jr. & David Domenici, *A Circle of Trust: The Story of the See Forever School*, in STARTING UP: CRITICAL LESSONS FROM 10 NEW SCHOOLS (Lisa Arrastia & Marv Hoffman eds., 2012).

<sup>20</sup> ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 327 (1992) (recounting a conversation in which Malcolm X asked a black associate professor, “Do you know what white racists call black Ph.D’s? ... Nigger!”).

<sup>21</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 376 (1987).

<sup>22</sup> Press Release, American Civil Liberties Union, ACLU Lawsuit Charges Idaho Prison Officials Promote Rampant Violence (Mar. 11, 2010).

<sup>23</sup> The Bureau of Justice Statistics (BJS) uses the term “Hispanic” rather than “Latino.” For the sake of consistency, I use the term Hispanic to follow BJS terminology.

<sup>24</sup> *Brown v. Plata*, 131 S.Ct. 1910, 1922–23 (2011).

<sup>25</sup> *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JIM P, 2009 WL 2430820, at \*84 (E.D. Cal. Aug. 4, 2009). *Coleman* was combined with *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

<sup>26</sup> *Plata*, No. 09-1233, slip op. at 38 (U.S. May 23, 2011).

<sup>27</sup> TA-NEHISI COATES, THE BEAUTIFUL STRUGGLE: A FATHER, TWO SONS, AND AN UNLIKELY ROAD TO MANHOOD 29-30 (2008).

<sup>28</sup> DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 12 (2011).

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# From the Editor

by Paul Wright

The Prison Phone Justice Campaign is gaining momentum nationally. As announced in last month's issue, a number of organizations, including the Human Rights Defense Center (the parent organization of Prison Legal News) have launched a campaign to end the practice of price gouging prisoners and their families for the cost of phone calls.

Right now a critical issue is getting the Federal Communications Commission (FCC) to act on the Wright Petition, which would cap interstate prison phone rates. If you and your friends, family members and supporters can call, write or e-mail the FCC, as described in the ad on page \_\_, that will let the FCC know this is an important issue affecting millions of prisoners and those who care about them.

In addition to organizing the Prison Phone Justice Campaign, we are also updating the information for all 50 states and the Bureau of Prisons with respect to their telephone contracts, the actual cost of prison phone calls, the kickbacks paid by phone companies, and who holds the contracts. We will report our progress in upcoming issues of *PLN* and will publish a comprehensive report on the topic in early 2013.

We have added almost a dozen new books, mostly law-related, to our book list on pages 53-54. Please check them out; as usual, there is free shipping on book orders over \$50. We will be publishing reviews of the new additions in the near future. As we move forward, we plan to update our book list on a more regular basis to provide our readers with timely and informative books they can use to help themselves. If you know of titles that might be of interest to *PLN* readers, please let us know.

On April 21, 2012, Charles "Chuck" Colson died at the age of 80. Colson

was special counsel to President Richard Nixon; he pleaded guilty to obstruction of justice for his role in the Watergate scandal. Colson had a religious conversion to Christianity, and served seven months in federal prison. Upon his release he started Prison Fellowship with the goal of evangelizing among U.S. prisoners.

I never met Chuck in person but we corresponded while I was in prison, and over the past 22 years PLN and HRDC have joined with Prison Fellowship on a number of issues to advocate on behalf of prisoners. Those issues have ranged from stopping prison rape and sexual assaults to supporting the Second Chance Act.

While Chuck remained a conservative Republican until his death, that turned out to be a good thing when it came to advocating for prisoners' rights, since all too often he and Prison Fellowship were the only voices of reason that conservative lawmakers would listen to. Prisoners of all religious persuasions have lost a friend and ally with Chuck's passing, and we extend our condolences to his family and friends.

This month's cover story responds to many of the points made by Michelle Alexander in her book *The New Jim Crow*, which was reviewed by Mumia Abu Jamal in the September 2010 issue of *PLN*. Alexander's book has been very popular, with good reason: she presents a compelling argument to explain mass incarceration in the United States. But as in many cases the underlying factors are more complicated, and James Forman's cover story discusses some of the weaknesses and problems with Alexander's race-based explanation for mass incarceration.

Those interested in this topic should read *The New Jim Crow*, which provides a compelling look at our justice system, and compare it with Forman's differing views

to make up their own minds. We believe it is important to have debate and discussion on these critical issues; as we seek progressive change in the criminal justice system, it is worthwhile to understand how we arrived at our current situation.

As the 2012 presidential election approaches, Forman's article has even greater relevance as people are asked to vote for Obama, assuming they can vote and are not disenfranchised because they have been convicted of a felony. After three years under the nation's first black president, the federal prison population continues to grow, its budget is higher than ever, and Obama went almost two years before issuing any pardons – the second slowest pardon record for any president.

Further, the deafening silence of most black civil rights groups on criminal justice issues and mass imprisonment is telling. PLN frequently sues jails and prison systems for censoring our magazine and books, and in the past few years we have sued some of the largest jails in the U.S., including the Fulton County jail in Atlanta and Orleans Parish jail in New Orleans. Most of the prisoners in those facilities are black, but nearly everyone in the political power structure in those cities – the mayor, sheriff, most of the jail staff, etc. – are also black, yet conditions are as bad if not worse than they were in the actual Jim Crow days when black people did not hold elected office.

Mass imprisonment has had a bipartisan consensus in this country over the past 40 years as mainstream politicians of all stripes vie to outdo each other as advocates for tough-on-crime laws and police-state policies. Of the potential candidates for the 2012 presidential election, only Ron Paul has publicly opposed the death penalty – yet surveys show that a third of the American public is against capital punishment. Policymakers have their own agendas, which are often contrary to establishing a fair, effectual and rehabilitative criminal justice system that best serves the public.

I hope you enjoy this issue of *PLN*. Please encourage others to subscribe. Also, please support our Prison Phone Justice Campaign by making a donation to help fund the campaign and gather the information necessary to make it successful. ■

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# Minnesota Man Settles Lawsuit for \$229,500 and Policy Changes to Assist Deaf Arrestees

A deaf Minnesota man has agreed to accept \$229,500 and policy changes to settle a lawsuit that alleged violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act (RA) and the Minnesota Human Rights Act (MHRA) due to the failure of jail officials to provide him with an effective means of communication.

Douglas Duane Bahl, a deaf advocate who teaches American Sign Language (ASL) at the University of Minnesota and St. Paul College, was arrested on November 17, 2006 following a traffic stop. Bahl had run a red light and was pulled over by St. Paul police officer Stephen Bobrowski. When Bobrowski reached the side of the car, Bahl pointed to his ear and said "no." He then gestured that he wanted to communicate in writing.

Bobrowski, who was not carrying a pen or paper, pointed to his mouth and said "driver's license," then made a card shape with his hands. Both parties agreed that Bobrowski pushed Bahl's shoulder and grabbed his wrist. Bahl pulled away and started to write when Bobrowski sprayed him with "aerosol subject restraint," and Bahl began flailing his arms. Bobrowski then removed him from the car, restrained him and placed him under arrest.

Bahl was taken to a hospital for treatment and then booked into the Ramsey County Adult Detention Center (RCADC). He spent three days at the

facility but was not provided an ASL interpreter. He eventually filed suit against the City of St. Paul, Ramsey County and the Ramsey County Sheriff's Office.

A Minnesota U.S. District Court granted summary judgment to the city. The court found that an arrest is not a "service," thus the ADA, RA and MHRA had not been violated, and Bahl did not claim excessive force. Further, the district court found no violation in the city's failure to provide an ASL interpreter during Bahl's arrest or custodial interrogation, because Bahl could communicate effectively in writing and refused to discuss his arrest without an interpreter.

On July 28, 2011, Bahl and the Ramsey County defendants reached a settlement. Under its terms, Bahl received \$51,000, his wife received \$6,000 and the Minnesota Disability Law Center received \$172,500 in attorney fees and costs. The settlement also specified changes at RCADC to provide effective communication for deaf and hard of hearing prisoners.


Within 30 days of the settlement, RCADC was to have a deaf and hard of hearing coordinator. Officers are to notify RCADC before leaving an arrest site that they are

bringing in a deaf or hard of hearing person, and RCADC "will normally provide interpreters within one (1) hour" of taking custody of the arrestee.

In addition to informing an arrestee of the charges against them and services that RCADC provides or offers through the interpreter, the facility will make its prisoner handbook available on video with an ASL interpreter. It will also equip and maintain a videophone, a text-only cell phone, a teletypewriter and a handset amplifier.

"My hope is that other counties here and around the world will look to these changes as an example," Bahl said. He has filed an appeal with the Eighth Circuit over the grant of summary judgment to the City of St. Paul, which remains pending. Bahl was represented by Roderick J. Macpherson III of the Minnesota Disability Law Center. See: *Bahl v. County of Ramsey*, U.S.D.C. (D. Minn.), Case No. 0:08-cv-05001-DSD-TNL. ■

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# Audits Identify Problems with Michigan Prisoner ReEntry Initiative

by David M. Reutter

Two audit reports, one by Michigan's Office of the Auditor General in 2012 and the other by the State Budget Office in 2011, both found shortcomings with the Michigan Prisoner ReEntry Initiative (MPRI).

Michigan took a bold step in 2005 by implementing MPRI. The program abandoned typical tough-on-crime practices and instead adopted policies designed "to significantly reduce crime and enhance public safety by implementing a seamless system of services for offenders from the time they enter into prison through their transition, reintegration and aftercare in their communities." For example, MPRI offers parolees assistance with housing, transportation, employment, health care and education.

The implementation of MPRI services by Department of Corrections (DOC) staff and partner community agencies statewide was coordinated by the Offender Reentry Services Section (ORSS), a new agency established within the DOC. ORSS was also responsible for initiating and monitoring certain offender reentry contracts. Oversight of the contracting and contract monitoring processes is provided by the DOC's Bureau of Fiscal Management.

For fiscal year 2009-10, MPRI's budget was \$52.7 million; of that amount, \$27 million was for contracts with "administrative agencies [that] serve as fiduciary agents and subcontract with other agencies to provide MPRI services." Special needs contracts received \$10.4 million to serve mentally ill, developmentally disabled, juvenile and medically fragile offenders. Around \$4.5 million was budgeted for contracts to expand risk reduction services such as substance abuse treatment, sex offender treatment, parole supervision and day reporting. The MPRI's budget also allotted \$1.9 million to provide capacity building and technical assistance services.

An audit by Michigan's Office of the Auditor General, released in February 2012, concluded "that DOC's efforts to oversee MPRI services were moderately effective" but lacked adequate monitoring. Notably, the audit found that the DOC "had not established a comprehensive process to monitor and evaluate the effectiveness of MPRI services," and "did

not have sufficient internal control to effectively implement MPRI."

With respect to the first finding, the audit determined the DOC did not require contract community agencies to report program data in a standardized format; some of the agencies did not submit all of the requested data while others did not report any data. Further, the DOC "did not perform a complete analysis of MPRI outcomes," including recidivism rate data according to whether or not parolees utilized MPRI services.

"We have had some data problems for years and are working with the state Public Health Department on a five-year contract to evaluate prisoner re-entry," acknowledged DOC spokesman Russell Marlan.

In regard to the second audit finding, due to a lack of internal controls the DOC "could not determine that MPRI parolees received and completed appropriate services, that the services received were properly approved, or that DOC staff could efficiently perform their MPRI duties."

The audit also included recidivism rate data for Michigan prisoners paroled during calendar year 2007, based on whether they participated in MPRI programs or not. Interestingly, parolees who did *not* receive MPRI services had lower recidivism rates – 11% after one year compared with 15% for MPRI parolees; 21% after two years compared with 28% for MPRI parolees; and 24% after three years compared with 33% for MPRI parolees. The audit noted, however, that "MPRI parolees have a higher risk of recidivism due to the criminogenic factors that the MPRI services are designed to address." Thus, comparing the MPRI and non-MPRI recidivism data "would not provide a valid or reliable measurement of the actual impact that MPRI had on the recidivism outcomes of MPRI participants."

The DOC agreed with the audit's findings and its recommendations to correct the identified deficiencies, including establishing "a comprehensive process to monitor and evaluate the effectiveness of MPRI services."

Previously, a February 2011 audit by Michigan's State Budget Office made several material findings that also were critical

of MPRI. The first criticism involved the failure of the DOC to fully describe contract change requests and justifications; one example involved \$679,800 budgeted for services that were not outlined in a contract or its amendment.

Over a five-year period, four of five risk reduction contract changes failed to disclose rate increases, changes in pricing methods or the reasons for same. Those changes resulted in the day reporting rate for male parolees to increase "from \$17.46/day to \$38.50/day" and the rate for female parolees to jump "from \$31.99/day to \$45.54/day." Eight months later, the program switched to a cost reimbursement rate.

The failure to disclose also affected MPRI's contract to provide special needs services. The original one-year contract totaled close to \$2.4 million, but amendments for three additional years amounted to approximately \$16 million.

Another material issue cited in the State Budget Office audit was the DOC's ineffective monitoring of MPRI contracts to ensure that contractors fulfilled expectations in a satisfactory fashion, and to verify the contracts were necessary. The audit also found the "DOC did not ensure that MPRI contractors effectively developed subcontracts and monitored their subcontractors." Finally, the audit faulted the DOC for failing to ensure "that its staff obtained and reviewed invoices and necessary supporting documentation to ensure that contract changes were eligible, authorized, fair and accurate."

Another six findings in the audit, although not material, were still indicative of basic problems in fully realizing MPRI's goals. Program rules or guidance for MPRI's comprehensive plan for administrative agencies and subcontractors was not fully developed. The DOC did not even have rules or guidance for awarding funds.

That failure resulted in no work hour limits or compensation reimbursement limits for the positions the program funded. Auditors found the DOC had allocated \$100,000 for a full-time position for a community coordinator position. The person who filled that position also received \$30,000 to serve as a community coordinator overseeing federal grants, plus was the paid executive director of a



non-profit organization.

The other audit findings addressed issues that revealed a basic lack of oversight of MPRI services. The DOC agreed with the findings and recommendations, and the audit noted that the DOC had made several improvements with respect to measuring MPRI's implementation and outcome goals.

MPRI's budget appropriation for fiscal year 2010-11 was \$52.1 million (in-

cluding federal reentry grant funds), and the program requested \$53.9 million in funding for fiscal year 2011-12. ■

Sources: "Michigan Prisoner Reentry Contracting Practices," Michigan State Budget Office, Office of Internal Audit Services (February 2011); "Performance Audit of the MPRI," Office of the Auditor General, Report No. 471-0400-11 (February 2012); Detroit News

## Florida DNA Mix-Up Raises Questions about Rapist's Conviction

When the FBI informed the Florida Department of Law Enforcement (FDLE) that it had a recent "hit" on the DNA of convicted rapist Andrew Lingard, the FDLE realized there was a problem: Lingard had been in prison for the past four years, and the FDLE lab in Orlando had processed the DNA evidence that led to his conviction and life sentence.

In September 2011, an investigation revealed that the labels on two DNA samples – that of Lingard and the boyfriend of the rape victim – were mistakenly switched by Altamonte Springs police evidence technician Toni Bullock, and the error went unnoticed by an FDLE lab analyst and reviewer. Based on the mislabeled DNA evidence, Lingard was convicted of raping a 21-year-old woman during a 2004 home-invasion robbery.

Undeterred, Altamonte Springs police chief Michael Deal insisted that Lingard was still guilty. Seminole County prosecutors said they would seek a court order compelling Lingard to provide another DNA sample for testing. Why the original sample was no longer available was not explained.

An independent lab, Orchid Cellmark, conducted additional tests on the rape victim's clothing and bed sheets, and found a match with Lingard's DNA. Thus, according to Assistant State Attorney Pat Whitaker, "the original mislabeling of evidence did not result in any prejudice to the defendant."

Lingard's attorney said he would likely seek a second opinion on the results of the more recent DNA tests. ■

Sources: [www.wftv.com](http://www.wftv.com), Orlando Sentinel

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# California U.S. District Court Holds that Prop. 9 Does Not Supersede Previously-Issued Injunction Regarding Parole Revocation Procedures

by John E. Dannenberg

Senior U.S. District Court Judge Lawrence K. Karlton has upheld a 2004 injunction that conflicts with the parole revocation provisions of California's so-called Victims' Bill of Rights, also known as Marsy's Law. Marsy's Law, enacted in 2008 as Proposition 9, a ballot initiative, granted entitlements to crime victims by amending the state constitution and adding § 3044 of the California Penal Code.

Prop. 9 restricted certain procedural rights for parolees at revocation hearings, including: 1) a probable cause hearing no later than 15 days following arrest for violation of parole; 2) an evidentiary revocation hearing no later than 45 days following arrest for a parole violation; 3) counsel at state expense only if the parole board or its hearing officers determine that the parolee is indigent and appears incapable of speaking effectively in his own defense; and 4) parole revocation determinations shall be based on a preponderance of the evidence, including documentary evidence, direct testimony or hearsay evidence offered by parole agents, peace officers or victims.

A federal suit challenging California's parole revocation procedures, *Valdivia v. Brown*, had been filed in 1994, and the state agreed to a permanent injunction in that case in 2004. [See: *PLN*, April 2004, p.24]. The district court found in 2009 that provisions of Prop. 9 related to parole revocation procedures did not supersede the *Valdivia* injunction, and denied the state's motion to modify the injunction. [See: *PLN*, Nov. 2009, p.42]. That ruling was reversed by the Ninth Circuit in March 2010, which remanded the case to the district court to "reconcile the Injunction with California law." See: *Valdivia v. Schwarzenegger*, 599 F.3d 984 (9th Cir. 2010), *cert. denied*.

Following remand, on January 24, 2012, Judge Karlton held that Prop. 9's parole revocation provisions do not provide the minimum due process protections guaranteed by the U.S. Constitution and two U.S. Supreme Court decisions, *Morrissey v. Brewer* and *Gagnon v. Scarpelli*.

The due process requirements absent from Prop. 9 include "a written summary of the proceedings and of the revocation decision, the opportunity to present documentary evidence and witnesses, and disclosure to the parolee of the evidence

against him," Judge Karlton wrote.

The district court held that the 2004 injunction entered in *Valdivia* was "necessary to remedy constitutional violations" created four years later by Prop. 9. The injunction provided, generally:

1) A parole revocation hearing shall be held no later than 35 calendar days from the date of the placement of a parole hold;

2) Defendants shall hold a probable cause hearing no later than 10 business days after the parolee has been served with notice of the charges and his or her rights, which shall occur no later than three business days from the placement of a parole hold;

3) Defendants shall appoint counsel for all parolees at the beginning of the Return to Custody Assessment stage of the revocation proceedings. Defendants shall provide an expedited probable cause hearing upon a sufficient offer of proof by appointed counsel that there is a complete defense to all parole violation charges that form the basis of a parole hold;

4) At probable cause hearings, parolees shall be allowed to present evidence to defend or mitigate against the charges and proposed disposition. Such evidence shall be presented through documentary evidence or the parolee's testimony, either or both of which may include hearsay testimony;

5) The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law in *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); and

6) Parolees' counsel shall have the ability to subpoena and present witnesses and evidence to the same extent and under the same terms as the state.

Judge Karlton found unconstitutional Prop. 9's provision restricting parolees to the right to an attorney at the state's expense only if the parolee is indigent and appears incapable of speaking for himself. The district court held that that provision overly restricted the parole board's discretion and allowed a parolee to go uninformed of his right to request counsel.

Most importantly, the court stated, a right to an attorney is presumed if the parolee presents a credible claim that he

did not violate parole or a credible claim of mitigating circumstances. Thus, the *Valdivia* injunction "is a properly tailored remedy, aimed at curing violations of due process rights."

Judge Karlton also disallowed provisions of Prop. 9 entrusting to the Board of Parole Hearings "the safety of victims and the public," and prohibiting the board from considering the cost or burden to taxpayers that may result from continually sending parolees back to prison.

The district court found the *Valdivia* injunction directs the board to use remedial sanctions rather than parole revocation when appropriate, thus reducing the number of parolees returned to custody and the overall prison population – consistent with the recent U.S. Supreme Court ruling in *Brown v. Plata*, which requires the state to substantially reduce its prison population. [See: *PLN*, July 2011, p.1].

Prop. 9 further violates the Constitution by denying a parolee a "neutral and detached" hearing body to make parole revocation decisions, Judge Karlton stated. Writing that the state places "a thumb on the scales of justice and tip[s] the balance towards incarceration," he found that "[b]y entrusting the board only with the safety of victims and the public, [Prop. 9] strips the board of its duty to balance those factors with a parolee's liberty interest."

The district court also rejected another provision of Prop. 9 that permits the unconditional use of hearsay evidence at parole revocation hearings, because it denies a parolee the "right to confront and cross examine adverse witnesses ... unless the government shows good cause."

The sole remaining parole revocation provision of Prop. 9 that survived the court's scrutiny is the requirement that a revocation hearing be convened no later than 45 days after the placement of a parole hold, as opposed to the 35 days required by the 2004 injunction in *Valdivia*. Therefore, the injunction was modified to provide for 45 days to hold a revocation hearing after placement of a parole hold, rather than 35 days.

In all other respects, the state's motion to modify the injunction was denied. See: *Valdivia v. Brown*, U.S.D.C. (E.D. Cal.), Case No. S-94-671 LKK/GGH; 2012 WL 219342. ■



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Only with your support will we end the abusive cost of prison phone calls. Encourage others to join us in this struggle!

# U.S. Department of Justice Soft on Corporate Crime

If you've wondered why no one has been prosecuted for the corporate misdeeds that devastated the economy in 2008 and nearly thrust the United States into another Great Depression, you're not alone.

The reason no Wall Street executives have faced charges for malfeasance is due to the federal government's recent adoption of a soft-on-corporate-crime approach that rewards companies that hire investigators to uncover and report their own misdeeds. Such self-policing leads to "deferred prosecution agreements," under which, in exchange for a fine and a promise to clean up its act, the corporation is let off the hook – usually with neither the company nor any of its executives facing prosecution.

According to a July 7, 2011 article in the *New York Times*, the Department of Justice (DOJ) began pulling back from aggressive prosecution of corporate crimes in 2005 after the U.S. Supreme Court overturned a hard-won conviction against Arthur Andersen LLP, Enron's accounting firm. See: *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005).

Fueled by this litigation success, corporate leaders began complaining that DOJ prosecutions had been overzealous and were hurting U.S. businesses. According to participants at a May 2005 meeting of DOJ officials that preceded a session of the Corporate Fraud Task Force, Deputy Attorney General James B. Comey reportedly questioned whether American companies were being harmed by DOJ investigations. He then urged his colleagues to act responsibly.

"It was a total retrenchment," said one of the participants, who did not want to be identified. "It was like we were going backwards."

The DOJ's response to this relaxation of investigations into corporate crime was to ramp up deferred prosecution agreements, which the DOJ made an official alternative to prosecution in 2008. Additionally, on November 19, 2008, the DOJ's Antitrust Division issued new guidelines for its leniency program, under which companies and corporate officials could avoid prosecution by confessing criminal activity and fully cooperating with the DOJ.

"Wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the

leniency program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity," the guidelines stated.

In 2010, the Securities and Exchange Commission (SEC) officially embraced deferred prosecution agreements as well. The SEC also increasingly began issuing reports on corporate misconduct without seeking sanctions, and filing civil actions rather than encouraging criminal prosecutions.

Business leaders rejoiced over the new soft-on-corporate-crime approach. The prominent Wall Street law firm of Sullivan & Cromwell said the shift by the DOJ represented "an important step away from the more aggressive prosecutorial practices seen in some cases under their predecessors."

Critics of such leniency, however, were not happy.

"If you do not punish crimes, there's really no reason they won't happen again," noted Washburn University School of Law professor Mary Ramirez, who is a former Assistant U.S. Attorney (AUSA). "I worry, and so do a lot of economists, that we have created no disincentives for committing fraud or white-collar crime, in particular in the financial space."

Indeed, there is no similar analogue in the government's fight against street crime – in which, for example, federal prosecutors zealously pursue cases against low-level drug offenders and seek lengthy prison terms. Apparently, white-collar crimes that involve powerful corporate defendants represented by equally powerful law firms require a different and more conciliatory approach.

DOJ spokeswoman Alisa Finelli said that under deferred prosecution agreements, corporations are punished by having to pay restitution and fines as well as cease their criminal conduct. The agreements also allow the DOJ to make the best use of its limited resources by "outsourcing" the investigation and its costs to the corporation. Further, they "achieve these results without causing the loss of jobs, the loss of pensions and other significant negative consequences to innocent parties who played no role in the criminal conduct, were unaware of it or were unable to prevent it," Finelli stated.

As former Attorney General John Ashcroft explained during a congressional

hearing in March 2008, "Prosecutors understand that a corporate indictment can be a corporate death sentence. A deferred prosecution can avoid the catastrophic collateral consequences and costs that are associated with corporate conviction."

Some agree with the DOJ's laxer approach to corporate wrongdoing.

"Given the scanty resources that have been committed to corporate crime enforcement, I think the government's leveraging of its prosecution power from corporations and their lawyers has been critically important," said Columbia University law professor Daniel C. Richman, who formerly served as an AUSA in New York.

However, deferred prosecutions can cause complications among government agencies. Such was the case in 2007 when the Department of Housing and Urban Development (HUD) began investigating claims of mortgage fraud involving Beazer Homes USA, one of the nation's largest home builders. Federal investigators discovered that Beazer had been offering a lower mortgage rate for an extra fee, then not delivering on the lower rate. The company had also been offering down payment assistance and then raising the price of the house by the same amount without telling the homebuyers. Those fraudulent practices resulted in losses to the Federal Housing Administration's insurance fund when the buyers defaulted.

Beazer's board of directors hired the law firm of Alston & Bird to investigate the allegations, and entered into a deferred prosecution agreement with the DOJ in April 2009. The agreement required Beazer to pay up to \$55 million in fines and restitution, and about the same amount to Alston & Bird for conducting the investigation. The company also shut down Beazer Mortgage Corporation.

The only Beazer executive criminally indicted was Michael T. Rand, 48, the company's former chief accounting officer. Why? The DOJ told HUD to stop investigating Beazer officials so the deferred prosecution deal could be made. This disturbed Kenneth M. Donohue, who was HUD's inspector general at that time.

"As a law enforcement official for over 40 years, I have never witnessed a like action in any of my varied dealings," Donohue wrote to U.S. Attorney General Eric Holder, complaining about the DOJ's

interference.

"The most important point of this whole thing is the fact that they threatened the HUD office of the inspector general that we would not be allowed to go forward with our investigation of executives if we didn't agree to their settlement," Donohue stated.

Rand, one of very few corporate officials to face criminal prosecution, was accused of manipulating records and colluding with another company to boost Beazer's revenue. He was found guilty of seven counts following a jury trial in October 2011, and has not been sentenced. See: *United States v. Rand*, U.S.D.C. (W.D. NC), Case No. 3:10-cr-00182-RJC-DSC.

Deferred prosecution agreements also tend to result in less media play, which means corporate misdeeds can slip under the public's radar. Companies such as Enron, WorldCom, Adelphia, Rite Aid and ImClone are widely known to have faced criminal prosecution due to their wrongdoing.

But who knows that American International Group (AIG) paid \$126 million in 2004 for allowing clients to falsify financial statements, or that Computer Associates International entered into a deferred prosecution agreement the same year? Or that in 2005, Monsanto was able to avoid prosecution by paying \$1 million and entering into a monitoring agreement with the DOJ, to resolve allegations of overseas bribery? And who would guess that Bristol-Meyers Squibb and Prudential Financial were parties to deferred prosecution agreements in 2005 and 2006, respectively, or that American Express Bank International avoided prosecution and paid a \$65 million fine in 2007?

The collapse of Lehman Brothers in 2008, which led to the largest bankruptcy in U.S. history with losses of hundreds of billions of dollars, was central to the financial crisis and the resultant economic downturn. An investigation by former U.S. Attorney Anton Valukas, ordered by the U.S. bankruptcy court, found sufficient evidence to bring fraud charges against corporate executives as well as Lehman's accounting firm, Ernst and Young. Yet no company officials have been prosecuted or otherwise held accountable. Lehman Brothers was one of the major backers of the private prison industry. [See: *PLN*, Nov. 2008, p.16].

The DOJ is reportedly planning a deferred prosecution agreement with Goldman Sachs & Co., which in July 2010

was forced by the SEC to pay a \$550 million settlement related to civil claims of fraud involving mortgage securities.

"If an alleged violation is identified during a Goldman investigation, we expect a reasoned response from the Justice Department," opined Brad Hintz, an analyst with Sanford C. Bernstein & Co., an investment firm. "In a worst case environment, we would expect a 'too big to fail' bank such as Goldman to be offered a deferred prosecution agreement, pay a significant fine and submit to a federal monitor in lieu of a criminal charge."

Incidentally, Goldman Sachs and another investment firm, Veritas Capital, recently purchased Global Tel\*Link Corp., the nation's largest prison phone service company, which profits by charging exorbitant rates for phone calls made by prisoners. [See: *PLN*, Feb. 2012, p.23; April 2011, p.1].

According to Hintz, a 2003 DOJ memo from Deputy Attorney General Larry D. Thompson stated "that prosecutors can reward cooperation by offering a negotiated settlement to a targeted company that can range from immunity from

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## DoJ Soft on Corporate Crime (cont.)

criminal indictment to a deferred prosecution agreement.... Ultimately, the targeted company is treated not as a hardened criminal but as the equivalent of a juvenile offender that can be reformed.”

Another DOJ memo, issued by Deputy Attorney General Paul J. McNulty in 2006, noted that “The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.”

Of course such practices, as well as the DOJ and SEC’s use of deferred prosecution agreements, are examples of the government kowtowing to corporate interests. If that’s difficult to fathom, try imagining a felony criminal defendant, such as a bank robber, being allowed to fund his own private investigation, self-report the results, then avoid prosecution by paying a fine and promising not to commit the same crime again. That simply does not happen in the world of crime-in-the-streets, but is an increasingly common occurrence for crime-in-the-suits.

The federal government’s approach to corporate misconduct is an affirmation that in the U.S. justice system, you get only as much justice as you can afford. And huge multinational companies can afford a great deal. How much? As just one example, data from the Center for Responsive Politics indicates that in 2010 and 2011 combined, the financial industry spent almost \$1 billion on lobbying expenses on the federal level alone.

According to the Transactional Records Access Clearinghouse at Syracuse University, during the first 11 months of fiscal year 2011 the DOJ initiated 1,251 new criminal prosecutions for financial institution fraud – down 28.6% since 2006, and the lowest number of such prosecutions in two decades.

“I wouldn’t blame anyone who believes they’re part of the 99 percent of Americans who has to follow the law, while 1 percent of the country doesn’t,” said Jeffrey Connaughton, former chief of staff to U.S. Senator Ted Kaufman, who chaired the Congressional Oversight Panel

that reviewed the Troubled Assets Relief Program (TARP – the federal bailout program). “And a big part of the reason for that is lawyers and accountants are failing in their role as gatekeepers, and the Justice Department is too often deferring to these lawyers and accountants, which is like outsourcing the interpretation of the fraud laws.”

In January 2012, President Obama announced the formation of a DOJ task force to investigate corporate misconduct that contributed to the financial crisis and current economic downturn. The task force, composed of the DOJ, SEC, FBI and HUD, is reportedly considering the

use of a federal statute called the Financial Institutions Reform, Recovery and Enforcement Act of 1989, which requires a lower burden of proof, has a longer statute of limitations and can result in the imposition of large fines.

Whether the task force’s investigation culminates in criminal prosecutions, as opposed to civil litigation, fines and deferred prosecution agreements, remains to be seen. ■

Sources: *New York Times*, *Wall Street Journal*, *CBS News*, [www.jonesday.com](http://www.jonesday.com), *Huffington Post*, [www.marketwatch.com](http://www.marketwatch.com), [www.thefiscaltimes.com](http://www.thefiscaltimes.com)

## New Jersey Comptroller Criticizes, Questions Halfway House Contracts

by Derek Gilna

In a June 15, 2011 letter and separate audit report, the New Jersey State Comptroller’s office sharply criticized a number of issues related to the Department of Corrections’ (DOC) contracts with private halfway houses. Singled out for special attention was Education and Health Centers of America, Inc. (EHCA), a non-profit corporation that operates about half of the halfway houses under contract with the DOC.

The Comptroller stated, in reference to EHCA, “One of the issues that we found is there are questions about the eligibility of one of those halfway houses to be a part of this program. We sent a letter to the [DOC] suggesting that on this issue they seek formal legal advice from the [State] Attorney General’s Office and they’ve agreed to do that.”

The Comptroller’s office noted that of the \$400 million New Jersey had paid to EHCA since 1997, \$390 million went to an affiliated for-profit company, Community Education Centers, Inc. (CEC). EHCA subcontracts with CEC for the “operation, support services, management, and maintenance” of EHCA’s halfway houses.

This arrangement skirts a state law requiring halfway houses to be non-profit facilities. While EHCA owns the halfway houses, it basically serves as a shell corporation for CEC, a for-profit company, which provides day-to-day operations and receives the vast majority of the state funds funneled through EHCA for halfway house contracts. [See: *PLN*, April 2011, p.48].

According to the Comptroller, “The same individual who serves as EHCA’s President/CEO ... also serves as the President/CEO of CEC. Similarly, there are several other people serving in executive management positions with both entities. According to EHCA’s 2010 proposal for [halfway house] services, CEC ‘maintains a staff of approximately 800 in New Jersey specifically to service EHCA contracts,’ while EHCA has a staff of ten employees, five of whom are also employed by CEC.”

“It appears that at this point a primary business purpose of EHCA is to receive public contracts on behalf of CEC,” the Comptroller concluded.

CEC senior vice president and general counsel for public affairs Bill Palatucci said the company was “still operating under the same agreement that was approved by the Attorney General back then, so we’re a bit puzzled by the report. We’ll take a look and talk to the Department of Corrections about it.”

Palatucci was described in news articles as a political adviser and close friend to New Jersey Governor Chris Christie. In fact, Palatucci had previously helped run Christie’s election campaign, served as co-chair of Christie’s inaugural committee and was Christie’s former law partner. Before becoming governor, Christie was registered as a lobbyist for CEC. This may explain the success of EHCA/CEC in New Jersey, considering that EHCA holds around half of the state’s halfway house contracts.

Additionally, in its June 15, 2011 audit report, the Comptroller's office accused the DOC of inadequately monitoring halfway houses, failing to maintain an adequate disciplinary process for halfway house residents, and failing to sanction providers for contract violations such as staffing levels and escapes. Further, the audit questioned whether the DOC was adequately measuring performance results for halfway houses, since the DOC currently does not collect recidivism data for halfway house residents.

The Comptroller's report also indicated that New Jersey overpaid 10 halfway houses a total of \$587,000 over a six-year period due to miscalculating per diem rates. The Comptroller questioned the adequacy of some halfway houses that let residents with disciplinary problems leave before they could be re-incarcerated. According to the audit report, six halfway house residents escaped before they could be returned to prison for probation violations because they were not placed in a secure holding area as required. Three of the facilities did not even have such a secure holding area.

In 2009, four DOC monitors documented spending 104 days in the field for

site visits at halfway houses; however, they should have documented over 600 visits. Two of the halfway houses did not receive any documented site visits, indicating a gross failure by the DOC to monitor those facilities.

"This is a \$64 million program whose success or failure has important consequences for public safety," said State Comptroller Matthew Boxer. "And yet as a state we have done a poor job of monitoring the program and have made no real attempt to find out what taxpayers are getting for their money. It is critical that the state takes a more active role in ensuring the success of these programs. It cannot simply cut these halfway houses a check and hope for the best."

In response to the Comptroller's criticisms, DOC Commissioner Gary Lanigan stated, "We acknowledge there are specific areas of oversight of [halfway houses] that can be strengthened and feel confident

that we can quickly improve our performance in these areas through measures that have already been implemented or are already in progress." ■

Sources: *Associated Press*; "Residential Community Release Program," *State of New Jersey Office of the State Comptroller, Report PA-13 (June 15, 2011)*; *Letter from New Jersey State Comptroller, Procurement Division Director Dorothy Donnelly, dated June 15, 2011*; *New Jersey Office of the State Comptroller press release*; *New York Times*

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## Former California Assistant Sheriff Awarded \$183,688 in Backpay Despite State and Federal Convictions

The California Court of Appeal has held that former Orange County Assistant Sheriff George Jaramillo is entitled to backpay of \$183,688.66 from the time he was improperly fired from the sheriff's department in March 2004 until he pleaded guilty to two state-law felonies in January 2007.

The appellate court found that Jaramillo was fired without notice and without an opportunity to administratively appeal, in violation of the Public Safety Officers Procedural Bill of Rights Act, and that the crimes to which he later pleaded guilty could not be used retroactively as grounds to deny him backpay.

Jaramillo, who had previously worked for the Garden Grove Police Department for 14 years, was one of a handful of "assistant" sheriffs appointed by Mike Carona after Carona was elected Sheriff of Orange County in 1998. The appointment was in effect a *quid pro quo* in exchange for Jaramillo agreeing to run Carona's campaign.

After being elected, Sheriff Carona called on Jaramillo to run interference with the district attorney's office when the son of Don Haidl, another assistant sheriff, was accused of raping a comatose 16-year-old girl. Despite having misgivings, Jaramillo reluctantly complied with Carona's request, but to no avail. Haidl's son and two other defendants were prosecuted and convicted of rape and other offenses.

Ultimately, Carona and Jaramillo had a falling out over what Jaramillo regarded as Carona's practice of selling badges – "get-out-of-jail-free cards" – to campaign donors. No longer viewing Jaramillo as a loyal follower, Carona fired him on March 17, 2004, making reference to a document Jaramillo had signed that classified him as an "at-will" employee.

Jaramillo filed suit a year later, claiming his termination was unlawful. The following year he was the subject of state and federal prosecutions, charging him with, among other crimes, misappropriating public funds and lying to a grand jury about a \$10,000 gift his wife had received (state charges), and filing a false tax return and honest services fraud (federal charges). In 2007 he pleaded no contest to the state charges and guilty to the federal charges. The honest services fraud charge was later dismissed by the Ninth Circuit on appeal.

Sheriff Carona also faced public corruption charges, and was convicted and sentenced to 5½ years in prison and a \$125,000 fine in April 2009. [See: *PLN*, Nov. 2009, p.38; Feb. 2009, p.1; July 2008, p.30]

The Court of Appeals determined that because Jaramillo had pleaded guilty to crimes that had nothing to do with the reasons why he was terminated, they could not be used retroactively as "after acquired evidence," or to justify an "unclean hands" defense, to argue that he was not qualified for the job he was appointed

to perform.

"None of the wrongful conduct to which Jaramillo has admitted was related to his summary termination on March 17, 2004 by Carona," the appellate court wrote.

Thus, the Court of Appeal affirmed the trial court's award of \$183,688.66 in backpay to Jaramillo, as well as \$336,800 in attorney fees and \$8,400 in costs. See: *Jaramillo v. County of Orange*, 200 Cal. App.4th 811, 133 Cal.Rptr.3d 751 (Cal. App. 4 Dist. 2011), *review denied*. ■

## Ohio Prison Guards Denied Qualified Immunity for Leaving Prisoner Handcuffed for 12 Hours

The Sixth Circuit Court of Appeals reversed a district court's grant of qualified immunity to prison officials in a federal civil rights action alleging violations of a prisoner's rights under the Eighth Amendment.

Ohio state prisoner Jasen Barker filed a lawsuit pursuant to 42 U.S.C. § 1983 that alleged "highly disputed" facts regarding an incident that occurred on February 7, 2007 at the London Correctional Institution (LCI). He sued the prison and eleven guards. The facts, in the light most favorable to Barker, indicated that he was taking medication that made him drowsy, which caused him to occasionally be asleep during the four o'clock count. A guard would usually wake him and remind him he had to be sitting up during count time.

On the day in question, however, LCI guard Andrew Goodrich woke Barker during count and immediately escorted him to the Captain's office. Barker was placed in an observation cell, handcuffed behind his back. His requests for mental health services were ignored and he remained in the cell until 8:00 a.m. the next day. While confined he was unable to urinate or get a drink of water and could not lie or sit down comfortably, so he mostly stood. He also missed a meal. At the time a deposition was taken in the case he was still experiencing problems with his wrists, especially when writing letters.

On January 10, 2010, a magistrate judge granted summary judgment to all the

defendants on the basis of qualified immunity, finding that the evidence "established a constitutional violation, but the right at issue was not clearly established."

Several issues were presented on appeal. The first concerned granting qualified immunity to LCI. Since LCI is an arm of the state, it is not eligible for such a defense. It could assert sovereign immunity but had not done so, and thus that defense was waived. Therefore, the grant of qualified immunity to LCI was reversed.

Next, the Sixth Circuit affirmed the district court's grant of qualified immunity to the individual guards for monetary damages in their official capacity, but clarified that Barker could still obtain declaratory and injunctive relief against those defendants.

The Court of Appeals then considered the guards' claim of qualified immunity in their individual capacity. The Court agreed with the district court's finding that Barker had presented evidence which, if true, constituted Eighth Amendment violations for excessive force and a conditions of confinement claim.

That evidence established "there was no penological need to keep Barker handcuffed once he was placed in the detention cell, that Barker was nonresistant and did not refuse to have the handcuffs removed, and that Barker was handcuffed behind his back for 12 hours, during which time he missed a meal and was unable to sit or lie down without pain ...," the appellate

court wrote. "Barker was denied adequate access to water and a restroom, and forced to maintain an uncomfortable position for an extended period of time, subjecting him to a significant risk of wrist and arm problems, dehydration and thirst, and pain and damage to the bladder."

The Sixth Circuit found that this was a denial of the "minimal civilized measures of life's necessities," and constituted excessive use of force. The appellate court also held that the "[d]efendants had fair warning in 2007 that their conduct was unconstitutional. Case law from the Supreme Court, this Court, and other circuits established at that time that each condition seen here – restraining an inmate in an uncomfortable position, denying access to water, and denying access to the toilet – could rise to an Eighth Amendment violation if allowed to persist for an extended period."

The defendants therefore had notice that their conduct was unconstitutional, and thus were not entitled to qualified immunity. The district court's order was accordingly affirmed in part, reversed in part and remanded for further proceedings. See: *Barker v. Goodrich*, 649 F.3d 428 (6<sup>th</sup> Cir. 2011).

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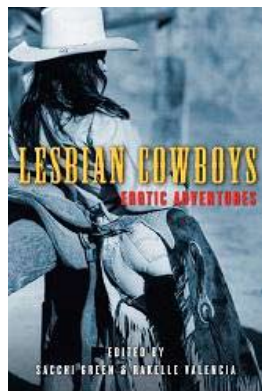
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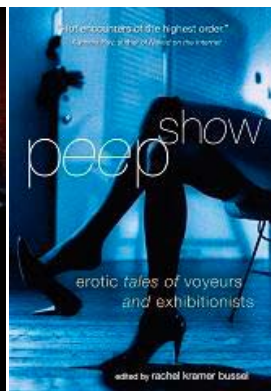
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# **PLN Lawsuit Ends No-Publication Policy at Washington Jail, Results in \$180,000 Settlement**

Less than 90 days after PLN filed suit challenging a no-publication mail policy at Washington State's Chelan County Regional Justice Center (RJC), the defendants conceded the policy was unconstitutional and agreed to the entry of a consent decree and payment of \$180,000 in damages, attorney fees and costs.

The settlement was approved on December 1, 2011 by U.S. District Court Judge Edward F. Shea. At issue in the lawsuit was the RJC's September 21, 2010 mail policy "that banned all incoming periodicals and magazines, except for one specific newspaper, and banned all books of any kind."

From December 2010 through September 9, 2011 when the lawsuit was filed, mailings sent to RJC prisoners by PLN were censored. At least 70 issues of *PLN* and 31 copies of *Protecting Your Health and Safety*, a book published by the Southern Poverty Law Center, were rejected. The RJC also censored informational brochures, book catalogs and book offers that PLN mailed to prisoners in envelopes.

Of the 112 items PLN sent to RJC prisoners, "Mail Denial Notice" forms were received for only two pieces of censored mail. None of the PLN magazines or envelopes with brochures were returned. Most, but not all, of the rejected books were sent back to PLN. The Mail Denial Notices did not inform PLN how to appeal the censorship decisions.

As a result of the censorship and failure to provide due process notice, RJC officials frustrated PLN's organizational mission and caused financial harm in the form of diversion of PLN's resources, lost subscriptions and book orders, and return-to-sender charges. The RJC defendants conceded that the mail policy violated the First Amendment and that the Mail Denial Notices – or lack thereof – violated the Fourteenth Amendment. They therefore agreed that a permanent injunction was appropriate.

As a result, the consent decree prohibits the RJC from rejecting mail without providing constitutionally adequate due process. It also may not reject incoming mail simply because it is a periodical magazine or other form of publication such as catalogs, brochures or paperback books. The consent decree applies to any person or entity that takes over responsibility for

the operation of the RJC in the future. The defendants also were ordered to update their Mail Denial Notice form.

As a prevailing party in the suit, PLN was awarded \$114,000 in damages, \$65,145 in attorney fees and \$855 in costs. PLN was represented by attorneys Jesse

A. Wing and Katherine Chamberlain with the Seattle law firm of MacDonald, Hoague & Bayless, and Human Rights Defense Center chief counsel Lance Weber. See: *Prison Legal News v. Chelan County*, U.S.D.C. (E.D. Wash.), Case No. 2:11-cv-00337-EFS. ■

## **California Plans to End Out-of-State Prisoner Transfers**

*by David M. Reutter*

On November 8, 2010, Corrections Corporation of America (CCA) issued a press release announcing that the California Department of Corrections and Rehabilitation (CDCR) intended to award a new contract to the company, "to manage up to 3,256 offenders at CCA's Crowley County Correctional Facility in Olney Springs, Colorado and CCA's Prairie Correctional Facility in Minnesota."

At the time, the announcement seemed like a safe bet. CCA already contracted with the CDCR to house around 10,000 prisoners in out-of-state facilities, stemming from an October 2006 state of emergency declared by then-Governor Arnold Schwarzenegger – a proclamation that remains in effect.

Further, in August 2009, as a result of the *Plata v. Brown* litigation, a federal three-judge panel ordered California to reduce its prison population by up to 44,000 prisoners within two years. [See: *PLN*, Sept. 2009, p.36]. One potential option for CDCR officials was to transfer even more prisoners out-of-state, to reduce overcrowding in California's in-state prisons.

But then a funny thing happened. Not only did the CDCR not fill CCA's Crowley County and Prairie Correctional Facilities with thousands of prisoners, but California has since announced plans to phase out its out-of-state prison contracts and bring its prisoners home.

On May 23, 2011, the U.S. Supreme Court upheld the three-judge panel's order in *Plata*, requiring California to reduce its prison population by tens of thousands of prisoners. [See: *PLN*, July 2011, p.1]. Consequently, the state embarked on an ambitious prison "realignment" initiative to do just that.

One key element of the realignment

plan, which went into effect on October 1, 2011, is to house low-level prisoners and parole violators in county jails rather than state prisons. The plan also includes closing the California Rehabilitation Center in Norco, eliminating 6,400 staff positions, cutting most of a \$6 billion prison construction project and, notably, reducing the number of prisoners held in out-of-state facilities.

"Currently we have 9,500 inmates in [CCA] prisons in Mississippi and Oklahoma and Arizona at a cost to California taxpayers of over \$300 million," CDCR Secretary Matthew Cate said in April 2012. Under the realignment initiative, all California prisoners held in out-of-state prisons would be returned by 2016.

That hinges, however, on the federal court giving the CDCR some leeway if it doesn't reduce its in-state prisoner population to 137.5% of capacity by June 2013. The state expects to still be over the cap by that deadline, by several thousand prisoners.

Not all California officials are in favor of reducing the number of prisoners held out-of-state. In an August 2011 report, the California Legislative Analyst's Office (LAO) suggested that the CDCR could "[c]hange state law to ... continue to transfer prison inmates involuntarily to out-of-state contract beds at least until the court's requirements are met." The LAO noted that "Using out-of-state contract facilities to house California inmates on a long-term basis to meet the state's institutional space needs raises several policy and legal issues that are worthy of legislative consideration and debate."

But an April 2012 CDCR report, titled "The future of California corrections: A blueprint to save billions of dollars, end federal court oversight and improve the prison system," indicated that



the state plans to return all out-of-state prisoners within 4 years. "Due to realignment, the implementation of the inmate classification score system, and other infill projects ... all offenders will be returned to California," the report said. "This plan eliminates the use of all out-of-state contract facilities by 2015-16."

The CDCR report noted that "Upon full implementation of this plan, the elimination of the out-of-state contract beds will result in a reduction of \$318 million General Fund and over 400 positions from the department's budget."

According to the report, the out-of-state prisoner population would be reduced to 9,038 by 2012-13; to 4,969 by 2013-14; to 1,864 by 2014-15; and to 531 by 2015-16, with a complete phase out by the end of 2016.

CCA has a significant stake in California, as the state accounted for 13% of the company's total revenue in 2010. Thus, CCA has courted California lawmakers – mainly through donations to their election campaigns. From 2003 to 2010, CCA officials and the company's Political Action Committee contributed over half a million dollars to political candidates, incumbents and parties in California; the majority of those funds went to 75 candidates between 2008 and 2010.

Despite such corporate largess, the anticipated CDCR contracts that CCA touted in its November 8, 2010 press release never came to pass. Unable to fill its Prairie Correctional Facility in Minnesota, CCA was forced to keep the prison closed; it had been shuttered in February 2010 after Minnesota and Washington State pulled their prisoners out.

The company had hoped to reopen the 1,600-bed facility by stocking it with California prisoners, but not only did that not happen, it now looks like CCA will lose its existing contracts with the CDCR to house approximately 9,500 out-of-state prisoners. This will have a negative impact on CCA's revenue but will be a positive step for the thousands of prisoners returned to California, who will be closer to their families.

"The California experience shows that states can save money and maintain public safety by carefully reducing their prison populations instead of paying private for-profit corporations millions of dollars," said Don Specter, director of the Prison Law Office. ■

Sources: *Minnesota Independent*, CCA press release, *Sacramento Bee*, <http://californiawatch.org>, [www.insidecca.com](http://www.insidecca.com)



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# Texas Prison System Increases Prisoners' Monthly Phone Minutes

by Matt Clarke

In 2007, when Texas became the last state in the nation to let prisoners make phone calls on a regular basis, the limit on phone usage was 120 minutes a month. [See: *PLN*, Nov. 2007, p.11]. Two years later the Texas Board of Criminal Justice (TBCJ) responded to requests by prisoners' families and doubled the monthly phone minute allotment to 240. In 2011 the Texas legislature considered, but ultimately did not adopt, an amendment that would have increased the number of minutes to 480; regardless, the limit on phone usage was upped anyway.

Not surprisingly, Texas officials have not increased the number of phone minutes solely for the benefit of prisoners and their families, for whom phone calls are a primary means of communication. Rather, the reason for allowing additional phone minutes is strictly financial. The legislature needs to plug a large budget deficit and money from the Texas Department of Criminal Justice (TDCJ) phone system is an attractive source.

Currently, phone calls from Texas state prisoners cost \$.234/minute for debit in-state phone calls (\$.26/minute for collect or prepaid) and \$.387/minute for debit out-of-state calls (\$.43/minute for collect or prepaid). While those rates are significantly less than those charged in other state prison systems, they are still higher than rates paid by the general public.

Of course the state gets a hefty kickback from the TDCJ phone contract – 40% of the gross revenue, with some of that money earmarked for the Crime Victims Compensation Fund. Thus, the more calls that prisoners make, the greater the amount of revenue and the greater the kickback to the state. This led Rep. Jerry Madden to introduce an amendment to Senate Bill 1 (2011) that would have increased the number of allotted phone minutes to 480 per month, by amending Texas Government Code § 495.027(d).

"This is an easy way to raise money for the state," said Madden.

Complicating the revenue-generating rationale behind increasing the number of allotted phone minutes is the fact that many prisoners do not even use 240 minutes per month. This is likely due to restrictions placed on the TDCJ phone

system – for example, prisoners can only call up to ten people included on their visitation list, who must go through a bureaucratic registration process. Additionally, phone calls to cell phones are not allowed; thus, people without landlines are unable to receive calls from prisoners.

Still, providing prisoners with more phone minutes, regardless of the motivation of state officials, is beneficial and conducive to increased communication between prisoners and their families and friends. Unfortunately, Rep. Madden's amendment to increase the number of phone minutes to 480 was excluded from the final enrolled version of Senate Bill 1. The bill did include a provision to charge Texas prisoners a \$100 annual fee for medical care, replacing the prior co-pay system; that change went into effect in

September 2011. [See: *PLN*, April 2012, p.24].

Despite the demise of Rep. Madden's amendment, the TDCJ decided in mid-May 2011 to modify the phone system to let prisoners make up to 500 minutes of phone calls each month. Calls are still limited to 15 minutes each, and the other restrictions described above still apply.

If the restrictions were changed to decouple TDCJ prisoners' phone number lists from their visitation lists, and to allow calls to cell phones, revenue from the prison phone system would likely skyrocket despite the costly per-minute rates. ■

Sources: *Texas Tribune*, [www.prisontalk.com](http://www.prisontalk.com), <http://gritsforbreakfast.blogspot.com>, [www.tdcj.state.tx.us](http://www.tdcj.state.tx.us), [www.texasprisonphone.com](http://www.texasprisonphone.com)

## Oklahoma Taxpayers Foot \$13.5 Million Settlement Bill for Sexual Abuse by Jailers

by David M. Reutter

The general public typically shows little concern about abuse and corruption in jails and prisons, at least until it affects them personally. That was the case when residents in Delaware County, Oklahoma attended a November 2011 meeting of the County Commission and learned they may face an increase in property taxes to satisfy a settlement in a lawsuit that accused county jailers of raping and molesting female prisoners.

"We alleged the sheriff permitted his jail to be a sexual romper room," said R. Thomas Seymour, an attorney representing 15 former female prisoners who were held at the Delaware County Jail (DCJ). The women were incarcerated between 2005 and 2010 on charges that ranged from drug and alcohol-related offenses to assault and larceny.

Seymour's law firm, Seymour & Graham, with the Garrett Law Office, had previously represented female prisoners who were sexually abused by Custer County, Oklahoma Sheriff Michael Burgess, who was convicted and sentenced to 79 years in prison. [See: *PLN*, March 2012, p.24; Sept. 2009, p.36; May 2009, p.1].

At the center of the Delaware County allegations were DCJ Administrator Lonnie Hunter and jail volunteer Bill Sanders, Sr. The lawsuit alleged that Hunter and Sanders had raped and sexually groped female prisoners when driving them to doctor appointments or while the women were in their cells or shower areas. It also claimed other jailers would "bargain" with prisoners to expose their breasts in exchange for food, cigarettes, candy and personal items. Sheriff Jay Blackfox was accused of covering for his employees and ignoring prisoners' complaints.

"I did not cover up anything," said Blackfox, who was elected in 2004. "I would not have tolerated any type of sexual misconduct out of my staff."

Sheriff Blackfox acknowledged that he received a letter of complaint in 2008 from female prisoners, which he said he immediately turned over, along with witness statements, to the Oklahoma State Bureau of Investigation. An investigation was opened and a report sent to Delaware County District Attorney Eddie Wyant. Citing insufficient evidence, Wyant declined to prosecute at that time.

Following a deposition by one of the female prisoners, Hunter was placed on paid administrative leave on April 19, 2011 and later fired. Sanders had died in 2008. The County Commission, after hearing evidence and on the advice of counsel, voted in November 2011 to pay \$13.5 million to settle the lawsuit, inclusive of the plaintiffs' attorney fees and costs. The settlement, which was three times the county's annual budget, was finalized on November 16; the district court entered a final judgment on December 1, 2011. See: *England v. Delaware County Sheriff*, U.S.D.C. (N.D. Okla.), Case No. 4:09-cv-00407-JHP-TLW.

The plaintiffs will split the settlement, less attorney fees and costs, based on the severity of their claims. "The least amount of money a woman will receive who claimed to be raped is \$1.215 million and the most money a woman can receive who claimed to be raped is \$3.375 million," Seymour said. Claims involving sexual abuse other than rape will result in payments ranging from \$67,500 to \$405,000.

"There is the potential that part or all of the [settlement money] will be raised through property taxes," remarked County Commissioner Doug Smith. That outraged citizens who attended a Commission meeting on November 8, 2011. "This county is notorious and has a reputation for being corrupt," complained resident Shirlene Denny.

The county's insurance policy has a \$1 million liability cap. Thus, one option was to raise property taxes up to 18% to cover the cost of the settlement plus interest. That didn't include the \$600,000 in legal expenses the county had already incurred to defend against the lawsuit. Sheriff Blackfox, who was not accused of engaging in sexual misconduct himself, resigned two days after the settlement was

announced.

One of the female prisoners named as a plaintiff in the suit was released from custody following the settlement. She had been arrested in May 2009 based on a probation violation, and was released after Wyant received statements that had been written by Hunter and two DCJ guards on June 25, 2009.

"This is the first time the District Attorney's Office has ever been provided or made aware of these reports," said Wyant. The woman had been charged with assault and received a five-year sentence for striking a deputy while being placed in a holding cell at DCJ.

The statements indicated how emotional she became when she was put in the cell – the same cell where she said she had been raped by Sanders previously. Wyant noted that had the DA's Office been aware of those facts, it would not have violated her probation based on the incident in the holding cell nor filed new charges against her.

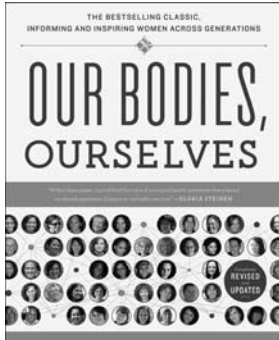
Commissioner Smith said changes had been implemented at DCJ to address the problems that resulted in the sexual abuse. Those changes included background checks for all employees and volunteers, and requiring female employees to transport female prisoners. Smith also issued a tearful apology to "anyone that has been harmed in the lawsuit."

In April 2012, Delaware County residents voted to raise the local sales tax to cover the cost of the \$13.5 million settlement, rather than raise property taxes. The sales tax was increased by one-half of a cent for seventeen years. "I'm glad that [the tax increase] passed," said Smith, "but it's nothing to celebrate about."

Sources: *Tulsa World*, *Associated Press*, [www.taxrates.com](http://www.taxrates.com), [www.fox14tv.com](http://www.fox14tv.com)



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# California Prisoners Seek End to Long-Term Segregation, Oppressive SHU Conditions

There are many forms of political and social protest. They can be purely for the sake of being disruptive or they can aim for resolution of a particular issue. Of course, even when they seek the latter they invariably involve some degree of the former.

A review of hunger strikes staged by up to 12,000 California prisoners in 2011 and early 2012 reveals that they were well-intentioned, peacefully orchestrated and achieved positive results. That is not to say that thousands of participants did not suffer, nor that the hunger strikers achieved all the goals they sought to attain. Regardless, the protests demonstrated that prisoners can make their voices heard and accomplish much-needed reforms.

## Background

The first hunger strike originated deep inside one of California's toughest pens, Pelican Bay State Prison (PBSP). More than just a maximum-security facility, PBSP is a remote lockup near the Oregon border that is the designated repository for prisoners the California Department of Corrections and Rehabilitation (CDCR) considers to be the worst troublemakers. This mostly includes gang members, whom the CDCR wants to isolate to prevent their promoting further gang activity while incarcerated.

But the CDCR has included within its designation of "gang members" and "associates" many prisoners who have been so identified by the slimmest of evidence, often including "confidential" snitch information from other prisoners. This has led, in some cases, to prisoners with no gang connections whatsoever being "validated" as gang members by the CDCR and placed in long-term segregation. [See: *PLN*, May 2010, p.24].

It was such prisoners, in desperation after lengthy stints in solitary confinement – 513 prisoners at PBSP have been isolated in their small cells for more than a decade, and of those 78 have been segregated 20 years or more – who became the core protest group for the hunger strike.

Those tagged with the "gang member" label, rightly or wrongly, are usually subjected to the harshest of conditions. They are assigned to "indeterminate SHU" (Security Housing Unit) status, which means solitary confinement in a

windowless, concrete cell with an attached dog-run for an hour of exercise once per day. "Indeterminate" means essentially forever, unless SHU prisoners either complete their sentence or are paroled, demonstrate gang non-affiliation for six continuous years, or "debrief."

More than 50% of the prisoners held in SHU status are serving indeterminate terms due to alleged gang membership or association. Their way out of the SHU is to "debrief" – that is, to tell CDCR gang investigators everything they know about gang activities, including crimes they have committed. The debriefing process, which sometimes spans a year, requires that prisoners formally disavow their gang affiliation.

This practice is known as "snitch, parole or die," as those are the only ways out of the SHU. In fact, the conditions at PBSP (and three other CDCR maximum-security prisons with SHUs) are so miserable that prisoners are waiting in line to debrief. Part of the problem is that when they do, and become eligible for less punitive housing, they must be placed in "sensitive needs yards" (SNYs) to protect them from other gang members. Consequently there is a chronic (and growing) lack of SNY space, which creates a waiting list for SHU prisoners who have debriefed. Meanwhile, those prisoners remain in segregation where they continue to endure oppressive SHU conditions. Around 4,000 California prisoners are held in SHUs.

## The First Hunger Strike

The core group of prisoners who initiated the first hunger strike compiled a list of five demands to submit to CDCR officials. Those demands were: 1) end group punishment and administrative abuse; 2) abolish the debriefing policy, and modify active/inactive gang status criteria; 3) comply with the Commission on Safety and Abuse in America's Prisons 2006 recommendations regarding ending long-term solitary confinement; 4) provide adequate and nutritious food; and 5) expand and provide constructive programming and privileges for prisoners held in indefinite SHU status.

The initial hunger strike began on July 1, 2011, when some 6,600 prisoners at facilities across the state began refusing

to eat state-issued meals. One week later about 1,700 prisoners were continuing to refuse at least some meals. By July 14, CDCR officials claimed that the number of hunger strikers had dropped to 676.

On July 15, 2011, leaders of the Pelican Bay hunger strike unanimously rejected a proposal from the CDCR to end the protest. In response to the prisoners' five reasonable demands, the CDCR distributed a vaguely worded document stating that it would "effect a comprehensive assessment of its existing policy and procedure" regarding prisoners held in SHUs. The document gave no indication whether any changes would be made.

On July 17, a state prison medical official disputed claims from advocacy groups related to health issues involving hunger strikers at PBSP and other facilities, which alleged that some fasting prisoners at Pelican Bay were suffering from renal failure and dangerously low blood sugar levels, and were unable to retain water.

"We have none of the issues that are being alleged," said Nancy Kincaid, spokesperson for California Prison Health Care Services. "Prisons that have fasting inmates have had their medical staff increased; nurses are making rounds three to four times a day, and when inmates are refusing medical treatment they are being visually checked from outside the cells," she added. "No inmates have been taken to a hospital for treatment because of fasting, but one inmate was taken to a prison clinic to be rehydrated."

As of July 18, 2011, the CDCR and the Federal Receiver's office, which monitors health care in California's prison system, said 338 prisoners were still refusing food. This included prisoners at Calipatria, California Correctional Institution, Corcoran and PBSP.

CDCR Secretary Matthew Cate announced on July 21, 2011 that Pelican Bay prisoners had ended their hunger strike. Dorsey Nunn, executive director of Legal Services for Prisoners with Children, who acted as a mediator between the CDCR and the hunger strikers, said he spoke with prisoners who confirmed the news. The strike ended on July 20, 2011 after prisoners better understood the CDCR's plans to review and change some of the policies related to SHU housing and gang management.



On July 22, hunger strike leaders Todd Ashker, Arturo Castellanos, George Franco and Louis Powell issued a public statement about the conclusion of the protest.

"We ended the hunger strike the evening of July 20, 2011, on the basis of CDCR's top level administrators' interactions with our team of mediators, as well as with us directly, wherein they agreed to accede to a few small requests immediately, as a tangible good faith gesture in support of their assurance that all of our other issues will receive real attention, with meaningful changes being implemented over time. They made it clear: such changes would not happen overnight, nor would they be made in response to a hunger strike going on.... On July 20, 2011, several top CDCR administrators sat across the table from us and made assurances that they are in the process of making meaningful changes right now, and will make affecting change a priority in the future, while providing regular updates and engaging in additional dialogue."

By July 24, Ashker had announced a performance timetable, giving the CDCR 2-3 weeks from the end of the protest to develop substantive changes in response

to the five core demands. If prison officials did not follow through, prisoners at Pelican Bay indicated they would resume the hunger strike.

### CDCR Considers Changes

As of July 19, 2011 the CDCR had started to reveal suggested policy changes, which still were being worked out but were in line with proposals highlighted in an internal study completed in 2007 by a panel of experts appointed by the CDCR. The panel's recommendations included:

- 1) Moving to a conduct-based model that punishes prisoners for tangible offenses, rather than for mere affiliation with a gang;
- 2) Ending the practice of indefinite detention of alleged gang members and associates in SHUs;
- 3) Ending the practice of automatically sending validated gang members and associates to SHUs;
- 4) Creating a "step-down" program inside the SHUs to encourage positive behavior by offering incentives to prisoners, such as special programs; and
- 5) Ending the distinction between prison gangs and other threat groups to give the CDCR more flexibility in deter-

mining prisoner placement in SHUs.

"I'm not talking about another study," said CDCR Undersecretary Scott Kernan. "I'm talking about making some changes that make the process much more in tune and in line with national best practices. And that's what [Secretary Cate] is going to do."

Kernan conceded there were "holes" in the department's gang management policies and use of the SHUs. He also said the state was wrong to deny certain personal items to SHU prisoners. "I think it's a sign of strength that the department looked at that [SHU policy] and was able to admit their mistakes and that we're moving forward," he stated. "We weren't consistent in all the SHU's and so [the prisoners] were right in some of their issues."

Kernan scheduled to meet with strike leaders at PBSP and with Donald Specter, director of the Prison Law Office, where Kernan said he would inform prisoners about the department's long-term goals and extended timetable.

On August 23, 2011, Kernan testified before the California State Assembly's Public Safety Committee. To the hunger strikers, it appeared that rather than subjecting their SHU policies to an

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## California Hunger Strikes (cont.)

honest review, prison officials were apparently planning to expand the CDCR's segregation regime to include all prisoners categorized as being part of a "disruptive group" – a code word that includes gangs. Convinced that this meant the CDCR had no intention of providing a meaningful response to their five core demands, the SHU prisoners planned to resume the hunger strike.

However, an internal CDCR memo dated August 25, 2011 outlined key elements of the proposed policy overhaul, including changes in how prisoners are validated as gang members and associates; changes in the criteria used to determine how prisoners are assigned to an SHU; and the creation of a "step-down" program that would allow prisoners to transfer to general population housing without having to debrief.

Additionally, CDCR officials agreed to allow personal items for SHU prisoners that were previously banned, including sweats, wall calendars and art supplies, and indicated that the new policy guidelines governing SHUs would be ready for review within a month. Kernan said the department had kept its word and would continue the policy makeover even if prisoners began a new hunger strike.

### Hunger Strike Renewed

On September 26, 2011, SHU prisoners at Pelican Bay and the Administrative Segregation Unit (ASU) at Calipatria State Prison resumed their hunger strike, as conditions had not improved and reforms were not evident. The Federal Receiver's office reported two days later that nearly 12,000 prisoners were refusing meals, including 3,000 California prisoners held in privately-operated contract facilities in Arizona, Mississippi and Oklahoma.

In-state prisoners were involved in the strike at PBSP, Calipatria, Centinela, Corcoran, Ironwood State Prison, Kern Valley State Prison, North Kern State Prison and Salinas Valley State Prison. Additionally, prisoners at the California Rehabilitation Center in Norco, Pleasant Valley State Prison, San Quentin and the West Valley Detention Center in San Bernardino County took part in the protest. "This is the largest prisoner strike of any kind in recent U.S. history," said Ron Ahnen of California Prison Focus.

Jay Donahue, a spokesman for the Prisoner Hunger Strike Solidarity Coalition, said prisoners participating in the renewed protest were subjected to retaliation by CDCR staff, who withheld water and vitamins. Guards reportedly raided prisoners' cells and issued disciplinary write-ups to hunger strikers. Reports from prisoners indicated that many were collapsing in their cells, but guards were doing nothing when alerted.

Other forms of retaliation included PBSP prisoners not being allowed to receive visits from their families. "Their visits for the weekend were not allowed, and they've been told that they won't be at all until the strike ends," Donahue stated.

Such retaliation was condoned at the highest levels of the CDCR. "If they still want to be on a hunger strike then there will be some consequences to that, because you can't shut down prison operations with no consequences," Secretary Cate said on September 27.

On September 29, 2011, the CDCR banned two attorneys representing the hunger strikers in mediation discussions – Carol Strickman with Legal Services for Prisoners with Children and Marilyn McMahon, director of California Prison Focus – from visiting CDCR facilities, citing security concerns.

After 17 days, the second hunger strike was waning. The number of prisoners involved had dropped to under 600 and there were only four hunger strikers left at PBSP, according to CDCR spokesperson Terry Thornton. At its height the second protest involved 4,250 prisoners, Thornton said, disputing the Federal Receiver's much higher estimate.

The CDCR declared the second strike over on October 13, 2011 after the department "agreed to continue on its same course" to pursue the reforms it had agreed to at the conclusion of the first hunger strike. CDCR officials reported that all prisoners had resumed eating by October 16, 2011.

"This is the first time the prisoners had heard that kind of review was in the works," noted Strickman. "That new information, I believe, convinced them to end the hunger strike."

### CDCR Outlines Reforms

On October 13, 2011, Kernan released a memo after meeting with mediators representing the hunger strikers, outlining changes that would be made in the CDCR's SHU program. Kernan then

announced his retirement after 30 years with the CDCR. The mediators were Strickman, McMahon, Laura Magnani with the American Friends Service Committee, and Ron Ahnen with California Prison Focus.

Although the memo was short on details, it specified that Kernan had presented a draft of SHU policy revisions to CDCR Secretary Cate. Kernan showed the mediators a 30-35 page revision that was in progress. He hoped that a final draft would be ready for review in another month, followed by approximately a one-year regulatory amendment process, including a public comment period. However, the new policies could be applied before then.

The process took longer than expected. The CDCR released new proposed policies for SHU placement and gang validation on March 9, 2012, but the policy changes were criticized by both prisoners and their advocates. Under the new policies, accused gang members can still be segregated for lengthy periods of time, SHU conditions remain largely the same and other changes are mere window-dressing – such as modifying the terminology for gang membership and expanding the number of prisoners subject to gang validation while adding a ten-point scale system.

"Overall this proposal shows that the CDCR is resisting both change and accountability," said Dorsey Nunn, with Legal Services for Prisoners with Children. "They are using what could be a chance to actually reduce or eliminate the SHU altogether to create more opportunities to issue SHU sentences."

The proposed new policies do include a step-down procedure whereby prisoners can be released from SHU status (though the process still takes four years); also, gang members would not have to renounce their gang membership and, importantly, there would be case-by-case reviews for current SHU prisoners. "Those who no longer meet the criteria would be released from the SHU," according to the memo signed by Kernan.

The proposed policy changes were disseminated to various stakeholders for review, including legislators, prisoners' advocates and the CCPOA – the union representing California prison guards. But not to the SHU prisoners directly affected by the policies. "The biggest issue with the stakeholder review is that the most important stakeholders, the prisoners who

have been validated and are currently in administrative segregation or the SHU, are not included,” noted Jerry Elster, an organizer with All of Us or None.

### Inspector General Reports

On October 17, 2011, California’s Office of the Inspector General (OIG) weighed in with a nine-page report submitted to the Senate Rules Committee. After describing the five core demands of the hunger strikers, the OIG listed the short-term actions that the CDCR agreed it would take in response to the protest.

Those actions included authorization for SHU prisoners to receive watch caps, wall calendars, sweat pants and some art supplies; annual photographs for disciplinary-free prisoners, with one photo to be provided to prisoners’ families each year; the use of a CDCR ombudsman to monitor and audit food services; and installation of certain exercise equipment in SHU yards.

The agreement also included “mid-term” fixes related to core demands 1, 2, and 3, such as a comprehensive review of SHU policies with respect to increased earnable privileges and a redefined gang validation process.

The OIG reviewed the CDCR’s promises, and found that all short-term actions had been accomplished or were in substantial progress (though there was a delay in installing the exercise equipment). As for food preparation, the OIG found it “satisfactory” – food trays were of the appropriate temperature, portion and cleanliness. Further, an education component was added in which 12 SHU

prisoners were enrolled in Coastline Community College correspondence courses, with proctoring provided for exams.

The OIG then investigated factors related to the second hunger strike. The prisoners asked for a program similar to the Maximum-B custody program at San Quentin prison in the 1980s, but this was considered infeasible due to the history of assaults and lockdowns in the Max-B population at the time. Instead, both sides agreed to form a Warden’s Advisory Group (WAG) to review gang management procedures and make proposed changes.

In response to claims of retaliation by CDCR staff against hunger strikers, the OIG reviewed all disciplinary reports issued during the relevant period and compared them with other periods. While the review showed an increase in gang-related write-ups during the hunger strike, equivalent to a “crackdown,” the OIG found no inordinate targeting in the cases it examined. Of course many types of retaliation did not involve formal disciplinary write-ups, though the OIG apparently did not take other retaliatory acts into account.

Summarizing, the OIG found that the CDCR had made a good faith effort to provide the promised short-term actions; that disciplinary write-ups were more numerous during the strike, but there was no evidence of illegitimate charges; that food service was in compliance with applicable standards; that the WAG was working well; that hunger strike policies prior to July 2011 were “inconsistent at best throughout the department”; and

that changes had been made to improve medical services and other procedures during hunger strikes.

### Prisoner Deaths and More Strikes

One troubling, unresolved issue involves three prisoners who participated in the protest, who reportedly killed themselves just before or shortly after the second hunger strike. Advocates for the prisoners contend their deaths were due to inadequate care as a retaliatory act by CDCR employees; they allege that guards did not respond to “man down” emergency calls from other prisoners who were aware of the suicide attempts.

“It is completely despicable that prison officials would willfully allow someone to take their own life,” stated Dorsey Nunn. “These guys were calling for help, their fellow prisoners were calling for help, and guards literally stood by and watched it happen.”

Two of the three prisoners, Johnny Owens Vick and Alex Machado, were housed at Pelican Bay. Vick died on September 22, 2011 while Machado died on October 24. The third, Hozel Alanzo Blanchard, was housed in the ASU at Calipatria State Prison when he died on November 9, 2011. The CDCR classified the three deaths as suicides and claimed that none of the prisoners were involved in the protests, which was disputed by prisoner advocates.

“It is a testament to the dire conditions under which prisoners live in solitary confinement that three people would commit suicide...,” said Laura Magnani, regional director of the American Friends



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## California Hunger Strikes (cont.)

Service Committee. "It also points to the severe toll that the hunger strike has taken on these men, despite some apparent victories."

Although not widely reported, another hunger strike began at Corcoran State Prison on December 19, 2011, when three prisoners in the facility's ASU, Pyung Hwa Ryoo, Juan Jaimes and William E. Brown, announced they were striking in protest of continued oppressive conditions. They issued a petition with 11 demands that included timely medical care, the provision of educational and rehabilitative programs, and that prisoners not face further punishment after completion of their SHU terms.

In the latter regard the petition stated, "Inmates are being placed in the ASU after the completion of their SHU terms supposedly 'pending transfer.' These inmates are then stuck here for four, five months, in many instances even longer, before finally being transferred to general population. This practice of illegally placing inmates in ASU upon the completion of their SHU terms for long periods of time without proper procedure and with excessive delays on their transfers is resulting in unjustified punishment for these inmates."

By December 28, 2011, almost 60 ASU prisoners at Corcoran were refusing state-issued meals; that number dropped over the next few days, and by December 31 the hunger strike had ended. CDCR officials reportedly said some of the prisoners' demands would be met. How-

ever, after several weeks there had been only partial changes at the ASU, and 32 prisoners resumed their hunger strike on January 27, 2012. All except one prisoner ended the strike by February 9, 2012, according to CDCR spokesperson Terry Thornton.

Corcoran ASU prisoner Christian Alexander Gomez, 27, was participating in the renewed hunger strike at the time of his death on February 2, 2012. According to Nancy Kincaid with California Prison Health Care Services, he was "medically monitored for hunger strike activity and had been on strike for four days" when he died. She added that "the preliminary autopsy report does not indicate hunger strike activity contributed to his death."

### Conclusion

The hunger strikes forced California prison officials to make changes they otherwise would not have undertaken. The CDCR admitted that its SHU policies were in need of review and modification, and is now pursuing regulatory amendments to accomplish that goal. There is finally hope for prisoners held in indeterminate SHU status – particularly those who participate in rehabilitative programs and choose not to engage in gang activity.

These reforms occurred due to the unity among prisoners who took part in the protests, public awareness of the extreme plight of SHU prisoners as a result of the hunger strikes, and strong support from outside organizations. Nor is the fight over. California prisoners and their advocates continue to call for improvements, and on

March 20, 2012 they petitioned the United Nations to take action against the CDCR's practice of holding thousands of prisoners in long-term segregation, which they equated to torture.

Based on the CDCR's proposed changes, the days of the "snitch, parole or die" policy, and some (but certainly not all) of the oppressive SHU conditions, now seem to be numbered. However, the substantive changes agreed to by prison officials will involve a lengthy process before they are implemented.

"We are not going to be pushed by the inmates or their advocates to change policy of this magnitude and get people killed," said CDCR Undersecretary Kernan. "We're going to do it slow and methodical and make sure we're doing the right thing."

While that may be the "right thing," it is exasperating for prisoners who have already spent years – or even decades – in segregation. "The prisoners are making very reasonable and legitimate demands regarding basic human rights," noted Strickman. "For those of us on the outside, the slow pace of reform is frustrating. For those people enduring barbarous conditions, the lack of meaningful improvement is unbearable." ■

Sources: [www.prisonerhungerstrikesolidarity.wordpress.com](http://www.prisonerhungerstrikesolidarity.wordpress.com), *Mercury News*, *SF Weekly*, [www.colorlines.com](http://www.colorlines.com), [www.cali-forniaawatch.org](http://www.cali-forniaawatch.org), [www.correctionsone.com](http://www.correctionsone.com), [www.prisons.org](http://www.prisons.org), [www.solitarywatch.com](http://www.solitarywatch.com), *New York Times*, [www.sfbayview.com](http://www.sfbayview.com), *California Prison Focus*, [www.hanfordsentinel.com](http://www.hanfordsentinel.com), *CNN*, *Los Angeles Times*

## Maryland DOC Rescinds Ban on Prisoner's Book

On July 20, 2011, the Maryland Department of Public Safety & Correctional Services (DPSCS) rescinded its ban on *The Marshall Plan: The Life and Times of a Baltimore Black Panther*, a memoir co-authored by Maryland state prisoner Marshall "Eddie" Conway and Dominique Stevenson with the American Friends Service Committee.

Maryland Correctional Training Center acting warden Wayne Webb had banned the book two weeks earlier. DPSCS spokesman Rick Binetti said the memoir was disallowed because it contained pictures of other prisoners without having notifying the victims of their crimes.

"[DPSCS] procedures dictate that any inmate photographed for media/other publication purposes be cleared through the proper victim notification process. This means they check to see if there is a victim notification request by the victim or victim's family in the inmate's file requesting they be notified should there be a photo/interview/media request of the inmate," Binetti said. "Generally speaking, victims ask that the inmate not be allowed to be interviewed/photographed."

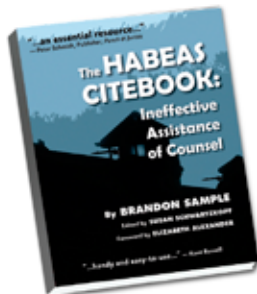
The DPSCS revoked its ban on *The Marshall Plan* after the ACLU threatened litigation. ACLU staff attorney David Rocah called the ban "flagrantly unconstitutional," noting that the preferences

of victims do not trump prisoners' First Amendment rights.

Ironically, the DPSCS had recently purchased hundreds of books and organized reading and discussion groups for prisoners as part of its "Big Read" program. According to a DPSCS press release, the goal of the program was "to get disenfranchised or lapsed readers (like inmates) to pick up a book, because in this case education is key to breaking the cycle of recidivism."

Unless that book is written by an incarcerated former Black Panther, apparently. ■

Sources: [www.mhpbooks.com](http://www.mhpbooks.com), *Baltimore Sun*, [www.dpscs.state.md.us](http://www.dpscs.state.md.us)



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# Missouri Court Finds Prisoner Phone Contract Bidding Process Unfair

On November 30, 2011, a Missouri circuit court held that adding optional services to the state's prisoner telephone contract without putting those services out for competitive bidding would render the contract void. The court found the current contract was valid, but to amend it to include the optional services would require the entire contract to be rebid.

From 2006 to 2011, Public Communications Services (PCS) provided phone services to more than 30,000 prisoners in the Missouri Department of Corrections (MDOC). The PCS phone system handled 12.1 million calls that totaled more than 117 million minutes in 2010. There are three methods by which prisoners can make calls: 1) debit calls, which are debited directly from the prisoner's account; 2) pre-paid calls with accounts set up by friends and family members; and 3) collect calls that result in the accepting party being billed.

In December 2010, Missouri's Office of Administration (OA), through its Director of Purchasing and Materials Management (DPMM), issued a Request for Proposal (RFP) for a new prison phone service provider following the expiration of the PCS contract in May 2011. Seven companies submitted acceptable responses: CenturyLink, Consolidated Communications Public Services, PCS, Securus Technologies, Synergy Telecom Service Company/Telcomate, Talk Telio LLC and Unisys Corporation.

Securus ultimately won the bid; its "proposal included a \$.05 per minute call charge for debit, pre-paid and collect calls; a \$1.00 collect call set up fee; and \$6.95 per transaction fee for pre-paid accounts, which was the highest pre-paid account transaction fee in any of the proposals," the circuit court found.

Securus' proposal also included "four optional services that would be provided at an additional cost of \$.01 per minute each for a total of an additional \$.04 per minute that would raise the Securus bid from \$.05 per minute to \$.09 per minute, one of the highest per-minute costs of all providers." The optional services, which included a cell phone detection fund and a prisoner voice mail system, would add \$32.8 million to the overall cost of the

contract over its seven-year term (five years plus two optional one-year extensions).

The court found that had DPMM "considered the cost of Securus' optional services in the calculation and compared Securus on a fair and equal basis with other offerors who included comparable proposals," Securus would have come in sixth in the bidding process. Even if the optional services were not at issue, the company's \$6.95 per pre-paid account transaction fee, if properly considered, would have placed it second.

After DPMM accepted Securus' bid, PCS and a Missouri taxpayer who received phone calls from prisoners filed a lawsuit contesting the contract award. The circuit court held a trial and initially found the plaintiffs had standing to bring the suit. The court said it was troubled by OA's position about the optional services; MDOC wanted the services, and DPMM believed it could add them through a contract amendment without further bidding.

"During the procurement process, DPMM failed to weigh the quality or cost of the optional services and gave no

analysis whatsoever to \$32 million's worth of optional services," the court concluded, finding the OA could not simply amend a contract for such costly services without competitive bidding.

"If DPMM were allowed in a bid document to do what it did in this RFP, which was effectively to ask offerors to propose any optional services each offeror individually might propose and then to select the optional services offered by one bidder, without giving other bidders the chance to make an offer on the same terms, it would create an exception to ... competitive bidding requirements that would threaten to swallow the rule and undermine the entire competitive bidding scheme," the circuit court wrote.

Having reached those conclusions, the court found that the MDOC's existing phone contract with Securus was valid, but the optional services were not contained in that contract. The defendants were enjoined from adding the optional services without rebidding the entire prison phone service contract. See: *Public Communications Services, Inc. v. Simmons*, Circuit Court of Cole County (MO), Case No. 11AC-CC00543. ■

## Alabama Prison Guards Charged in Prisoner's Murder

Four Alabama state prison guards have been charged in connection with the brutal 2010 beating death of a prisoner at the Ventress Correctional Facility (VCF).

The first guard, Lt. Michael Anthony Smith, 37, was indicted on October 17, 2011 by a Barbour County grand jury; he was arrested and booked into the Lee County Jail with a \$500,000 bond. Smith was charged with intentionally causing the death of VCF prisoner Rocrast Mack on August 4, 2010, "by beating him with his hands, fist, and/or baton." Mack was taken to two hospitals following the incident and died the next morning.

Six VCF guards were involved in the beating; all were either fired or resigned when threatened with termination during the ensuing investigation. Mack, 24, was serving a 20-year sentence for a minor drug offense at the time he was killed.

According to a lengthy *Huffington*

*Post* article, "Civil rights advocates call Mack's death an avoidable tragedy, the inevitable product of a profoundly dysfunctional state corrections system in Alabama that ranks among the very worst America has to offer."

The Equal Justice Initiative (EJI), a Montgomery-based organization that represents indigent prisoners, called for state and federal investigations into Mack's death. EJI conducted its own investigation and issued a report that found Mack "was confronted by a correctional officer who accused him of looking at her inappropriately." She "initiated the assault by hitting Mr. Mack in the face." Witnesses also told EJI that when the guard hit Mack a second time, he hit her back.

Several guards responded and "beat Mr. Mack until he was limp and lifeless," the report stated. "Another correctional officer was threatened by guards when

he tried to stop the beating. One officer announced during the beating that he intended to kill Mr. Mack.”

Lt. Smith reportedly told Melissa Brown, the female guard who initially hit Mack, to falsely claim that Mack had struck her first. This was duly reported by DOC public information manager Brian Corbett, who stated, soon after Mack’s death, “An inmate allegedly assaulted an officer and other officers had to intervene.”

The *Associated Press* obtained medical records that “showed Mack had multiple bruises to the head, torso, arms and legs, was missing at least one tooth, and his left eye was swollen shut. He suffered traumatic brain injury and never regained consciousness.” He also had fractures to his ribs, arms, legs and skull; an autopsy concluded that his death was a homicide caused by “unusually severe” blunt force trauma.

A report by the Alabama Bureau of Investigation released in January 2011 “reportedly found that officers engaged in ‘criminal conduct,’ ‘abused their authority,’ ‘used unauthorized physical force’ and provided ‘false information’ about the incident,” according to the Equal Justice Initiative.

Alabama Department of Corrections (DOC) Commissioner Kim T. Thomas pushed for a state prosecution. “I am thankful and supportive of the attorney general’s willingness to see that justice is served and that those responsible for this tragic event are held accountable,” he said.

“A senior officer is accused of not only violating his oath of office, but of being so brutal in his actions that he took the life of an inmate under circumstances that make murder the appropriate charge,” stated Attorney General Luther Strange, when Lt. Smith was indicted. “Neither the DOC nor this office tolerates the use of excessive force in controlling inmates, and when officers cross the line, they will face the serious consequences of their acts.”

That was not the case, however, when the Attorney General previously defended Smith in three federal lawsuits filed by VCF prisoners who alleged brutality. In one of those cases, prisoner Michael Dobbins, who was confined to a wheelchair and partially paralyzed, said Smith had repeatedly punched him in the face, breaking his nose. Another suit claimed that an unresisting prisoner lying on the

ground had been kicked, punched and beaten by a group of guards that included Smith. In an unusual turn, former VCF guard Paul T. Costello submitted a sworn statement in that lawsuit, acknowledging he had witnessed the assault involving Smith.

“We’ve seen a dramatic increase in the number of complaints coming into our office concerning guard-on-inmate assaults,” said EJI executive director Bryan Stevenson. “Physical assaults of inmates by guards have become an accepted part of the culture in a lot of Alabama prisons.”

EJI and other prisoners’ rights advocates pushed for more indictments of guards involved in Mack’s death, and their efforts were rewarded when the U.S. Attorney’s Office stepped in. Guard Scottie T. Glenn, 28, was charged in federal court in November 2011 with one count of violating Mack’s civil rights and one count of conspiring with other guards to cover up the incident. Glenn pleaded guilty and admitted that he knew Mack would be beaten and that he and other officers had lied to investigators and in written reports. He has not yet been sentenced. See: *United States v. Glenn*, U.S.D.C. (M.D. Ala.), Case No. 2:11-cr-00200-MHT-SRW.

Smith and two other VCF guards, Matthew Davidson, 43, and Joseph Sanders, 31, were charged in federal court on March 12, 2012. They are accused of civil rights violations for beating Mack, obstructing justice by attempting to cover up their actions, and making false statements to the FBI. Those cases remain pending. See: *United States v. Smith*, U.S.D.C. (M.D. Ala.), Case No. 2:12-cr-00048-MHT-TFM.

Other VCF guards involved in the incident that resulted in Mack’s death have not been charged, including Melissa Brown, who was subsequently fired for violating DOC rules.

State officials reportedly settled a civil suit filed by Mack’s family shortly after his death, agreeing to pay \$900,000. Around half the money from the settlement was placed in a trust for Mack’s four-year-old son. See: *Mack v. Alabama Department of Corrections*, Montgomery County Circuit Court (AL), Case No. CV-11-900033. ■

Sources: *The Birmingham News*, *Huffington Post*, [www.eji.org](http://www.eji.org), U.S. Department of Justice press release, [www2.eufaulatribune.com](http://www2.eufaulatribune.com)

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# Another Oregon Prison Food Manager Accused of Misconduct

As previously reported in *PLN*, former Oregon Department of Corrections (ODOC) Food Services Administrator Farhad “Fred” Monem accepted over \$1.2 million in bribes from several food vendors and then fled to his homeland of Iran, leaving his wife and the vendors to face criminal prosecution. [See: *PLN*, Oct. 2011, p.38; Sept. 2010, p.24; July 2009, p.20; Aug. 2008, p.1].

Now, the Food Services Manager at the Two Rivers Correctional Institution (TRCI) in Umatilla, Oregon has resigned and may face criminal charges in an unrelated incident.

In 2007, the ODOC hired Mike W. Mathisen, 44, to work in the food services department at the Oregon State Penitentiary. The next year he transferred to TRCI, where he earned \$59,000 a year as the facility’s Food Services Manager. While employed in that capacity, Mathisen also owned catering and food packing businesses, and established two local farmers markets.

In 2010, Mathisen was endorsed by state Republicans in a failed bid to unseat state Representative Bob Jenson. He raised \$31,500 for his campaign, including \$2,500 from the Oregon Anti-Crime Alliance, which is headed by former Oregon legislator Kevin Mannix, the chief sponsor of numerous mandatory minimum sentencing laws.

Ironically, while running for office and accepting money from the Anti-Crime Alliance, it appears that Mathisen was stealing from the ODOC. He was placed on administrative leave in May 2011 until he resigned in late November at the conclusion of an internal investigation. The ODOC refused to provide details regarding Mathisen’s alleged misconduct, but insiders said he stole food purchased to feed TRCI’s 1,580 prisoners and then resold it through his personal businesses.

Mathisen told reporters he did not misuse any state money or assets, and had provided documents the ODOC wanted for its investigation. However, he declined to elaborate on the allegations.

“After five months of waiting for the investigation to be completed, I decided to resign and pursue other things,” Mathisen said.

The ODOC notified the Oregon State Police (OSP) of its internal investigation in late May 2011. The OSP, in turn, sent the ODOC’s findings to Umatilla County

District Attorney Dan Primus.

ODOC officials are awaiting Primus’ decision as to whether additional investigation is needed, reported OSP Lt. Gregg Hastings. In January 2012, the ODOC gave the OSP a second batch of reports related to Mathisen and his supervisor, Assistant Superintendent Bob Martinez. Primus confirmed he was considering criminal

charges but refused to discuss the case.

Martinez, who is not expected to face charges, was placed on paid leave in November 2011 upon the conclusion of the Mathisen investigation. He was allowed to return to work in January 2012 after being demoted to a counselor position. ■

Source: *The Oregonian*

## Michigan Introduces Tasers to Prison System

by David M. Reutter

Citing hopes of reducing the number of work-related injuries and associated costs resulting from altercations with prisoners, in December 2011 the Michigan Department of Corrections (MDOC) invested \$125,000 in a pilot program at five maximum-security prisons to test the effectiveness of Tasers.

MDOC guards at Algier Correctional Facility, the Michigan Reformatory in Ionia and the Ionia, Carson City and St. Louis correctional facilities were armed with a Taser model X26 or X2, both of which have video recording capabilities.

High numbers of assaults involving multiple prisoners, prisoner-on-staff assaults and prisoners with weapons were why the five facilities were selected for the pilot program, said MDOC operations administrator Edward Mize. He noted that other states that allow guards to carry Tasers have reported a 20-50% reduction in employee or prisoner injuries related to altercations.

Each Taser costs around \$1,070 and each prison requires about 20, Mize said. In addition to the \$107,000 to purchase the electroshock devices, the MDOC spent another \$18,000 in equipment and training for five to ten guards at each facility to carry Tasers.

The MDOC has a phone service fund for revenue generated from phone calls made by prisoners. Since the fund is to be used for security equipment, prisoners and their loved ones may end up footing the bill to deploy Tasers within the MDOC.

“We certainly would evaluate if that is something appropriate to use those funds, yes,” stated Mize, who also said the initial Taser purchase was not made using any money from the fund.

Guards will be authorized to use a

Taser when lesser force is inadequate to stop prisoners who are assaulting another prisoner or staff member. “If nothing else, verbal commands and the warning [then] a Taser will be deployed will stop some of the aggression in several situations,” Mize stated. “They work very well.”

However, there have been numerous reported deaths involving the use of Tasers against both prisoners and non-prisoners. [See, e.g.: *PLN*, March 2012, p.46; Jan. 2012, p.42]. And in April 2012, a report published in the American Heart Association journal *Circulation* confirmed that Tasers could trigger heart attacks.

Given the propensity of guards to abuse their power and engage in excessive use of force, it is only a matter of time before there is an incident involving the unjustified deployment of a Taser by MDOC staff against a prisoner.

That was the topic of a letter sent to Director Heyns from the Human Rights Defense Center (HRDC – the parent organization of Prison Legal News) on February 24, 2012. The letter noted that *PLN* “has reported on the use of Tasers in the correctional setting for over two decades. We have, for example, reported cases in which pregnant prisoners miscarried after being Tasered; where prisoners were Tasered while restrained in handcuffs or restraint chairs; and where Tasers were used sadistically for the purpose of inflicting pain rather than being used to regain control or respond to incidents involving violence or the threat of violence.”

HRDC director Paul Wright noted, “Of particular concern is the deployment of Tasers against prisoners who are mentally ill, whose unruly behavior and inability to follow prison rules is a result of their mental health condition.”

Further, MDOC employees “do not need another tool that causes pain in order to gain compliance, such as Tasers, but there rather needs to be a systemic change in the manner in which DOC staff members interact with prisoners – particularly those who are mentally ill.”

The letter concluded, “We submit that a better use of resources for the Michigan DOC would be training DOC employees in proper techniques for responding to disturbances and incidents involving prisoners with mental health conditions, so as to minimize the use of force – rather than deploying Tasers, which simply adds another type of force to the DOC’s arsenal that has the potential for abuse. The only way to ensure Tasers are not used in an abusive manner against prisoners is to ensure they are not made available to DOC employees.”

Director Heyns did not respond to the HRDC letter. Rather, according to a March 2012 press release from Taser International, the MDOC deemed the pilot program a great success and placed an order for 242 Taser X2s with video recorders, plus 3,783 Taser cartridges, at a cost of around \$800,000.

“The recent implementation of the Taser X2s in the Michigan Department of Corrections, although recent, has shown a huge decrease in staff and prisoner injuries,” said Mize. “We have every intention of utilizing them in the majority of our facilities to help control combative and aggressive prisoners.”

Sources: [www.mlive.com](http://www.mlive.com), Taser press release, HRDC letter dated Feb. 24, 2012

## Washington State Court Holds Requester Has the Right to Joinder in Suit Seeking to Bar Disclosure of Public Records

The Division Three Court of Appeals for the State of Washington has vacated an injunction that barred the disclosure of records requested by a state prisoner related to Washington Department of Corrections (DOC) employees.

Allan Parmelee submitted a Public Records Act (PRA) request to the DOC for documents concerning several guards employed at the Washington State Penitentiary. Rather than honor Parmelee’s request, the DOC notified him that it would withhold the records pending the outcome of a lawsuit filed by the affected guards. Through their suit, the guards sought an injunction barring disclosure of the records.

Parmelee sought mandatory joinder to the guards’ suit under Civil Rule (CR) 19. The trial court, however, denied his joinder request and granted the injunction, and Parmelee appealed.

The Division Three Court of Appeals, in an unpublished opinion, reversed the trial court. According to the appellate court, Parmelee’s request for joinder was controlled by the Washington Supreme Court’s decision in *Burt v. Department of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (Wash. 2010).

In *Burt*, another PRA case involving Parmelee, the Court held that he was an indispensable party in a similar lawsuit filed by guards seeking to bar the disclosure of records in a PRA request.

Following *Burt*, the Court of Appeals found that “a requester in a PRA injunction has an interest in the subject of the action.” As such, the appellate court concluded, “Parmelee was a necessary party whose joinder was mandatory under CR 19(a).”

The injunction barring the disclosure of the public records sought by Parmelee was accordingly vacated, and the case remanded for further proceedings. See: *Parmelee v. Abbott*, 161 Wash.App. 1015 (Wash.App. Div.3 2011); 2011 WL 1631722.

Parmelee has an extensive history of litigating PRA cases, although that history resulted in the state legislature introducing bills to restrict prisoners’ ability to obtain public records and collect damages in PRA cases. [See: *PLN*, April 2011, p.32; Nov. 2010, p.36; Oct. 2010, p.46].

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## California Pays \$2.5 Million After Girl Attempts Suicide at Juvenile Facility

California officials have agreed to pay \$2.5 million to the family of a teenage girl who was left severely brain damaged after trying to hang herself in the mental health unit of the Ventura Youth Correctional Facility (VYCF). According to the family's lawsuit, VYCF guards and supervisors failed to follow established suicide prevention protocols.

In May 2008, Shanelle Crawford, 16, was incarcerated at VYCF, a facility operated by California's Division of Juvenile Justice (DJJ). She suffered from major depression, was a victim of sexual abuse and had made a serious suicide attempt two years earlier. Due to her mental health condition, she was placed in the Intensive Treatment Program (ITP) at VYCF and classified as being a "high" suicide risk. The ITP housed 14 juvenile females, all with pre-existing mental illnesses and all in need of visual observation.

On May 25, 2008, Shanelle was talking on the phone with her father when a guard, Matthew McHendry, told her to get off the phone because it was time for her to shower. An argument ensued and, according to court records, McHendry "physically hung up the phone, greatly upsetting Shanelle."

Afterwards, Shanelle spoke to a female supervisor and was then escorted back to her cell by a counselor. Although still agitated, she was left alone and unmonitored.

When McHendry made his rounds, he observed that the window in Shanelle's cell was covered. Instead of immediately intervening as mandated by DJJ policy – a policy instituted after a successful suicide by a youth in 2005 – he continued his rounds.

Only later, when McHendry observed that Shanelle's window was still covered, did he take steps to open her door. He then discovered Shanelle hanging from a bedsheet she had tied around her neck.

Witness testimony and evidence concerning the extent of Shanelle's resultant brain trauma suggested that she had been hanging for 8 to 10 minutes.

When deposed, McHendry acknowledged his practice of allowing girls to cover their cell windows while they used the toilet or undressed for a shower, but only for "a minute or two."

Shanelle now requires full-time care;

she has a life expectancy of 20 years. McHendry was subsequently promoted to a supervisory position at VYCF.

The district court approved the \$2.5 million settlement on July 13, 2011, which included \$948,097.50 for attorney fees and costs, \$202,157 to cover Medicaid obligations and \$1,088,745.50 to establish a special needs trust for Shanelle. The

plaintiffs were represented by Pasadena attorneys Ronald Kaye and Kevin Lahue of the law firm Kaye, McLane and Bednarski. See: *S.C. v. Finley*, U.S.D.C. (C.D. Cal.), Case No. 2:09-cv-03956-GHK-E. The settlement and complaint are posted on PLN's website. ■

Additional source: *Los Angeles Times*

## Study Reveals High Rates of Sexually-Transmitted Diseases at Maricopa County, Arizona Jails

A joint study by the Arizona Arrestee Reporting Information Network and Arizona State University's Center for Violence Prevention and Community Safety, released in June 2011, found high rates of sexually-transmitted diseases (STDs) among prisoners in Maricopa County's jail system. Approximately 130,000 people are booked into the county's jails each year, with an average incarceration period of less than 30 days.

The first anomaly was noticed when the Center for Violence Prevention and Community Safety conducted a federally-funded study that tested women under 35 for diseases that could affect fertility. The study noted elevated STD rates among incarcerated women for chlamydia and gonorrhea. Believing that incarcerated men might also have high rates of infection, the researchers expanded the study to include all prisoners regardless of age or gender.

The expanded study revealed gonorrhea infection rates of 5% and chlamydia infection rates of 10% among female prisoners – about 80.6 and 14.5 times higher than the average in the general population, respectively. For male prisoners, the gonorrhea infection rate was 4.6% and the chlamydia infection rate was 6.8% (54.4 and 23.7 times greater than in the general population, respectively).

Public health care officials hope the study will be a springboard for additional research into STD rates at other county jails. The main thing holding back such studies is the high cost of STD testing. The federal grant-funded tests in the study cost about \$18 per prisoner, while tests without grant funding run up to \$95. Maricopa County health care officials

are working with the Centers for Disease Control and Prevention to determine the real value of STD testing by developing a cost-benefit analysis.

Of course, that analysis should take into account the fact that releasing infected prisoners without testing and treatment will result in the spread of STDs among the general population, which would result in additional costs. Often that money will come from government health services, since many former prisoners and their families have low incomes and are dependent on public health care. Therefore, treating STD-infected prisoners while they are incarcerated, where their compliance with taking the antibiotics necessary to cure STDs can be closely monitored, is more cost effective than waiting until after they are released to treat them in the community.

"Whether they're outside or in here, if you look at it from a public money standpoint, it's still tax dollars," said Dr. Jeffrey Alvarez, medical director of Maricopa County's Correctional Health Services. "It's hard to help taxpayers understand we are paying for this. Even if you don't think of the good that we're doing for people, it's still cheaper for you to take care of this now."

According to the study, "Left untreated, these STDs can lead to serious urethral or cervical infections, infections in other parts of the body, infertility, and neonatal transference." Which is another good argument for STD testing and treatment for prisoners. ■

Sources: *Arizona Republic*, <http://cvpcs.asu.edu>



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| <input type="checkbox"/> Car & Driver (12)             | <input type="checkbox"/> Ladies Home Journal (11)             | <input type="checkbox"/> Snowboard (6)                 |
| <input type="checkbox"/> Charisma (12)                 | <input type="checkbox"/> Latina (10)                          | <input type="checkbox"/> Snowboarder (7)               |
| <input type="checkbox"/> Complex Magazine (6)          | <input type="checkbox"/> Log Home Living (9)                  | <input type="checkbox"/> Sound & Vision (8)            |
| <input type="checkbox"/> Conde Nast Traveler (12)      | <input type="checkbox"/> Los Angeles Magazine (12)            | <input type="checkbox"/> Spa (6)                       |
| <input type="checkbox"/> Country (7)                   | <input type="checkbox"/> Lucky (12)                           | <input type="checkbox"/> Sport Rider (10)              |
| <input type="checkbox"/> Cruising World (12)           | <input type="checkbox"/> Marie Claire (12)                    | <input type="checkbox"/> Super Chevy (12)              |
| <input type="checkbox"/> Cycle World (12)              | <input type="checkbox"/> Men's Fitness (10)                   | <input type="checkbox"/> Surfer (12)                   |
| <input type="checkbox"/> Detroit Home (6)              | <input type="checkbox"/> Men's Journal (12)                   | <input type="checkbox"/> Surfing (12)                  |
| <input type="checkbox"/> Digital Photo (7)             | <input type="checkbox"/> Motor Trend (12)                     | <input type="checkbox"/> Taste of Home (8) No Renewal  |
| <input type="checkbox"/> Dirt Rider (12)               | <input type="checkbox"/> Ministry Today (6)                   | <input type="checkbox"/> Teen Vogue (10)               |
| <input type="checkbox"/> Ebony (11)                    | <input type="checkbox"/> Midwest Living (6)                   | <input type="checkbox"/> Texas Monthly (12)            |
| <input type="checkbox"/> Elle (12)                     | <input type="checkbox"/> Motorcyclist (12)                    | <input type="checkbox"/> The Atlantic (10)             |
| <input type="checkbox"/> Elle Décor (10)               | <input type="checkbox"/> Muscle & Fitness (12)                | <input type="checkbox"/> Timber Home Living (6)        |
| <input type="checkbox"/> Entrepreneur (12)             | <input type="checkbox"/> Muscle Mustangs & Fast Fords (12)    | <input type="checkbox"/> Transworld Motocross (12)     |
| <input type="checkbox"/> ESPN (26)                     | <input type="checkbox"/> Nylon (10)                           | <input type="checkbox"/> Transworld Skateboarding (12) |
| <input type="checkbox"/> Esquire (11)                  | <input type="checkbox"/> Off-Road (12)                        | <input type="checkbox"/> Transworld Snowboarding (9)   |
| <input type="checkbox"/> Family Circle (15)            | <input type="checkbox"/> Old House Journal (6)                | <input type="checkbox"/> Transworld Surf (12)          |
| <input type="checkbox"/> Family Fun (10)               | <input type="checkbox"/> Orange Coast Magazine (12)           | <input type="checkbox"/> Urban Farm (6)                |
| <input type="checkbox"/> Fast Company (10)             | <input type="checkbox"/> Outdoor Life (12)                    | <input type="checkbox"/> Vibe (6)                      |
| <input type="checkbox"/> Field & Stream (12)           | <input type="checkbox"/> Outdoor Photographer (11) No Renewal | <input type="checkbox"/> Waterfowl & Retriever (2)     |
| <input type="checkbox"/> Fitness (10)                  | <input type="checkbox"/> Outside (12)                         | <input type="checkbox"/> Weight Watchers (6)           |
| <input type="checkbox"/> Florida Sport Fishing (6)     | <input type="checkbox"/> Parent & Child (9)                   | <input type="checkbox"/> Whitetail Journal (6)         |
| <input type="checkbox"/> Fly Fishing in Salt Water (6) | <input type="checkbox"/> Parenting Early Years (11)           | <input type="checkbox"/> Whole Living (10)             |
| <input type="checkbox"/> Flying (12)                   | <input type="checkbox"/> Parenting School Years (11)          | <input type="checkbox"/> Wired (12)                    |
| <input type="checkbox"/> Four Wheeler (12)             | <input type="checkbox"/> Parents (12)                         | <input type="checkbox"/> Wood (7)                      |
| <input type="checkbox"/> Freeskier (6)                 | <input type="checkbox"/> Plane & Pilot (12) No Renewal        | <input type="checkbox"/> Working Mother (8)            |
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## \$2.4 Million Awarded for Wrongful Death of Virginia Prisoner

On September 13, 2011, a Virginia jury awarded the estate of a Richmond City Jail prisoner \$2.4 million in a wrongful death suit.

James D. Robinson, 46, was arrested and booked into the jail in 2008 after he suffered a seizure while driving with a suspended license and crashed his car into a house. Despite jail officials knowing that Robinson had a seizure disorder, he was not housed in the medical section of the facility and did not receive his anti-seizure medication for ten days.

Robinson complained of swollen legs and pain in his chest, mid-section and side during the entire time he was held at the jail. He had to walk hunched over and stayed in bed most of the time. However, deputies simply ignored his and other prisoners' repeated requests to provide him with medical care.

Robinson's mother contacted the jail seeking medical attention for her son; she was told that he was receiving effective treatment.

A jail health care employee – who was not licensed to do so – ordered X-rays of Robinson's abdomen and lower back. Despite the fact that he was complaining of chest pain and trouble breathing, no X-rays were made of his chest. Jail physician Dr. Stanley N. Furman then concluded that Robinson's lungs were clear even though, according to the complaint, they were "definitely not clear but were harboring a growing and deadly infection."

Robinson collapsed on his eleventh day at the jail. He was shaking and had no pulse. A jail health care employee used a malfunctioning defibrillator in an unsuccessful attempt to revive him; he was then transferred to the Virginia Commonwealth University Medical Center (MCV), where he was pronounced dead.

Represented by attorney Mark J. Krudys, Robinson's estate filed a wrongful death suit in Circuit Court against Sheriff C. T. Woody, Jr. and Dr. Furman. After a week-long trial, the jury awarded the estate \$2.4 million. Sheriff Woody was found liable for the conduct of jail staff who ignored Robinson's repeated requests for medical care. Dr. Furman was found liable for failing to diagnose the pneumonia that led to Robinson's death.

"The pneumonia was so extensive that the other side's expert testified that Mr. Robinson essentially drowned from pus that had collected in his lungs," said Krudys.

"An inmate at the jail cannot call down to CVS for medication," he noted. "They can't call MCV and say 'I need some care right now.' They are totally depending on the medical services staff."

The defendants appealed, but agreed to settle the case on May 18, 2012 while the appeal was pending. Pursuant to the settlement agreement, Robinson's estate received a total of \$2.05 million, inclusive

of attorney fees. See: *Gaines v. Senior Health Center PC*, Richmond Circuit Court (VA), Case No. CL09-002343-00.

The Richmond City Jail has since contracted with a private company, Correct Care Solutions, to provide medical services at the facility. ■

Sources: *Richmond Times-Dispatch*, [www.ncb12.com](http://www.ncb12.com)

## Saginaw County Jail in Michigan Settles Prisoner's Wrongful Death Suit for \$1.3 Million

The Executive Committee for Saginaw County, Michigan voted in December 2011 to settle a lawsuit that alleged county and jail officials were responsible for a prisoner's death that occurred in May 2007.

Jerry Rouster, 48, was serving a 3-day sentence for misdemeanor contempt of court at the Saginaw County Jail when he died. A medical examiner determined his death was due to peritonitis resulting from a pre-existing perforated ulcer below his stomach. A lawsuit filed by Rouster's estate alleged that jail officials and the jail's private health care provider, SecureCare, Inc., had violated Rouster's civil rights and "displayed deliberate indifference to Jerry's serious medical condition."

Rouster was found curled up in a fetal position on the floor of a cell he shared with 14 other prisoners on May 9, 2007. He complained to jail medical staff that he had stomach cramps and abdominal pain. Three guards carried Rouster to the medical unit for examination.

According to the lawsuit, Rouster "was not examined by competent and licensed medical personnel, and was returned to his jail cell, despite obvious signs of emergent and urgent abdominal illness." He was placed in a medical observation area.

Rouster's mental and physical condition worsened within hours, but neither guards nor medical staff arranged for him to see a registered nurse or doctor, nor was he transferred to a hospital. His condition deteriorated to the point that he was eating leftover food off the cell floor and drinking water from a toilet despite a water fountain being nearby. A few hours later he again complained of severe

stomach pain, yet staff did not provide medical care.

Guards failed to log observations or make rounds every 15 minutes as required by policy for prisoners in medical observation cells, the lawsuit charged. "Despite the fact that Jerry denied drug or alcohol abuse at that time," medical personnel performed a drug and alcohol withdrawal assessment in response to his complaints and obvious pain.

A video camera recorded Rouster's last moments at 3:00 a.m. on May 11, 2007. It showed him "with his legs straightened out from underneath him and leaning against the wall." At 5:40 a.m., a guard entered Rouster's cell to deliver breakfast and "discovered [he] was no longer moving and ultimately request[ed] medical assistance, only to discover Jerry had died."

In court filings, the county's attorney, David J. MacMain, blamed Rouster for failing to disclose he had medical problems during his intake at the jail, and argued jail officials did not "have any reason to believe that Rouster was suffering from any medical condition." Other than his repeated requests for help, complaints of pain and bizarre behavior, apparently.

The lawsuit also claimed that jail employees had "engaged in deceitful and dishonest conduct to cover up the fact that they had not appropriately or timely monitored" Rouster. It further alleged jail personnel "knowingly failed to provide honest and truthful statements during an investigation" into Rouster's death; had instructed subordinates "to falsify records, reports and statements"; and "knowingly falsified observation sheets in an attempt to cover up [the] failure" to carry out

their duties.

Indeed, eighteen jail employees were disciplined following an internal investigation into Rouster's death. Two guards were fired, a shift supervisor was demoted and suspended for five days, a sergeant and four guards received six-hour suspensions, and 10 other guards received written reprimands.

Saginaw County Sheriff William L. Federspiel conceded policy changes were needed to avoid such incidents in the future. "We are very aware of the mistakes that may have been made by our agency

that we hope will never happen again," he said.

Those changes included contracting with a different medical provider at the Saginaw County Jail; SecureCare was replaced in September 2009. Sheriff Federspiel declined to comment on other specific policy reforms.

"This is one of the most egregious, sad cases I've ever seen in my life," said attorney Vernon R. Johnson, who represented Rouster's estate. "There was an absolute failure that a man who went into jail healthy rotted from inside out. It was

a failure on all levels. This man literally died a horrific death."

The county agreed to settle the case for \$1.3 million in December 2011. Approximately \$452,236 of that amount went to attorney fees and costs. The lawsuit remains pending against SecureCare and other defendants, though two doctors were later dismissed by stipulation. See: *Rouster v. Saginaw County*, U.S.D.C. (E.D. Mich.), Case No. 1:11-cv-10986-TLL-CEB. ■

Additional source: [www.mlive.com](http://www.mlive.com)

## Private Prison Industry Exerts Political Influence in Arizona

Arizona Governor Jan Brewer and other state policymakers have been criticized for their close connections with private prison companies, including Corrections Corporation of America (CCA), the nation's largest for-profit prison firm.

Brewer's senior political advisor and 2010 campaign manager, Chuck Coughlin, founded Highground Public Affairs Consultants, which lobbies for CCA. Further, Brewer's former deputy chief of staff for communications, Paul Senseman, lobbied for CCA through Policy Development Group, Inc. both before and after working for the governor; his wife, Kathryn Senseman, is a CCA lobbyist with the same company. CCA operates six facilities in Arizona although none currently house Arizona prisoners.

Florida-based GEO Group, CCA's main competitor and one of the bidders for a state contract to manage 2,000 private prison beds in Arizona, has taken a page from CCA's playbook. Since CCA apparently has the governor in its pocket, GEO Group decided to influence members of the legislature who have control over the state's purse strings.

Lobbyists associated with GEO Group gave campaign contributions to House Speaker Andy Tobin and state Rep. John Kavanagh, Chairman of the House Appropriations Committee and outgoing Chair of the Joint Legislative Budget Committee. The contributions came from sources associated with Arizona-based consulting firm Public Policy Partners (PPP). GEO has seven registered lobbyists in Arizona; in addition to PPP, GEO has hired KRB Consulting, Inc. and Leibowitz Solo.

PPP has numerous Arizona clients

but only two national clients – GEO Group and Ron Sachs Communications, a Florida-based public relations company that promotes prison privatization. [See: *PLN*, Nov. 2010, p.1]. According to Kavanagh's campaign finance reports, PPP owner John Kaite and his wife, Ann Peralta Kaite, have contributed to Kavanagh's campaign, as have PPP lobbyist Ken Quarterman and his wife, Laurie Quarterman. Other PPP lobbyists also made donations to Kavanagh.

"[Private prison companies] spend a lot of money, and clearly, they spend it because it benefits their interest, which is winning contracts," said Bob Libal, a senior organizer at Grassroots Leadership, a non-profit group that opposes prison privatization.

GEO Group obviously hopes that campaign contributions to Kavanagh and other lawmakers will help it get a big slice of Arizona's private prison contract pie; after all, such donations certainly don't hurt. Nor does having former public officials on a company's payroll. For example, one of CCA's board members is former Arizona U.S. Senator Dennis DeConcini; the company has also hired Bradley Regens, who served as director of fiscal policy for the Arizona House of Representatives.

Private prison firm MTC, which is also vying for Arizona's 2,000-bed private prison contract, hired the Dunn Stewart Group – an Arizona consulting company that includes former Arizona DOC director Terry L. Stewart. Additionally, MTC employs former Arizona DOC assistant director Carl Nink.

Arizona continues to contract with private prison companies despite serious

problems in the past, including the July 30, 2010 escape of three prisoners from an MTC-operated facility in Kingman that resulted in a double homicide and nationwide manhunt. [See: *PLN*, March 2011, p.24; Sept. 2010, p.42].

In May 2012, the Arizona state legislature approved a compromise budget that included funding for 1,000 private prison beds – half the number initially proposed, which was down from an original bid for 5,000 private prison beds after the state's failed attempt in 2009-2010 to privatize practically its entire prison system. [See: *PLN*, Sept. 2010, p.42].

The legislature also decided to remove a current requirement to study the quality and cost of public versus private prisons. The lack of such data will make it easier to contract with private prison companies in the future, since past studies have indicated that privately-operated facilities in Arizona actually cost more than public prisons.

Notably, a September 2010 report by Arizona's Office of the Auditor General found that private prisons housing minimum-security state prisoners cost \$.33 per diem more than state prisons (\$46.81 per diem in state prisons vs. \$47.14 in private prisons), while private prisons that house medium-security state prisoners cost \$7.76 per diem more than state facilities (\$48.13 per diem in state prisons vs. \$55.89 in private prisons), after adjusting for comparable costs.

But why let facts stand in the way of political connections and campaign donations by private prison companies? ■

Sources: *Tucson Citizen*, *Phoenix New Times*, *Arizona Republic*, [www.azauditor.gov](http://www.azauditor.gov), [www.kpho.com](http://www.kpho.com)



# Texas Parole Board Removes Onerous Sex Offender Conditions from 176 Parolees

In November 2011, the Texas Board of Pardons and Paroles removed the sex offender designations from 176 parolees who were subject to stringent parole restrictions known as Condition “X,” but had never been convicted of a sex offense.

The issue of whether Texas can impose sex offender conditions on parolees who had not been convicted of a sex crime has been litigated for over a decade. Legal challenges have resulted in a series of defeats for parole officials in both state and federal courts, which have held that Condition “X” restrictions are such an infringement on a person’s liberty that a prisoner or parolee who has not been convicted of a sex offense must be afforded a hearing before such conditions can be imposed.

Condition “X” restrictions include prohibitions on: the possession or operation of computer or photographic equipment; visiting any location where minors regularly congregate; establishing a dating, matrimonial or platonic relationship with a person who has minor children; having any contact (directly or indirectly) with minors; or enrolling in a college or university. Other requirements include registering as a sex offender; attending sex offender treatment programs; agreeing to warrantless searches at any time; taking regular polygraphs concerning the parolee’s sexual history; and taking “penile plethysmographs” in which a pressure-measuring device is attached to the penis and monitored while the parolee is shown pictures, to gauge sexual response.

The hearing required before Condition “X” is imposed has about the same level of due process protections as a parole revocation hearing. This means that parolees must be presented in advance with the evidence to be used against them, and must be given an opportunity to attend the hearing, present evidence and cross-examine witnesses. Texas is not required to provide parolees with attorneys, but must allow an attorney to represent them if they hire one.

Faced with a fresh state court loss, *Ex Parte Evans*, 338 S.W.3d 545 (Tex.Crim. App. 2011) [*PLN*, Feb. 2012, p.48], in which the Texas Court of Criminal Appeals followed the reasoning of previous

Fifth Circuit cases [See: *PLN*, Feb. 2010, p.20; Sept. 2009, p.20], the parole board apparently decided that – at least for 176 parolees – it was better to simply remove the sex offender designation than to hold 176 hearings. The board is also considering petitions filed by another 300 parolees who were never convicted of a sex offense but have sex offender designations.

Texas legislators have questioned the

appropriateness of the expense of closely monitoring thousands of parolees who have not been convicted of sex crimes but are under Condition “X” sex offender parole restrictions. Those expenses are even greater when one factors in the cost of repeatedly defending the practice in court – and consistently losing. ■

Source: *U.S. Politics*

## Most Second Chance Act Money Goes to Government Agencies

by Derek Gilna and Brandon Sample

When the Second Chance Act (SCA) was signed into law by President George W. Bush in 2008, the legislation was intended to fund programs to help former prisoners find jobs, reintegrate into society and stay out of jail. Years later, however, it appears that most SCA grants are being funneled to government agencies rather than community organizations that provide reentry services for ex-offenders.

Rules promulgated by the U.S. Department of Justice (DOJ), and left undisturbed by Congress, give the DOJ authority to dole out SCA funds according to criteria established by the DOJ. Sadly, this is not an isolated practice but part of a decades-long trend in which Congress passes bills with broadly-brushed legislative goals, then leaves entrenched bureaucracies like the DOJ to fill in the details as they see fit.

In fiscal year 2011, SCA grants totaling \$2.9 million were distributed to various non-profit community organizations for Adult Offender Mentoring. Some of the grants, which averaged \$300,000 each, went to organizations that have tenuous connections with prisoner reentry – such as Goodwill Easter Seals in Miami Valley, Ohio and the Kentucky Domestic Violence Association. Another \$3 million went to community groups for Promoting Successful Reentry Through Responsible Fatherhood/Motherhood grants.

However, most SCA funds went to government agencies rather than community-based organizations that actually provide reentry services. For example, about \$12 million in Adult Offender Reentry Program Implementation grants

went to city, county and state agencies, including Departments of Correction for Connecticut, Ohio, Minnesota and Missouri, the Los Angeles County Sheriff’s Department and the Norfolk County Sheriff’s Office in Massachusetts.

Approximately \$5.2 million in SCA funding for Substance Abuse Treatment Programs went to county, tribal and state agencies, including the Indiana, Louisiana and New Jersey Departments of Correction, while \$720,000 in grants for Adult Offender Reentry Program Planning were distributed to municipal, county and state agencies, including the Oxnard Police Department (California), the Nassau County District Attorney’s Office (New York) and the Louisiana Department of Public Safety and Corrections.

Another \$8.9 million in SCA grants went to programs for Co-Occurring Substance Abuse and Mental Health Disorders – all to counties and states, including the Pennsylvania, Iowa and Louisiana Departments of Correction, the Crime Prevention and Control Commission in Colorado, the Delaware County Sheriff’s Office in Ohio and the San Joaquin County Probation Department in California.

Around \$4 million in SCA grants funded Technology Careers Training Demonstration Projects for Incarcerated Adults and Juveniles; those funds all went to county and state agencies, including the Colorado Department of Corrections and Western Virginia Regional Jail Authority. Slightly over \$1.3 million in SCA grants were for State, Local and Tribal Reentry Courts.

More than \$5.4 million in SCA funding was disbursed by the DOJ's Office of Juvenile Justice and Delinquency Prevention (OJJDP) for Juvenile Mentoring Initiatives. Most of those grants went to community-based organizations, including Boys and Girls Clubs and the Neighborhood First Program in Pennsylvania.

However, other SCA grants totaling \$3.5 million distributed through the OJJDP went to county and state agencies, including the Arizona Department of Juvenile Corrections and New York State Division of Criminal Justice Services, for implementation and planning of Reentry

Program Demonstration Projects.

Thus, of the DOJ's \$46.9 million in 2011 SCA grant funding for both adult and juvenile offender reentry programs, around \$11.3 million (25%) went to community organizations while \$35.6 million (75%) went to government agencies.

Clearly, the bulk of SCA funding, which is intended to assist ex-prisoners upon their return to society, is not going to community-based groups that provide reentry services, such as operating halfway houses or providing job placement assistance. The relatively few grants to non-profits pale in comparison to SCA

funding provided to government agencies, including, in many cases, Departments of Correction, sheriff's offices, and even police departments and attorney general's offices.

Sadly, the DOJ's misplaced priorities when distributing SCA grants serve only to frustrate Congress' intent to provide funding for reentry services for released prisoners. And Congress for its part shows no interest in correcting the situation. ■

Source: *Bureau of Justice Assistance Grants for Fiscal Year 2011* ([www.grants.ojp.usdoj.gov](http://www.grants.ojp.usdoj.gov))

## \$1 Million Settlement in Maricopa County, Arizona Jail Prisoner's Beating Death

The Board of Supervisors for Maricopa County, Arizona has agreed to pay \$1 million to the family of a man who was beaten to death by guards at the Maricopa County Jail (MCJ).

Juan Farias Mendoza was in the custody of the MCJ for a DUI probation violation on December 2, 2007. Four days later, Maricopa County Sheriff's Office (MCSO) detective Jeff Perez contacted Mendoza's family to inform them he had passed away due to natural causes. Perez said no one at MCJ had hurt or injured Mendoza prior to his death.

But rather than having died on December 6 as Perez told the family, Mendoza actually died on December 5. Further, medical records and autopsy reports indicated that Mendoza died after he suffered a severe beating. When the family viewed Mendoza's body several days later, they were "completely shocked ... because it was covered with bruises, abrasions and contusions."

MCSO failed to comply with nine requests for information related to Mendoza's death between December 20, 2007 and May 22, 2008. Despite this intentional effort to conceal what had happened, Phoenix attorney Luis P. Guerra was able to uncover sufficient facts to file a notice of claim concerning Mendoza's death.

It was later learned that at least ten guards beat Mendoza, who was also pepper sprayed and Tasered. His arms and legs were cuffed behind his back and he was forced to wear a spit mask. Additionally, according to the notice of claim, MCJ medical staff may have improperly medicated him. The autopsy revealed a

brutal, painful death, as Mendoza had broken ribs and bruises and contusions on all parts of his upper body. [See: *PLN*, March 2009, p.34].

The effort to conceal the true nature of Mendoza's death extended not only to the MCSO, which, according to Detective C. Garcia, had videotape footage of the guards' altercation with Mendoza, but also to the Medical Examiner's Office, which did not initially release an autopsy report or findings despite a policy requiring the release of such records within 90 days.

The matter was settled in November 2011 for \$1 million based on the notice of claim filed by Guerra, without the filing of a lawsuit. Mendoza was survived by his three children.

Maricopa County is infamous for its brutal and degrading treatment of prisoners. The county's self-styled "America's toughest Sheriff," Joe Arpaio, denied the settlement had anything to do

with his jail's policies or misconduct by employees.

"It was settled due to the nature of doing business," he said. "That wasn't up to us, that was the county that decided to settle it. We have nothing to do with this."

Wrongful deaths, civil rights violations and other abuses involving the MCSO have resulted in around \$50 million in verdicts, settlements and related legal costs since Arpaio was first elected sheriff in 1993. A disproportionate number of those claims and lawsuits have involved the MCJ.

"Claims are far excessive, and that is because [Sheriff Arpaio] has created in our jails a culture of cruelty," noted Phoenix attorney Michael Manning. ■

Sources: *The Arizona Republic*; *Phoenix New Times*; [www.abc15.com](http://www.abc15.com); *Notice of Claim for the death of Juan Farias Mendoza*, dated May 30, 2008

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# Prisoners Win Three Jury Trials in Eastern District of California

On September 29, 2011, a Sacramento jury found that a prison doctor had violated state prisoner Christopher Kyle Prater's civil rights, and awarded \$10,000 in compensatory damages and \$20,000 in punitive damages. Prater alleged that Dr. Paramvir Sahota, Chief Medical Officer at Folsom State Prison, was deliberately indifferent in denying his second level grievance and refusing a Magnetic Resonance Imaging (MRI) diagnostic procedure that had been approved by another physician, Dr. Benjamin Lee.

Prater finally obtained an MRI after he was transferred to another facility, and based on the results of that test received arthroscopic surgery to his left knee. The jury agreed that denial of the MRI resulted in long-term pain to Prater's left leg and a more serious injury than if Sahota had followed Dr. Lee's original recommendation.

Prater litigated the case pro se until the final pretrial conference, with the court denying his written motions for appointment of counsel seven times. At the pretrial conference, Prater orally requested a lawyer and U.S. District Court Judge Kimberly Mueller appointed a member of the pro bono panel, Rebecca L. Woodson of the San Francisco law firm of McKenna, Long & Aldridge, to represent him.

After the verdict, pro bono counsel ended up with a payday after all, when the court granted \$45,000 in attorney fees – the maximum permitted under the Prison Litigation Reform Act. The defendants appealed the verdict and attorney fee award to the Ninth Circuit; the appeal was later dismissed by stipulated agreement, and on May 9, 2012 the district court affirmed the award of \$45,000 in attorney fees, plus \$2,759.39 in costs. See: *Prater v. Sahota*, U.S.D.C. (E.D. Cal.), Case No. 2:06-cv-01993-KJM-GGH. The lesson for *PLN* readers is that federal judges will often wait until just before trial to appoint counsel in a prisoner's civil rights case.

Another incident at Folsom State Prison led to another verdict for a pro se prisoner. Robert Franklin alleged that on January 7, 2007, guards Donald Butler, Todd Phillips and Shad Pulley ordered

him to cuff up and escorted him from his cell. During the escort, Franklin fell to the ground and Butler dragged him twenty to thirty feet.

On November 10, 2011, a Sacramento jury found that Butler had violated Franklin's Eighth Amendment right to be free from excessive force, and that the two other guards violated Franklin's rights by failing to intervene. The jury awarded \$1 each in nominal damages and a total of \$10,000 in punitive damages against the three guards. The defendants have appealed the verdict to the Ninth Circuit. See: *Franklin v. Bush*, U.S.D.C. (E.D. Cal.), Case No. 2:07-cv-00656-JAM-CKD.

Two months later, on January 12, 2012, a federal jury in Fresno awarded \$3,000 in compensatory damages to Gerald L. Miller, Jr., a prisoner representing himself pro se. The jury found that prison

medical employee Onesimo Rufino had violated Miller's Eighth Amendment right to be free from deliberate indifference to his serious medical needs.

According to a pretrial order, Miller was involved in a fight with another prisoner on October 16, 2007 at Kern Valley State Prison. Rufino, who at the time worked as a Licensed Vocational Nurse, cleared Miller for placement in administrative segregation and failed to treat his broken right thumb. Miller was not approved for an X-ray of his thumb until a week after the incident.

The defendants appealed the verdict, but voluntarily dismissed the appeal in March 2012 after Miller agreed to accept the \$3,000, less restitution that he owed, as the full and final judgment in the case. See: *Miller v. Rufino*, U.S.D.C. (E.D. Cal.), Case No. 1:08-cv-01233-BTM-WMC. ■

## Federal Suit Targets Dangerous, Unconstitutional Conditions in Fresno County, California Jail System

Fresh off their recent victory in *Plata v. Brown*, where the U.S. Supreme Court held that overcrowding is the primary cause of constitutionally inadequate medical and mental health care in California's prison system [See: *PLN*, July 2011, p.1], attorneys at the Prison Law Office, joined by Disability Rights California and attorneys with the law firm of Cooley LLP, filed a class-action lawsuit in December 2011 against Fresno County officials.

The suit alleges systemic failures to 1) provide minimally adequate health care to Fresno County jail prisoners and 2) protect those prisoners from injury and violence from other prisoners, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. The suit, filed in federal court, seeks declaratory and injunctive relief. It is related to the *Plata* case in that state officials have responded to the *Plata* court's order to reduce prison overcrowding by implementing a massive "realignment" plan, whereby tens of thousands of prisoners formerly sent to state prison to serve time for parole violations and/or low-level offenses are now being housed in county jails instead.

The realignment plan, it is anticipated, will effectively shift much of the overcrowding problem from California's

prison system to its county jails, and the Fresno County suit seeks to minimize the resulting harm to prisoners, at least in one major county jail system. Fresno County houses 2,300 prisoners in three facilities – a number that is expected to rise due to realignment – and the class-action suit addresses conditions at the jails, which are already dangerous and substandard, before they become even worse due to overcrowding.

The named plaintiffs in the suit include prisoner Quentin Hall, who has serious mental health issues (recurring psychosis, depression, anxiety and insomnia); another male prisoner, Robert Merryman, who suffers from serious and chronic diseases (COPD and hypertension) and was the victim of an attack by another prisoner; female prisoner Dawn Singh, diagnosed with Crohn's disease, who has suffered serious medical symptoms (hemorrhaging, abdominal pain and cramping, diarrhea, fevers, dehydration and fatigue) for two years as a result of the defendants' failure to adequately treat her; and a male prisoner who suffers from painful and bleeding gums and is at risk of irreversible tooth decay as a result of the defendants' failure to provide him with timely, adequate dental care.

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“Most detainees in the jail are awaiting trial and have not been convicted of any crimes. They are dependent on the jail for all their medical needs,” stated Kelly Knapp, an attorney with the Prison Law Office. “To leave them in pain, at risk of life-threatening injury and permanent disability is simply inhumane.”

With respect to the failure-to-protect claim, the lawsuit alleges that as a result of understaffing and failure to adequately classify prisoners, as well as structural deficiencies (blind spots) in the jail system, fights between prisoners regularly occur and vulnerable prisoners are routinely victimized.

In regard to health care, the suit alleges that there is an insufficient number of medical, dental and mental health clinicians, particularly overnight; that the screening and intake process for serious illnesses, mental health conditions and communicable diseases is inadequate; that the process for requesting health care is inadequate and results in unreasonable delays; that the care ultimately received is insufficient (with prisoners often being labeled as “drug-seeking” or “malingering” when they make legitimate requests for medication, and with dental care limited to tooth extraction); that defendants fail to keep complete and adequate health care records; that force and/or solitary confinement are often inappropriately used to control prisoners suffering from serious mental health conditions; that suicide precautions are inadequate; that housing conditions are substandard; and that prisoners with serious medical conditions are released without measures to ensure that

their health care is not disrupted.

On May 16, 2012 the district court denied a motion to dismiss the case, noting that the defendants “ignore well-settled standards” regarding motions under Fed.R.Civ.P. 12(b)(6). The court found that the plaintiffs had presented “specific allegations to support each of the areas that [they] claim are deficient in the Fresno County jail system.” As the court may

draw inferences in favor of the plaintiffs from the allegations in the complaint at the pleading stage, the defendants’ motion to dismiss was accordingly denied. This case remains pending. See: *Hall v. Mims*, U.S.D.C. (E.D. Cal.), Case No. 1:11-cv-02047-LJO-BAM. ¶

Additional source: *PLO/DRC press release*

## Florida Nurse Accused of Scalding Prisoner with Hot Water

A registered nurse at Florida’s Lake Correctional Institution (LCI) was charged on February 8, 2011 with abuse, aggravated abuse and neglect of an elderly or disabled adult. The charges followed a three-month investigation by the Florida Department of Law Enforcement (FDLE).

Nurse Elaine M. Wade, 48, was accused of failing to assess and document the unnamed prisoner’s condition following a November 27, 2010 incident that resulted in the prisoner being burned by hot water during a shower. While Wade provided treatment immediately after the prisoner was scalded, she failed to note his “worsening condition” during an examination the next day.

Later that day the prisoner was taken to a local hospital, where doctors found he had first- and second-degree burns over 25-35% of his body. He was also dehydrated and had low blood pressure.

FDLE agents said the prisoner was scalded while Wade was overseeing his

shower in the prison’s infirmary. She posted a \$2,000 bond after her arrest at LCI; when asked by a news reporter if she had burned the prisoner with hot water, she replied, “I had nothing to do with him getting burned, sir.”

LCI houses prisoners with mental health problems. It has a crisis stabilization unit that receives prisoners from other facilities following psychiatric incidents.

The felony neglect charge against Wade was dropped (*nolle prosequi*) in January 2012. ¶

Sources: *WFTV, St. Petersburg Times*, <http://westorlandonews.com>

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## News in Brief:

**Alabama:** On March 2, 2012, the maximum-security Limestone Correctional Facility was hit by a tornado and suffered damage to several buildings, including the roofs of cell blocks C and D and the canteen. A week later, around 200 prisoners were transferred to other facilities. No injuries were reported at the Limestone prison as a result of the tornado.

**Arizona:** Martin Batiene Kombate, 44, was arrested for trespassing at the Coconino County jail in January 2012 because he refused to leave after being released on his own recognizance. According to Gerry Blair, a spokesman for the sheriff's office, Kombate said he couldn't find his wallet and became disorderly in the lobby area. He was then arrested and booked back into the jail he was refusing to leave. He had originally been jailed on an unrelated trespass charge.

**Arkansas:** In March 2012, Baxter County jail prisoner Henry Nielson was found with a broken arm; he told staff that he had fallen from his bunk and was taken to a local hospital. Apparently, however, Nielson had arranged to have another prisoner, Cody Stradford, intentionally break his arm, which was confirmed

when jail staff reviewed video surveillance footage. Both Nielson and Stradford were charged with impairing the operation of a vital public facility and obstructing governmental operations. Stradford also faces a second-degree battery charge.

**Australia:** Kristen Henderson was worried about her brother, who was held at the Maryborough Correctional Centre, and decided to visit him on December 16, 2011 after she felt a staff member at the facility was being uncooperative. Unfortunately she had the wrong address, tore down a wire fence when she drove into a council reserve area while trying to find the prison, and was confronted by a council ranger. Henderson was charged on February 6, 2012 with willful damage; she pleaded guilty and was fined \$500 and ordered to pay \$533.50 to repair the fence.

**California:** On January 6, 2012, a protest by 400-500 people in the immigrant rights community and the Occupy movement shut down two Wells Fargo branches in Santa Rosa. The bank was targeted as part of a national campaign due to its mutual fund investments in private prison companies GEO Group and CCA.

The demonstration also challenged the bank's foreclosure practices in Sonoma County; protestors asked people to move their money from Wells Fargo to other banks or credit unions. Organizations that participated in the event included the Graton Day Labor Center, the DREAM Alliance of Sonoma County, MEChA of Santa Rosa Junior College, the Committee for Immigrant Rights of Sonoma County and various Occupy groups.

**California:** San Quentin state prison guard Taurus Collins, 37, was arrested on February 29, 2012 after he used a handgun to threaten employees at West Coast Car Audio in Sacramento during a dispute over a \$20 deposit he had placed on a car alarm. Collins was jailed on suspicion of making threats to commit a crime that could result in death or great bodily injury, and for carrying a loaded firearm registered to somebody else. He posted bail, returned to West Coast Car Audio the next morning and again threatened employees at the store, which resulted in a second arrest.

**California:** A riot involving around 70 prisoners broke out on the main exercise yard at Folsom State Prison on March

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6, 2012. Guards responded with pepper spray and fired three warning shots. The medium-security facility was locked down; no serious injuries were reported.

**District of Columbia:** Former D.C. prison Sgt. Darryl Ellison, a 23-year veteran of the Department of Corrections, pleaded guilty on March 16, 2012 to a charge of simple assault related to abuse of a prisoner. Ellison had kicked a prisoner during a use of force incident, then pepper sprayed him in the face after he was in a prone position and not resisting. Ellison, 51, agreed to perform 150 hours of community service; he also faces up to 180 days in jail, a \$1,000 fine or both.

**Florida:** On March 18, 2012, state prison Sgt. Ruben Thomas was stabbed to death at the Columbia Correctional Institute annex. Another guard reportedly saw prisoner Richard Franklin chase Thomas and stab him several times in the neck. Franklin, who is serving a life sentence, was also accused of injuring a second guard, William Brewer. Thomas' death was the second time a Florida prison em-

ployee had been killed by a prisoner since June 2008, when Donna Fitzgerald was murdered. [See: *PLN*, Nov. 2008, p.50].

**Idaho:** Former Bonneville County Sheriff's Office correctional officer Brian James Brown, 44, pleaded guilty on April 2, 2012 to fraudulent use of a financial transaction card. The charges resulted from Brown's use of a county card to purchase \$147 worth of gas for his personal vehicle. He was sentenced to five years in prison with two years fixed and three years indeterminate, though he may be eligible for early release on probation if he completes a Correctional Alternative Placement Program, which was recommended by the court.

**Illinois:** An April 2, 2012 *Associated Press* article described how Sheriff Tom Dart had introduced a chess program for prisoners at the Cook County jail. "We see it day-in and day-out that people want instant gratification and that often individuals do not think before they act," Sheriff Dart stated. "Thoughtless actions will hurt you while playing chess and hurt

you more on the street." Former world chess champion Anatoly Karpov praised the program. "We started a similar program in Russia 15 years ago, and now we have a [chess] championship in Russia for detainees and for people who are rotting in prison," he said.

**Indiana:** LaPorte County Jail prisoner Kevin Coleman, 25, filed suit against a jail employee and a local paper in March 2012, stating that he had not escaped from the jail two months earlier but rather had mistakenly left because he thought he had made bond. According to the lawsuit, a guard called for a "Mr. Coleman" to be released on bond, and Coleman responded. Although it was another prisoner who was supposed to be released, Coleman evidently did not notify jail staff when he was processed out. He was captured at his mother's house two hours later. "Truthfully, I didn't escape," he said. "It was on the end of the county jail personnel."

**Indiana:** On March 28, 2012, a nurse employed by Corizon Medical at the Indiana State Prison in Michigan City was

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busted while trying to smuggle marijuana into the facility. Phyllis Ungerank, 41, was charged with possession and attempting to traffic marijuana; she was arrested and booked into the LaPorte County Jail.

**Montana:** Former public defender Stacy Sampson is speaking out against allowing prisoners at the Yellowstone County Jail to have *Playboy* and other magazines that depict nudity, according to a March 11, 2012 report in the *Billings Gazette*. "I can't think of any legitimate reason that an inmate needs access to any sort of adult pornography," she said,

claiming that such publications may cause security problems. Sheriff's Capt. Dennis McCave disagreed. "What she is offended by is obviously nudity," he stated. "Then we would have to ban *National Geographic*. Nudity by itself is not pornographic."

**New York:** On March 13, 2012, former state prison guard David Perry was arrested on a charge of second-degree grand larceny for falsely claiming that he suffered a work-related back injury, which resulted in his receipt of more than \$192,000 from the New York State and Local Retirement System since 2005. He had been employed at the Elmira Correctional Facility. Police also want to question Perry in connection with the

March 2011 disappearance of his girlfriend, a police cadet, though he has not been charged in that case.

**Oregon:** Mark W. Samuels, 54, a deputy with the Marion County Sheriff's Office, was arrested on March 19, 2012 and charged with one count of sexual abuse 2, six counts of sexual abuse 3, one count of custodial sexual misconduct 1 and six counts of custodial sexual misconduct 2. He is accused of having a sexual relationship with female prisoners at the Marion County Work Center. On April 26, 2012, two prisoners, Amanda Bishop and Teresa Wilson, filed a \$3.1 million lawsuit against the county, stating they had been sexually abused by Samuels. ■

## Criminal Justice Resources

### *ACLU National Prison Project*

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### *Amnesty International*

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### *Center for Health Justice*

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### *Critical Resistance*

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### *Family & Corrections Network*

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### *FAMM*

FAMM (Families Against Mandatory Minimums) publishes the FAMMgram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### *The Fortune Society*

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### *Innocence Project*

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### *Just Detention International*

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### *Justice Denied*

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### *National CURE*

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### *November Coalition*

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### *Partnership for Safety and Justice*

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### *The Sentencing Project*

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)

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**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

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# PRISON

## Legal News

VOL. 23 No. 8

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

August 2012

### Federal Sex Offender Civil Commitment Process Under Fire

*by Derek Gilna*

**A**mong other provisions, the Adam Walsh Child Protection and Safety Act of 2006 allows the federal government to indefinitely detain “sexually dangerous” offenders through a civil commitment process, which requires mandatory court hearings after such offenders have been certified by the U.S. Department of Justice (DOJ) as eligible for commitment. The Adam Walsh Act was named for the kidnapped and murdered son of *America’s Most Wanted* host John Walsh. [See: *PLN*, June 1996, p.12].

Under 18 U.S.C. § 4248, the federal government must obtain a “Certification of a Sexually Dangerous Person” before it can proceed in a civil commitment action.

Under § 4247(a)(5), a “sexually dangerous person” is defined as one who has engaged or attempted to engage in sexually violent conduct or child molestation, and who is “sexually dangerous to others” or suffers from a serious mental illness, abnormality or disorder, as a result of which he would have “serious difficulty in refraining from sexually violent conduct or child molestation if released.”

To order civil commitment, a federal district court must find at an evidentiary hearing (no jury trial is required) that the government has met its burden of proof by clear and convincing evidence that an offender is a sexually dangerous person. If so, he may be confined in a suitable facility for mental health treatment until it is determined that he is no longer a danger to others. 18 U.S.C. § 4248(d). The standard of “clear and convincing evidence” is lower than the “beyond a reasonable doubt” standard required in criminal prosecutions, and when certifying prisoners for civil commitment the DOJ can consider conduct that did not result in an arrest, prosecution or conviction. In fact, offenders can be certified for civil commitment even if they have no prior criminal record of sex offenses.

According to investigative reporting by *USA Today*, the DOJ has certified 136 federal prisoners over the past six years but only 15 have been civilly committed following court hearings. The “Justice Department has either lost or dropped its cases against 61 of the 136 men” who have been certified since 2006. Of the prisoners certified as eligible for civil commitment who were eventually freed, some had been detained for more than four years pending a hearing.

“Things take time,” stated former U.S. Attorney George Holding. “These men are accused of being a threat to society, and the system has to play itself out.”

Often, though, offenders certified by the DOJ are ultimately determined not to be a threat to society deserving of civil commitment. Ironically, one of the prisoners who was released because he did not meet the civil commitment criteria was Graydon Comstock. His case previously had been appealed to the U.S. Supreme Court, which upheld the constitutionality of the federal civil commitment process. See: *United States v. Comstock*, 130 S.Ct. 1949 (2010) [*PLN*, July 2011, p.31; Dec. 2010, p.44]. Comstock was freed in November 2011.

In addition to the federal government, around 20 states have civil commitment statutes for sex offenders. Notably, civil commitment is not imposed for past crimes, as prisoners have been convicted and sentenced for prior offenses before being certified for civil commitment proceedings. Indefinite civil commitment is instead intended to prevent crimes they might commit in the future – a disturbing concept reminiscent of the “thought police” from Orwell’s novel *1984* or the movie *Minority Report*.

While civil commitment is not supposed to be a form of punishment, the DOJ’s civil commitment unit is located within the federal prison complex in Butner, North Carolina – and prison by any other name is still prison. “Detainees are not prisoners, yet we are treated just like if not worse than criminals convicted of crimes,” observed Gerald Timms, who was certified for civil commitment.

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## **Sex Offender Law Problems (cont.)**

Unsurprisingly, the DOJ has released no public statements concerning its singular lack of success in civilly committing prisoners the department has certified as sexually dangerous. Of the certified offenders who have had commitment hearings thus far, 15 have been committed and 17 ordered freed; thus, the DOJ has a less-than-impressive 47% success rate in cases that result in hearings – not counting other cases that the DOJ has voluntarily dismissed. Nor have DOJ officials issued any explanations regarding the defects and delays in a process that has kept offenders – who have usually finished their prison sentences – incarcerated for many years while awaiting civil commitment hearings.

Some outside observers, including the U.S. Court of Appeals for the Fourth Circuit, have described the lengthy delays in civil commitment proceedings as “troubling” (though not troubling enough to constitute a due process violation, according to the appellate court). See: *United States v. Timms*, 664 F.3d 436 (4<sup>th</sup> Cir. 2012).

Fred Berlin, Director of the Sexual Behaviors Consultation Unit at Johns Hopkins Hospital, stated in reference to the DOJ’s civil commitment process, “If it’s going to be done, it has to be done in a just and fair manner.” However, an examination of hearing transcripts and court pleadings in cases where federal prisoners facing civil commitment have eventually won their freedom reveals problems indicative of a systemic lack of justice and fairness.

Government experts, including many Bureau of Prisons (BOP) psychologists, almost always find that prisoners certified under the Adam Walsh Act are sexually dangerous – but such certification typically does not occur until offenders are close to completing their sentences and nearing release. These delays result in extending prisoners’ terms of incarceration when, had they been certified earlier, they presumably could have been receiving sex offender treatment while serving their prison sentences.

Conversely, most private (non-government) psychologists hired by defense attorneys find that offenders certified by the DOJ as sexually dangerous do not require indefinite civil commitment. Private psychologists appear in court transcripts

to be more objective, thorough and nuanced in their observations and findings than their BOP counterparts. Although readily acknowledging that prisoners who face civil commitment possess some measure of dysfunction in matters of a sexual nature, almost none of the private psychologists agreed with the DOJ’s conclusions that such offenders were dangerous enough to warrant continued confinement after serving their prison sentences.

Increasingly, federal judges are agreeing with the findings of private psychologists and defense experts in civil commitment cases, which has put the DOJ in the unusual position of losing more contested hearings than it wins. Courts have repeatedly found that the federal government failed to meet its burden of proof that prisoners certified for civil commitment are sexually dangerous or have a high risk of reoffending, as required by § 4248.

It is uncontroverted that many federal prisoners have been convicted of serious sex-related crimes. But the broadness of some federal criminal statutes – which, for example, make simple possession (or downloading) of child pornography a crime that results in a lengthy sentence – means that numerous prisoners are not guilty of a “hands-on” offense such as sexual assault or rape. That, and the fact that most of the crimes occurred years before and offenders have usually completed their prison sentences, make judges reluctant to order indefinite civil confinement.

Many of the federal prisoners certified by the DOJ for the civil commitment process end up in the Commitment and Treatment Program at Federal Correctional Institution (FCI) Butner in North Carolina. This includes both offenders sent to Butner by the BOP and others who have volunteered for sex offender treatment programs offered at the facility. Under the skewed reality of life behind bars, some prisoners volunteer for the programs in order to avoid harassment, physical violence and even rape in other federal prisons due to the nature of their crimes.

Thus, prisoners may exaggerate their sexual deviancies to obtain a transfer to FCI Butner, which is perceived to be a safer environment for sex offenders. Ironically this puts them at greater risk of being “Adam Walshed,” or certified for civil commitment, after they complete their

## Sex Offender Law Problems (cont.)

sentences. Prisoners at Butner and other facilities have also discovered that statements they made to gain admittance to a sex offender treatment program (SOTP), and issues they discuss in treatment, are not treated as confidential and can be used against them in civil commitment hearings.

Further, the quality and thoroughness of reports prepared by BOP psychologists that the DOJ relies upon to prove its case in civil commitment proceedings are sometimes questionable. It appears that the government feels obligated to proceed in cases where proof may be less than substantial, perhaps due to perceived public hostility toward sex offenders and media coverage of heinous sex crimes. Judges in civil commitment proceedings, though, have shown a willingness to carefully sift through the facts before rendering decisions based on applicable legal standards.

According to records in two cases discussed below, federal district courts declined to impose civil commitment and ordered the defendants freed under strict conditions of supervised release or probation. The DOJ simply could not present enough proof to justify the courts finding otherwise. In one case the judge noted that the defendant had not committed a “hands-on” crime in decades, had undergone extensive treatment and was at an

age where reoffending was unlikely. In the other case, the district court cast doubt on psychological tests used by the BOP in the initial screening process to determine whether an offender should be certified for civil commitment.

Responding to such judicial criticism of the BOP’s certification methodology, BOP spokesman Chris Burke said that prisoners are only certified as sexually dangerous after “careful assessments by mental health professionals.” However, the BOP reportedly suffers from a shortage of experienced psychologists, especially those qualified in the area of civil commitment. Often unable to attract sufficient experienced mental health staff, the BOP maintains a psychology predoctoral internship program in an effort to find potential candidates to hire.

Anthony Jimenez, a psychologist who ran the BOP’s civil commitment program from 2007 to 2008, acknowledged the inadequacy of the BOP’s expertise in this area and said that some prison psychologists had no experience in performing civil commitment certifications. “It was rushed, and initially,” he stated, “I believe, quality probably suffered.”

Jimenez also admitted that public pressure sometimes entered into the certification process. Although noting that the BOP consulted with staff attorneys before certifying an offender as sexually dangerous, he conceded that some prisoners were certified even though the evaluation might not have held up in court. According to Jimenez, “It’s not a willy-nilly, ‘this guy looks like a bad guy’ process. If we thought someone was really dangerous but there wasn’t a strong legal case, we might very well still push it for the public interest. Hopefully justice is served in the end.”

This admission comes as no surprise to defendants and their supporters who

have claimed the government delays cases it doesn’t think it will win, just to keep prisoners incarcerated for as long as possible. More recently, though, the DOJ has begun voluntarily dismissing civil commitment cases – including 40 of the 136 cases brought since 2006. When questioned, DOJ spokesman Charles Miller said the dismissals were due to “the totality of circumstances ... age, health status, change of circumstances, supervised release terms, family support and the opinions of all of the forensic experts.”

One private psychologist, Amy Phenix, offered her own analysis of the DOJ’s difficulty in making proper psychological determinations in civil commitment cases, noting that they “just didn’t have the same expertise” as outside mental health professionals. Which is an interesting statement considering that Phenix had helped train some of the government experts involved in the civil commitment certification process. “There were differences of opinion, and in some cases it was left up to the U.S. Attorney to make decisions about what to do,” she added.

Cases that have resulted in favorable rulings for the defendants serve as a chilling reminder of the power of the DOJ to arbitrarily deprive prisoners of their freedom for years after they have completed their sentences, by keeping them confined pending civil commitment hearings. The case of federal prisoner Sean Robert Francis, including the outcome of his § 4248 hearing before Judge Terrence W. Boyle, a federal judge in the Eastern District of North Carolina, is instructive.

In Francis’ case, a DOJ expert said he had testified in 150 to 200 trials involving sexually violent predators and sexually dangerous persons, and had been asked to render opinions about whether offenders certified by the government met the criteria under § 4248 “fifteen or sixteen times.”

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Of those 15 or 16 cases, he concluded that “nine or ten” met the criteria for sexual dangerousness. The expert stated that Francis had been “convicted of crimes of a sexual nature, of obscene phone calls on multiple occasions ... which involved the use of force or the threatened use of force ... [and there were] “multiple ... offenses [which] involved specific threats of rape or murder...”

Judge Boyle noted that “None of these convictions were hands-on crimes ... none of the threats were made in physically present context. They were all telephone threats.” The government expert agreed that Francis’ offenses were limited to threats made over the phone. “And you think that that established the type of predicate that is contemplated by child molestation or serious sexual crimes?” the court inquired. The expert indicated that was his “understanding” of the law.

The DOJ expert said that in this case, “several of the victims were identifiable victims and [Francis] had personal knowledge of and made specific threats that could certainly be ... perceived by the victims as real, material threats for their safety...” which satisfied the first part of

the required criteria under § 4248 because Francis was guilty of “threatened use of force.”

The court then asked the expert to address the second part of the criteria, regarding whether Francis suffered from a serious mental illness, abnormality or disorder. The government expert stated that Francis’ repeated pattern of making obscene telephone calls showed he had such a condition, based upon his self-confessions and various criminal investigations.

Judge Boyle acknowledged Francis’ penchant for obscene phone calls but stated, “[H]ere you have a person whose criminal history, if any, is all reliant on his own self-confession during therapy, when he had no foreseeable expectation that he would be Adam Walshed and detained civilly.” The court then addressed one of the major weaknesses of many civil commitment proceedings – the fact that some sex offenders confess to crimes they did not commit in order to be accepted into a treatment program. “If you don’t admit that you’re a sexual predator or sexual deviant, they don’t want you in the program because the program’s only for people who admit it.”

Under cross examination by Francis’

attorney, the same DOJ expert acknowledged that previous mental examinations performed at other prison medical facilities failed to find sufficient evidence that would require Francis to be certified as a sexually dangerous offender.

The defense expert attacked the very basis of the prosecution’s case – the appropriateness of the civil commitment certification process. He stated that “there’s no tool, no actuarial or statistical risk assessment tool that would be appropriate in this particular case with this type of [hands-off] offenses ... for which Mr. Francis has been adjudicated.... There’s no contact-based offenses.” He then argued that the “Static-99R” test generally relied upon in such cases was invalid because “It violates the most fundamental assumption of test use.... So it’s not appropriate in this case with Mr. Sean Francis to use any actuarial tool. It’s misleading at its most charitable.”

At the conclusion of the hearing, Judge Boyle found the DOJ had failed to meet its burden of proof that Francis had “engaged in or attempted to engage in sexually violent conduct or child molestation” and suffered “from a serious mental illness, abnormality, or disorder as a result

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## Sex Offender Law Problems (cont.)

of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” The court noted Francis’ history of making obscene phone calls but said it was not persuaded by the government’s expert witness, and instead adopted the findings of the defense expert. The BOP was thus ordered “to release the Respondent to the custody of the appropriate United States Probation Office.” The DOJ appealed the court’s ruling. See: *United States v. Francis*, U.S.D.C. (E.D. N.C.), Case No. 5:10-HC-2013-BO; 2012 WL 174590 (Jan. 20, 2012).

Although most prisoners certified by the DOJ for civil commitment have been convicted of some form of sex-related crime, the certification process falters in the area of determining their probability of reoffending. Notably, the tests used in the certification process provide data related to the likelihood of recidivism by groups of offenders with similar characteristics, but not necessarily the *individual* probability of reoffending for the person being tested. Further, widely-varying scores given by psychologists who administer the same tests indicate that the process is far from an exact science.

As one appellate court put it, “The question of whether a person is ‘sexually dangerous’ is ‘by no means an easy one,’ and ‘there is no crystal ball that an examining expert or court might consult to predict conclusively whether a past offender will recidivate.’” See: *United States v. Shields*, 649 F.3d 78, 89 (1<sup>st</sup> Cir. 2011).

Most experts agree that released sex offenders are rarely convicted of another sex crime. For example, a 2003 study by the Bureau of Justice Statistics found that

only 5.3% of sex offenders committed another sex-related offense within three years after their release from prison. Other studies dating from the 1980s maintain that many of the psychological methods used to predict who may be a dangerous offender can not be substantiated by any recognized scientific method. Despite that fact, psychologists have spent years sifting through the records of thousands of sex offenders to develop tests to determine which are likely to reoffend. Those tests, however, have been subject to criticism.

A Hawaii federal district court, after reviewing the government’s evidence and making specific findings as to the quality of the diagnostic tests used, found in favor of prisoner Jed Abregana at a civil commitment hearing. Abregana had a history of sex-related crimes that included exposing his genitals to a 12-year-old boy in a movie theater in 2000. That charge was dismissed without prejudice, but in 2001 he was arrested by U.S. postal inspectors for possession of child pornography. He pleaded guilty and was sentenced to 44 months in prison followed by three years of supervised release.

Abregana was transferred to FCI Butner but expelled from the SOTP program, and was released from BOP custody in 2004. He was rearrested for violations of his conditions of release, re-released, and subsequently rearrested for lewd emails. He was certified as a “sexually dangerous person” just prior to his completion of a new prison sentence in 2007.

DOJ experts used many of the same tests utilized in Francis’ case to contend that Abregana met the criteria for civil commitment under § 4248, including the Static-99 test, the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). According to the court, “RRASOR consists of four items concerning a person’s prior sex offenses, his age, whether he has had a male victim, and whether he has had a victim outside of his family ... Static-99 is a brief actuarial instrument designed to estimate the probability of sexual and violent recidivism among adult males who have been convicted of at least one sexual offense against a child or non-consenting adult.... The MnSOST-R was developed in Minnesota to provide for a formal and uniform process to identify high-risk offenders at the time of their release from prison....”

The government and defense experts came up with widely-varied scores on the

tests, which led the judge to comment that “the difference among the experts [was] reflective of the difficulty of psychiatric diagnosis.” As the U.S. Supreme Court stated in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 1811 (1979), “Psychiatric diagnosis ... is to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician ... [which] makes it very difficult for the expert physician to offer definite conclusions about any particular patient.”

The district court further noted that while Abregana had committed a sex-related crime, “neither of the other [non-government] experts, Dr. Rosell and Dr. Barbaree, consider Abregana to suffer from a serious mental disorder.... The U.S. Supreme Court precedent makes clear that the ‘serious difficulty’ language does not require total or complete lack of control, but does require that it must be difficult, if not impossible, for the person to control his dangerous behavior. See *Kansas v. Crane*, 534 U.S. 407, 411 (2002) (citing *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).... These are difficult questions that require clearer and more convincing proof than is available in the circumstances before the Court.” Abregana was therefore ordered released. See: *United States v. Abregana*, 574 F.Supp.2d 1145 (D.Hawaii 2008).

The DOJ’s case against another federal prisoner, Markis Revland, also collapsed for lack of “clear and convincing evidence.” According to the district court, Revland’s “only convictions, which conceivably could be labeled as somehow involving child molestation, were two incidents of indecent exposure,” both in 1999, one of which involved public urination. “The government does not suggest that [this] incident involved ‘exploitation’ of minors, ... [and] the government did not prove that respondent engaged in conduct of a sexual nature with them ... or touched other children.”

The DOJ relied heavily on “self-reported” incidents from Revland when he was enrolled in the SOTP program at FCI-Butner, where he admitted to 149 incidents of “hands-on” child sexual abuse. The district court, however, “having considered the matter carefully ... concludes that the government has failed to prove” that any of those incidents actually occurred.

“The court finds that respondent invented the 149 incidents because he was desperate to remain in the SOTP at

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FCI-Butner. Respondent testified, quite convincingly, that he had been beaten and raped at knifepoint by fellow inmates while incarcerated at the federal prison in Leavenworth, Kansas; that he feared for his life if he remained at Leavenworth; that he sought and obtained admission to FCI-Butner's SOTP in order to be transferred away from Leavenworth; that once in the SOTP he was encouraged by SOTP staff to 'get it all out,' i.e., 'confess' everything; and that he felt compelled to make up a long list of sex offenses, lest he be deemed 'uncooperative' and returned to the institution from which he had come."

Revland "would be the Charles Manson of child molesters if even a small portion of the 149 incidents had actually happened," the court wrote, quoting one of the experts in the case, adding that Revland had "no documented history of ever committ[ing] a 'hands-on' sexual offense" and that "the government offered no evidence to independently verify that any of these incidents occurred or that any of them – even one – ever resulted in investigation or prosecution." Consequently, the DOJ's petition for civil commitment was denied. See: *United States v. Revland*, U.S.D.C. (E.D. N.C.), Case No. 5:06-HC-02212; 2011 WL 6749814 (Dec. 23, 2011).

In January 2012, Judge Terrence W. Boyle ruled against the DOJ in a civil commitment hearing for prisoner Jeffrey Neuhauser, who had a history of sex-related offenses. The DOJ contended that Neuhauser suffered from a mental disorder of "hebephilia" – a primary sexual preference for adolescents undergoing puberty. Judge Boyle rejected the

government's argument. "Although hebephilia has been proposed to be included as a mental disorder in the revision of the DSM [Diagnostic and Statistical Manual of Mental Disorders], it has been rejected as a proper mental disorder by numerous psychologists..." he stated. "The Court finds that it would be inappropriate to predicate civil commitment on a diagnosis that a large number of clinical psychologists believe is not a diagnosis at all, at least for forensic purposes."

The DOJ's own expert had admitted that hebephilia was controversial. Regardless, the district court held that even if hebephilia was considered a legitimate diagnosis, the DOJ had still failed to prove that Neuhauser was at high risk of reoffending. He was therefore ordered freed on supervised release with conditions that included polygraph testing and participation in a sex offender treatment program. See: *United States v. Neuhauser*, U.S.D.C. (E.D. N.C.), Case No. 5:07-HC-2101-BO; 2012 WL 174363 (Jan. 20, 2012).

The Eastern District of North Carolina is the epicenter of federal civil commitment cases, since FCI Butner is located in that district. As a result the Fourth Circuit, which has jurisdiction over federal courts in North Carolina, hears numerous appeals of civil commitment decisions (the Supreme Court's *Comstock* opinion originated from a Fourth Circuit ruling).

On January 9,

2012, the Fourth Circuit rejected the government's appeal of an adverse decision in a civil commitment hearing involving prisoner Clyde Hall. Although the Court of Appeals found that Hall had previously engaged in "past acts of child molestation" in the 1980s and 90s, and suffered from "a serious mental illness, abnormality, or disorder," it agreed with the district court's finding that the DOJ had failed to prove "by clear and convincing evidence, that Hall, as a result of these disorders, 'would have serious difficulty in refraining from ... child molestation if released.'"

The appellate court noted that the government and defense experts in the case had "arrived at conflicting opinions," but affirmed the lower court's decision to credit the testimony of the defense expert and Hall, who testified in his own behalf. One contributing factor cited by the Fourth Circuit was that Hall had spent 28 months in the community after completing a sex offender treatment program and had not committed another sex crime during that time. See: *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012).

Although it appears from the cases cited above that many judges are justifiably skeptical of the federal civil commitment

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## Sex Offender Law Problems (cont.)

process, that has not dissuaded the DOJ from continuing to certify prisoners as sexually dangerous who may or may not eventually be found eligible for civil commitment under § 4248, including those who have committed “hands-off” sex offenses. Judge Boyle complained during a court hearing in 2011 about the lengthy, indefinite civil commitment process once a prisoner is certified by the DOJ. “There’s no horizon. It’s just darkness,” he said.

Another issue that has yet to be addressed by the DOJ is preparing offenders awaiting civil commitment hearings for their eventual release back into the community. Such prisoners are often prevented from participating in educational and rehabilitative programs available to those in the general prison population. As a result, offenders whose civil commitment cases are ultimately dismissed, or who prevail at their court hearings, are unprepared in terms of their post-release employment, housing and treatment requirements.

Clearly the entire federal civil commitment process is in need of serious improvement. If the government intends to civilly commit certain offenders after they have completed their prison sentences, not for what they have done but for what they might do in the future, then changes are necessary to ensure that our justice system lives up to its name.

The DOJ should seek to certify only those convicted sex offenders who meet the applicable criteria and are likely to reoffend. If prisoners require sex offender treatment, they should receive it while serving their prison terms; the DOJ should not wait until they have almost finished their sentences before certifying them for civil commitment proceedings. The civil commitment process needs to be expeditious, to ensure it is not used as a means to improperly detain offenders after they complete their prison sentences. Further, the certification process should be based on objective, scientific methodology that evaluates the individual dangerousness and probability of reoffense of the person being tested.

As of March 2012, 59 federal prisoners were awaiting civil commitment hearings. The DOJ has since argued in its appeal to the Fourth Circuit in Sean Francis’ case that the courts should approve civil commitment for offenders who engage in “hands-off” non-contact crimes

– such as making obscene phone calls, exhibitionism and, presumably, soliciting sex from law enforcement officers posing as minors on the Internet. This would, of course, greatly increase the potential pool of federal prisoners eligible for civil commitment proceedings.

The Fourth Circuit rejected the DOJ’s argument on July 16, 2012, finding that the district court had “appropriately considered the evidence as a whole using the framework provided in the Act and concluded that Francis was not sexually dangerous to others, within the meaning of the Act, because the government failed to meet its burden of proof regarding this required component for civil commitment under the Act.” The district

court’s judgment in favor of Francis was therefore affirmed. See: *United States v. Francis*, U.S. Court of Appeals for the Fourth Circuit, Case No. 12-1205; 2012 WL 2877668.

Despite yet another adverse ruling, the DOJ will most likely continue to certify offenders for civil commitment whether they meet the necessary criteria or not, in order to keep them in prison for as long as possible. That, apparently, is what passes for “justice” in the federal civil commitment process. ■

Sources: [www.usatoday.com](http://www.usatoday.com), [www.newsobserver.com](http://www.newsobserver.com), [www.raleighpublicrecord.org](http://www.raleighpublicrecord.org), <http://lforencispsychologist.blogspot.com>, [www.nacdl.org](http://www.nacdl.org), [www.bjs.ojp.usdoj.gov](http://www.bjs.ojp.usdoj.gov)

## Ethics Complaint Against Former Oregon Prison Official Dismissed

As previously reported in *PLN*, Michael Taaffe, 56, retired from his \$91,020-per-year position with the Oregon Department of Corrections (ODOC) in March 2011. He had been employed as an assistant administrator with the ODOC’s Health Services Division, and served on a three-member panel in 2009 that recommended Correctional Health Partners (CHP) as a contractor to manage the prison system’s medical care. CHP was awarded the contract, worth approximately \$1.2 million annually.

Three days before his retirement Taaffe went to work for CHP, which resulted in an ethics complaint filed against him. Under Oregon state law, public employees are prohibited from having a “direct beneficial financial interest” in a contract awarded by an agency with the employee’s participation. This prohibition “continues for two years after the employee leaves public service.” [See: *PLN*, Feb. 2012, p.46].

Although Taaffe was not solely responsible for granting the contract to CHP, he worked closely with the company while employed by the ODOC. “Michael Taaffe did work directly with CHP, as did many other staff in Health Services,” state prison officials noted. “His role was to analyze CHP reports and to track DOC costs based on those reports.” Moreover, after Taaffe went to work for CHP, ODOC director Max Williams acknowledged that “some of the contractor’s employees are embedded with DOC Health Services

staff in our offices, and Mr. Taaffe is one of those.”

In an August 19, 2011 report, an investigator for the Oregon Government Ethics Commission found cause to proceed with a full investigation. “Information for this preliminary review appears to indicate that Mr. Taaffe may have had a direct beneficial financial interest in a public contract in which he participated in the authorization of while acting in his former official capacity as a public official representing DOC,” the report stated. “Information also appears to indicate that Mr. Taaffe may have been met with conflicts of interest while participating in official actions, decisions or recommendations that could or would have been to his private pecuniary benefit and may have failed to comply with disclosure requirements ... and may have used or attempted to use his official position to obtain prohibited financial benefits.”

On February 24, 2012, however, the Ethics Commission unanimously voted to dismiss the complaint against Taaffe after finding that the evidence against him was “insufficient to infer a violation of ORS Chapter 244 or warrant further investigation.” Taaffe did not testify before the Commission, and no other explanation was provided for the dismissal of the complaint. ■

Sources: *Oregon Government Ethics Commission*, *The Oregonian*, *Statesman Journal*



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# From the Editor

by Paul Wright

When *Prison Legal News* published its first issue in May 1990, it was less than one month after Washington state became the first in the nation to enact a civil commitment law for sex offenders. *PLN* has reported on this issue ever since as such laws have spread around the country, and as the court system has for the most part duly upheld civil commitment statutes in a results-oriented effort to imprison people based on crimes they *might* commit in the future.

When the federal government first announced plans to hold suspected terrorists and “enemy combatants” at Guantanamo Bay without charge or trial for essentially the rest of their lives, the mainstream media largely ignored the fact that the U.S. has been detaining citizens – mostly sex offenders – on a similar basis since 1990.

As this month’s cover story indicates, once the mechanism for repression is put in place it needs to be used, and having a civil commitment law creates a need to commit people whether they meet the applicable criteria or not. The federal civil commitment process has received relatively little attention compared to that of various states, and to date there has been a dearth of litigation challenging the conditions of the DOJ’s civil commitment program, which operates in a relative shroud of secrecy.

Like other aspects of the government’s repressive penal machinery over the past three decades, the federal civil commitment program continues to grow. To their credit at least some members of the federal judiciary have been skeptical and, as the cover story notes, have declined to commit many of the defendants whose cases result in hearings. Unlike, say, Minnesota’s civil commitment program; to date, not a single person has been deemed eligible for release since the program was enacted in 1994. The only 24 people released from Minnesota’s civil commitment facility left in body bags after they died.

The good news is that a majority of states (30) have resisted enacting civil commitment laws. Several years ago, the Human Rights Defense Center was among a number of organizations that worked to stop the Vermont legislature from adopting a civil commitment statute. The bad news is that none of the 20 states

and the federal government that use civil commitment have recognized it for the expensive failure that it is, and maintain their programs despite enormous societal, fiscal and human costs.

As reported in this issue of *PLN*, we recently settled our lawsuit against the Sacramento County jail, which had censored *PLN* under the pretext that our publication is bound with staples and has address labels. The case was hard-fought but we prevailed, obtaining a preliminary injunction and then a consent decree, damages and attorney fees thanks to excellent legal representation from the San Francisco-based law firm of Rosen, Bien, Galvan & Grunfeld LLP, and our in-house litigation director Lance Weber and staff attorney Alissa Hull. We are grateful to our legal team for winning the case and ensuring that the 2,000+ prisoners in the Sacramento County jail system can now receive *PLN* and other publications with staples and address labels.

As part of the overall decimation of civil liberties and free speech in the U.S., efforts at censoring publications like *Prison Legal News*, and mail to and from prisoners and detainees in general, are

increasing. We have had to dedicate a significant portion of our meager resources to combat these efforts at unlawful censorship. Despite the win in Sacramento, we still have censorship cases pending against the state prison systems in Florida and New York, and against jails in Oregon, Arizona, Louisiana and Michigan. We are strongly committed to ensuring that prisoners can receive *PLN* and the books we distribute.

In the latter regard, we have added a number of new titles to our book list, including several on criminal law and procedure which many *PLN* readers had requested. Please review our book catalog on pages 53 and 54 for the latest additions. We will be running reviews of the new books in upcoming issues of *PLN*.

If you can make a donation to help support our news reporting, litigation and advocacy efforts, please do so. Every donation, no matter how small, helps; the cost of a subscription to *PLN* does not cover all of our operating costs. Donations are tax deductible for those who pay taxes.

Please enjoy this issue of *PLN*, and encourage others to subscribe. 📖

## Maryland Women Prisoners Sew Commemorative 1812 Flags

In July 2011, prisoners at the Maryland Correctional Institution for Women in Jessup were busy sewing 1812-style flags to be flown at Maryland public buildings.

The plan was to replace the state’s old flags with the 1812-style flags, which have 15 stars and 15 stripes, in time for the bicentennial of the War of 1812. The women prisoners engaged in that task are employed with Maryland Correctional Enterprises (MCE).

According to MCE public relations officer Renata Seergae, “The goal is to train [prisoners] ... so when they are released they don’t wind up back in here.” According to Seergae, the women who work in the sewing program produce approximately 700 state and U.S. flags a year, and are paid between \$1.25 and \$3.85 per hour.

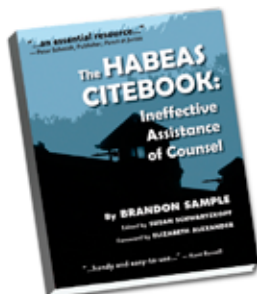
Prisoners who were interviewed indicated they were proud of their work.

One, Julia Applegate, said she had been sewing flags for three years and enjoyed the fact that they would be flown in front of Maryland state buildings.

Another, Natasha Fowlkes, was responsible for supervising and training the other prisoners. She said she had no prior sewing experience before she came to prison, but now appreciates the technical beauty inherent in flags. She mentioned that she hoped to be a “professional flag lady” one day.

There are, however, relatively few freeworld businesses that manufacture flags. While prison industry programs purportedly teach prisoners job skills to assist with their reentry to society following their release, the MCE’s flag program appears to benefit the state – which receives low-cost flags – more than the women prisoners who produce them. 📖

Source: *Baltimore Sun*



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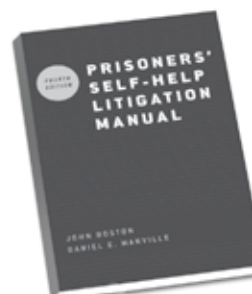


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# Hawaii Audit Finds Offenders Rarely Pay Restitution Owed

Thirteen years after the Hawaii Office of the Auditor issued a report critical of the state judiciary's efforts to collect restitution payments from offenders, only a small fraction of tens of millions of dollars in restitution has been collected, which has left crime victims upset at what they perceive as a continuing injustice.

According to a series of articles published in the *Star-Advertiser* in June 2011, Hawaii had approximately 6,000 prisoners, 1,800 parolees and 20,000 people on probation or other court-ordered supervision who collectively owed around \$25.5 million in restitution as of June 30, 2010. Prisoners and parolees were responsible for \$15 million of that amount, of which at least \$800,000 has been collected – though an “antiquated” computer management system has prevented officials from tracking the actual collection rate.

Restitution is based on a victim's losses, but the amount an offender is ordered to pay depends on his or her financial resources and ability to make payments, which can be as little as \$10 a month. Because ex-offenders are often unemployed and have few assets, however,

even that small amount may go unpaid. And while probation officers have the authority to revoke probation for non-payment of restitution, such sanctions are rarely imposed.

Rather, probation officials tend to work with probationers to help them complete drug or anger management programs, find jobs, make progress in their rehabilitative efforts and become productive citizens. A major public safety goal is to help offenders reintegrate into society without committing future crimes, and that goal supersedes restitution payments. Additionally, if probationers are incarcerated for failing to pay restitution, they still would be unable to pay while sitting in prison or jail.

Prisoners who owe restitution have 10 percent of their wages collected by the Hawaii Department of Public Safety. As prison wages are just 25 cents per hour, that does not amount to much. Legislation signed into law on June 21, 2012 (SB 2776) will increase the percentage collected for restitution payments to 25 percent “of the total of all moneys earned, new deposits, and credits to the inmate's individual account.” For parolees, typically 10 to 20 percent of their wages are collected by parole officers for restitution payments.

Stakeholders involved in the restitution issue fall into three general groups: 1) victim advocates, 2) those concerned with offender reintegration and 3) those in charge of overseeing collection efforts. A fourth group – the offenders who owe restitution – typically have no voice in the matter.

To victim advocates, the criminal justice system is not placing enough emphasis on justice for victims. Pamela Ferguson-Brey, executive director of the Crime Victim Compensation Commission, said the system should be “more victim-driven.”

“There's not enough concern about the impact of the crime, the financial, physical and emotional impact on the victim, and how we are going to make sure they become whole again,” she stated.

The majority of victims have not received full restitution; according to the Crime Victim Compensation Commission, only 22% of the prisoners and parolees the Commission has monitored since 2003 have paid the full amount of restitution owed.

Deputy public defender Susan Arnett has a different perspective on the restitution issue. She noted that her office's clients are often indigent and unable to

find employment due to the stigma of their criminal convictions.

“I honestly don't think the problem is people out there with a significant ability to pay who aren't paying,” she said. In her view, the idea that the courts should be functioning as a collection agency working on behalf of victims, without taking into account the larger problem of ex-offenders having difficulty finding jobs, is “a little too simplistic.”

As mentioned above, probation officials seek a middle ground, trying to balance the goal of reintegrating offenders into the community with the goal of collecting court-ordered restitution. Probation officials have noted that by finding employers willing to hire ex-prisoners, both goals can be achieved.

On the administrative side, the inability of Hawaii's existing computer management system to generate accurate statistical reports makes it nearly impossible to assess the success or failure of restitution collection efforts. According to Susan Howley, public policy director of the National Center for Victims of Crime, Hawaii, like other states, needs to do a better job of monitoring restitution.

“Until you start tracking what's outstanding, it's hard to get agencies to focus their attention on the problem, and see the scope of the problem,” Howley observed. “The judge's sentence, the recognition that the defendant should pay, is often disregarded with no consequences, and that causes crime victims to lose faith in the criminal justice system.”

Ferguson-Brey agreed, stating, “Many victims feel betrayed.” At the same time, though, she acknowledged that very few offenders have adequate assets at their disposal to pay the restitution they owe.

Responding to a 1998 state audit that was critical of the restitution collection process, Hawaii's judiciary established the position of victims assistance coordinator to address the concerns of victims. Noreen Kishimoto, who has occupied that position for around a decade, estimates that she receives 200 to 300 calls a year from victims, many of whom are frustrated by nonpayment of restitution.

Kishimoto's role, however, is limited. She follows up on complaints about restitution with calls to probation officers, who in turn contact the offenders. She also sends out 500-600 delinquency notices each year directly to offenders when their

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payments are 120 days overdue. Roughly one-third of those who receive the notices eventually comply, she said.

When victims question why they are not receiving higher amounts of restitution, or why the payments decrease, all Kishimoto can do is explain that the payments are based on an offender's ability to pay, which fluctuates.

Victims can also turn to the Crime Victim Compensation Commission for monetary compensation. Established in 1967, the Commission awards from \$600,000 to more than \$1 million annually to victims of violent crime.

Civil lawsuits are another option for crime victims seeking compensation. While it's relatively easy under Hawaii state law to get a civil judgment for the amount of outstanding restitution, enforcing the judgment is an entirely different matter. In fact it's extremely difficult because attorneys are rarely willing to take such cases; the amount of restitution is usually very small, thus many lawyers feel it's not worth their time and effort.

Plus there's the fact that most offenders have few assets or income to satisfy a civil judgment – which goes back to the need for offenders to receive resources and services to help them obtain stable employment. Indeed, if victims' advocates truly want to ensure that victims receive the restitution they are owed, then they should support programs that reintegrate ex-prisoners into the community and help them find jobs. ■

Sources: *Star-Advertiser*, [www.capitol.hawaii.gov](http://www.capitol.hawaii.gov)

## Prisoner Lacked Standing to Challenge Georgia's Failure to Send Absentee Ballot to Jail

The Eleventh Circuit Court of Appeals held on February 2, 2012 that a former Georgia jail prisoner lacked standing to complain that state and local officials had failed to mail his absentee ballot to the jail, which prevented him from voting.

In anticipation of the November 4, 2008 presidential election, staff at the DeKalb County Jail held voter registration drives and encouraged prisoners to register to vote and apply for absentee ballots. Prisoner Hassan Swann was among those who completed an application for an absentee ballot. He wrote his home address in DeKalb County on the line labeled "address as registered," but left blank the space for "address ballot to be mailed" because he didn't know the jail's address.

On September 29, 2008, Maxine Daniels, DeKalb County's assistant director of registrations and elections, informed jail officials she would not mail absentee ballots to the jail. She said state law prohibited such ballots for non-disabled voters to be mailed to another address within the same county.

Swann's absentee ballot was sent to his registered home address, but he never received it and was thus unable to vote. Jail officials had set up a drop box for relatives to leave prisoners' absentee ballots. Swann said he was unaware of the drop box. He and another prisoner, David A. Hartfield, filed a complaint in federal court arguing

that the state law that prohibited them from receiving a ballot at the jail was unconstitutional. They also alleged due process violations.

The district court granted summary judgment to the defendants, finding no constitutional violation. On appeal the Eleventh Circuit said the district court should have determined if Swann had standing to bring the lawsuit. The appellate court held it did not need to decide if Swann had suffered an injury, because his non-receipt of an absentee ballot was not fairly traceable to the challenged actions of the defendants.

"Swann's lawsuit is based on an imaginary set of facts: an imaginary request to send his ballot to the jail and an imaginary refusal on the ballot clerk's part to send a ballot to him," the Court of Appeals wrote. "Swann asked the ballot clerk to mail Swann's absentee ballot to Swann's house – no other address was given in the application for the ballot – and the clerk says a ballot was sent to Swann's house. Nothing wrongful can arise from those facts."

Swann's contention that even if he had provided the jail's address on his application the ballot would not have been sent to the jail was speculative, the appellate court found. The Eleventh Circuit therefore vacated the district court's judgment and remanded with instructions to dismiss the case for lack of subject matter jurisdiction. See: *Swann v. Secretary, State of Georgia*, 668 F.3d 1285 (11<sup>th</sup> Cir. 2012). ■



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## Federal BOP to Let Prisoners Have MP3 Players

The U.S. Bureau of Prisons (BOP) has announced that it will allow federal prisoners to purchase MP3 music players, which were first tested at Federal Prison Camp Alderson, a women's facility in West Virginia. The policy change, expected to be implemented throughout the BOP system in 2012, was hailed as a "positive step" by prisoners' rights groups.

Various studies have indicated that keeping prisoners occupied with positive leisure-time activities is to everyone's benefit. David Fathi, director of the American Civil Liberties Union's National Prison Project, stated that providing prisoners with access to music "allows for an important connection [to life on the outside] that assists with their eventual re-entry" to society.

Initial reaction was mixed, however, with Republican U.S. Senator Chuck Grassley, who serves on the Senate Judiciary Committee, saying it was "difficult to see how all of the necessary safeguards can be put into place to stop prisoners from using MP3 players as bargaining chips or other malicious devices.... It appears to be a risky endeavor and raises a lot of questions that need to be answered."

Senator Grassley did not provide details as to what could be risky or what questions should be answered. Similarly, the president of the Council of Prison Locals, Dale Deshotel, indicated that unionized prison employees had reservations about the program, though he didn't specify what those concerns were.

The MP3 players will not be connected to the Internet, but instead will download approved songs through the BOP's secure computer system, TRU-LINCS, which has filtering software and records all emails and services accessed by prisoners. MP3 players will be sold in prison commissaries and prisoners can load them with songs from a playlist of about one million titles, stated BOP spokeswoman Traci Billingsley.

According to Billingsley, after startup expenses are paid, revenue from the MP3 sales will go to the BOP's Inmate Trust Fund, which pays for recreational services for prisoners. "The MP3 program is intended to help inmates deal with issues such as idleness, stress and boredom associated with incarceration," she said. MP3 players sold to prisoners at FPC Alderson during the testing period cost around \$70,

plus \$.80 to \$1.55 per song.

The MP3 devices that will be made available to federal prisoners will be supplied by Advanced Technologies Group, Inc., which has a two-year, \$5.15 million contract with the BOP. Certain songs will not be allowed, including those with explicit, obscene or racist lyrics.

MP3 players and music downloads are also available in several state prison

systems, such as Michigan, Alaska, Idaho, Mississippi, Ohio and Oklahoma, and are provided through Access Corrections, a division of Keefe Group. Prisoners can buy MP3 players from the commissary and then load them with songs through special kiosks. ■

Sources: *USA Today*, [www.correctionsone.com](http://www.correctionsone.com), [www.keefegroup.com](http://www.keefegroup.com)

## \$975,000 Award to Former Prisoner Who Gave Birth in Seattle, Washington Jail

A federal jury in Washington State has awarded \$975,000 to a mentally ill woman who gave birth in a cell at the King County Correctional Facility (KCCF). The jury found both the county and jail staff liable on federal constitutional and state law negligence claims.

Imka Pope was sleeping in a city bus shelter when she was arrested for criminal trespass on November 15, 1997 and booked into KCCF. It was immediately apparent that she was not only pregnant, but also suffering from mental illness. Her initial jail assessment disclosed she was exhibiting such illogical and disorganized thought processes that staff were unable to communicate with her or determine her name.

Several KCCF staff members screened Pope. Jail employee Vicki Shumaker performed an intake screening, registered nurse (RN) Sean Dumas performed a medical screening and RN James Ilika conducted a psychological intake screening. None of them noted on their respective forms that Pope was pregnant, nor did they refer her for additional evaluation or treatment.

The day after her arrest, RN Paul Jerksey saw Pope for a "psychiatric housing initial assessment." He noted that she was mentally ill and talked to herself "constantly." Following that assessment Pope was placed in an isolation cell, where she neglected her personal hygiene and refused to leave. Jail employees observed that she "decompensated" but provided no care other than having medical and security staff check on her periodically.

Guard Todd McComas conducted fifteen-minute checks on Pope on November 21, 1997. She informed him that she was pregnant and going into labor. "McComas walked away without even telling

Ms. Pope that he would get help for her, and he did nothing for her until after she had given birth alone in her cell," according to an amended complaint in a lawsuit filed on Pope's behalf.

The county's own jail-practices expert concluded that KCCF staff "probably did this because they believe she's just mentally ill, she's just pretending to have a baby."

The lawsuit was not filed until 2007, but because Pope was incompetent or disabled to such a degree that she could not understand the nature of the legal claims, the statute of limitations was tolled.

On February 3, 2012, a U.S. District Court jury found that Pope's right to adequate medical treatment had been violated, and McComas, Jerksey, Dumas, guard Doyle Hustead and nurse Marieclaire Healy were liable under constitutional or negligence claims. McComas and Hustead were also held liable on a claim of outrage, while Ilika was found not liable. King County was held liable for failing to adequately train and supervise staff at the jail.

The jury awarded \$850,000 in compensatory damages for pain, suffering and emotional distress, plus punitive damages of \$50,000 against McComas and \$75,000 against Hustead, for a total of \$975,000. The awards will be paid from the county's risk-management fund.

Pope was homeless and had been living in California, but her attorneys brought her to Seattle prior to the trial. Before the verdict was entered, she was begging for change. See: *Pope v. McComas*, U.S.D.C. (W.D. Wash.), Case No. 2:07-cv-01191-RSM. ■

Additional sources: *Seattle Times*, *Huffington Post*

# California Pays \$295,000 to Settle Religious Discrimination Lawsuit by Sikh Barred from Employment as Prison Guard

In August 2011, the California Department of Corrections and Rehabilitation (CDCR) settled a religious discrimination suit filed by Trilochan Oberoi, a Sikh, who was barred from becoming a prison guard because he refused to shave his beard, which was required by his religion.

In exchange for dismissal of the lawsuit, the CDCR agreed to pay Oberoi \$295,000 and hire him as a manager in a \$61,000-a-year job in the department's Regulation and Policy Management Branch.

Under the terms of the settlement agreement, prison officials admitted no liability and did not have to change their policy requiring most male employees to be free of facial hair so they can be fitted with gas masks.

In March 2005, Oberoi, 59, applied for a position as a guard at Folsom State Prison. Roughly one year later he reported for a pre-employment examination where he was to be fitted for a gas mask. Since 2004, CDCR policy has required gas masks to fit tightly to protect guards from tear gas and pepper spray used when responding to disturbances.

When he appeared for his examination, however, Oberoi was not clean-shaven and thus could not be fitted with a gas mask. Consequently, the CDCR refused to hire him.

"The wearing of the beard, keeping hair, is part of my religion," Oberoi said. In 2009 he filed a complaint in Sacramento County Superior Court alleging religious discrimination. He

argued that, insofar as the CDCR had adopted a grooming policy that allowed employees with certain medical conditions to wear beards up to one inch in length, it should make similar allowances for Sikhs, Muslims, Orthodox Jews and others whose religion requires that they keep their facial hair.

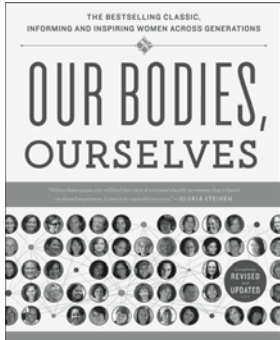
"Why should those who cannot shave for religious reasons be treated differently from those who cannot shave for medical reasons?" asked a group of organizations, including the ACLU of Northern California, Asian Law Caucus, Council on American Islamic Relations-California, Sikh Coalition, Asian American Bar Association and Bay Area Association of Muslim Lawyers, in a letter sent to Attorney General Kamala Harris.

In June 2011, the superior court denied the CDCR's motion for summary judgment and allowed Oberoi's claims of disparate treatment and disparate impact to proceed. The settlement agreement followed two months later, on August 10, 2011, after state officials learned that the U.S. Department of Justice's Civil Rights Division was investigating the way the CDCR was handling the case. Oberoi was represented by the San Francisco law firm of Dhillon & Smith. See: *Oberoi v. Department of Corrections and Rehabilitation*, Sacramento County Superior Court (CA), Case No. 34-2009-00054595. ■

Additional sources: *Associated Press*, [www.msnbc.msn.com](http://www.msnbc.msn.com), [www.abclocal.go.com](http://www.abclocal.go.com)



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# California Supreme Court Restricts Lifer Parole Challenges

In its second review in three years of a state prisoner's habeas corpus petition seeking review of an adverse parole decision, on December 29, 2011 the California Supreme Court again reversed the Fourth District Court of Appeal, Div. 1, which had ordered a new hearing after finding that the Board of Parole's decision to deny parole was not supported by "some evidence."

Richard Shaputis was sentenced to 17 years to life for second-degree murder in the 1987 shooting death of his wife. He was found suitable for parole in 2006, after a state appellate court ordered a new parole hearing with restrictions on the Board of Paroles' (Board) exercise of discretion. Former Governor Arnold Schwarzenegger reversed the Board, which was subsequently overturned by the appellate court. On the state's petition for review, the California Supreme Court reversed, thus upholding the Governor's decision. See: *In re Shaputis*, 44 Cal.4th 1241, 190 P.3d 573 (Cal. 2008) (*Shaputis I*) [*PLN*, April 2009, p.30].

Shaputis had a new Board hearing in 2009, wherein he was denied parole. The appellate court, finding no evidence in the record to support the Board's decision, again granted his habeas petition and ordered the Board to conduct yet another hearing. The California Supreme Court granted the state's petition for review of this latest appellate ruling and again reversed – leaving Shaputis, 75 years old and medically infirm, to wait three years for another parole hearing.

The unanimous Supreme Court made several significant holdings in its December 29, 2011 ruling. The Court asserted that while Shaputis' decision to not speak to either the Board's psychologist or the Board itself could not *per se* be held against him, the absence of such information and testimony could not be used as a shield to prevent the Board, in rendering an unsuitability decision, from relying on older evidence in the record.

The Supreme Court emphatically held that a candidate for parole can not evade the Board's inquiry into his current dangerousness by hiring a private psychologist to prepare a favorable report, while refusing to cooperate with a Board psychologist who might issue adverse findings. Ironically, Shaputis hired a private expert only after he had asked the Board for a new psych evaluation and they responded that he didn't need one. Thus, his

use of a private psychologist was neither evasive nor manipulative. The Court clarified that the Board is not bound by the most recent evidence in the record (e.g., a current psych evaluation) and may, upon finding reason to discredit newer reports, rely on older ones.

The Supreme Court further settled an ongoing complaint in recent California lifer habeas petitions regarding the Board's use of the parole denial factor "lack of insight" subsequent to the Court's 2008 ruling in *Shaputis I*, which had crafted that language. Lifers thereafter found that their parole denials were routinely being grounded in the talismanic factor "lack of insight," notwithstanding that the Board's regulations do not mention that term.

The Court explained that the concept of "lack of insight" fits within the Board's existing regulatory factors of "past and present attitude toward the crime" and "understands the nature and magnitude of the offense." The Supreme Court stated that "the regulatory suitability and unsuitability factors are not intended to function as comprehensive objective standards." Observing that "a finding on insight is no more subjective or conclusory than a finding on the inmate's 'past and present mental state,'" the Court wrote that "the inmate's insight into not just the commitment offense, but also his or her other antisocial behavior, is a proper consideration."

Reaffirming the "some evidence" standard of judicial review of lifer parole decisions that it established in *In re Rosenkrantz*, 29 Cal.4th 616, 59 P.3d 174 (Cal. 2002) [*PLN*, July 2003, p.30], and followed in *In re Lawrence*, 44 Cal.4th 1181, 190 P.3d 535 (Cal. 2008) [*PLN*, April 2009, p.30], the Supreme Court emphasized that the proper role of the judiciary in such matters was limited to reviewing whether the Board's decision was arbitrary, capricious or procedurally defective. The question of *which* evidence the Board (or Governor) relied upon, or the credibility of that evidence, or the weight given to the evidence, was solely the function of the executive branch and beyond the scope of judicial reevaluation.

Thus, the existence of a mere "modicum" of evidence in the record is sufficient to bar the judiciary from reviewing the merits of parole decisions by the executive branch. Moreover, the Court explained, judicial deference to the executive branch permitted such a "modicum" to be present

anywhere within the entire record before the Board (or the Governor) – not just within the evidence expressly cited in the parole decision statement.

Reviewing the record that had been before the Board in Shaputis' 2009 parole hearing, the Supreme Court found (as it did in *Shaputis I*) that the record still provided the requisite "some evidence" to support the Board's finding of parole unsuitability. The Court held that the Board had acted well within its discretion to reject the conclusions of the private psychologist hired by Shaputis, where the Board found those conclusions to be inconsistent with the record. Likewise, the Court determined that the Board had acted within its discretion to give little credibility to Shaputis' prepared written statement of remorse and insight after he declined to speak at his parole hearing.

To guide future judicial reviews of parole decisions, after noting that California Courts of Appeal had been "confused" about the proper scope of review, the Supreme Court set forth five "relevant considerations":

1. The essential question in deciding whether to grant parole is whether the prisoner currently poses a threat to public safety.

2. That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the prisoner's progress during incarceration and the insight he or she has achieved into past behavior.

3. The prisoner has a right to decline to participate in psychological evaluation and in the parole hearing itself. That decision may not be held against the prisoner. Equally, however, it may not limit the Board or the Governor in their evaluation of all the evidence.

4. Judicial review is conducted under the highly deferential "some evidence" standard. The executive decision of the Board or the Governor is to be upheld unless it is arbitrary or procedurally flawed. The court must review the entire record to determine whether a modicum of evidence supports the parole suitability decision.

5. The reviewing court does not ask whether the prisoner is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination



of current dangerousness. The court is not empowered to reweigh the evidence.

In summary, with this second decision in *Shaputis*' case the California Supreme Court has elevated "lack of insight" into a central factor for the Board to consider when determining parole suitability. The Court also substantially reduced the "wig-

gle room" for California courts to review challenges to lifer parole denials, except those without a "modicum" of supporting evidence anywhere in the record.

Pending its resolution of this case, the Supreme Court had granted "review and hold" on four other appellate rulings in lifer parole challenges (*In re Macias*,

S189107; *In re Adamar*, S190226; *In re Loveless*, S190625; and *In re Russo*, S193197). Following its decision, the Court remanded those cases for reconsideration consistent with this ruling. See: *In re Shaputis*, 53 Cal.4th 192, 265 P.3d 253 (Cal. 2011) (*Shaputis II*), rehearing denied. ■

## CA Court of Appeal: Documents Identifying Suppliers of Execution Drug are Public Records

On December 20, 2011, a California Court of Appeal held that the California Department of Corrections and Rehabilitation (CDCR) may not withhold the names of pharmaceutical companies and other sources from which it sought to acquire a drug used in the state's lethal injection protocol, when a request for that information is made pursuant to the California Public Records Act (CPRA), Government Code § 6250 *et seq.*

In October 2010, the American Civil Liberties Union of Northern California (ACLU) submitted a CPRA request for documents related to the CDCR's acquisition and use of sodium thiopental, the first of three drugs administered to condemned prisoners when they are executed. The CDCR declined to turn over the requested records and the ACLU filed a petition for writ of mandamus in San Francisco Superior Court.

In February 2011, relying on its perception of a "potential problem with boycott and business interests," the Superior Court allowed the CDCR to withhold, among other information, the names of pharmaceutical companies and other businesses and individuals the CDCR had contacted in order to acquire sodium thiopental.

The ACLU appealed, and the 1st District Court of Appeal found that "the

passionate nature of the death penalty debate... heightens public interest" in the requested documents and "justifies non-disclosure only to the extent [the CDCR] may show that disclosure of that information would pose a potential security threat of some sort" to the pharmaceutical companies or other entities from which the CDCR tried to obtain the drug.

On the merits, the Court of Appeal held that no evidence in the record supported the trial court's determination that the requested records would pose a potential security threat. With respect to the possibility of an economic boycott of the companies involved, the appellate court noted that the CDCR had explicitly disassociated itself from that argument, and thus concluded that the Superior Court's ruling was "based, at least in part, on a judicially perceived threat not credited by CDCR." See: *ACLU v. Superior Court*, 202 Cal. App.4th 55, 134 Cal. Rptr.3d 472 (Cal. App. 1 Dist. 2011).

States have

been scrambling to find new supplies of execution drugs after the overseas companies that produce them have increasingly banned them for use in lethal injections. [See: *PLN*, June 2011, p.1]. Several states are turning to different execution protocols, including Arizona, Ohio, South Dakota, Idaho, Texas and Washington. On July 18, 2012, Texas used a single dose of pentobarbital to execute prisoner Yokamorn Hearn, 33. Other states, such as Missouri, have switched to a different drug – propofol – for lethal injections. ■

Additional sources: *Metropolitan News-Enterprise*, [www.timesonline.com](http://www.timesonline.com), [www.abcnnews.go.com](http://www.abcnnews.go.com)


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# Florida Town Rallies to Stop CCA Immigration Detention Facility

by David M. Reutter

Residents in a South Florida community near a proposed 1,500-bed privately-operated immigration detention center waged a successful yearlong opposition campaign that culminated in the cancellation of the project in June 2012.

Corrections Corporation of America (CCA) purchased a 24-acre plot in the town of Southwest Ranches 15 years ago, with the intention of eventually building a prison or detention facility on the property. The land was located just outside the city of Pembroke Pines near an existing state women's prison, and Immigration and Customs Enforcement (ICE) preliminarily selected the site for a detention center in 2010. ICE contracts with CCA to operate 13 facilities nationwide that hold immigration detainees.

Documents filed in Broward County by Southwest Ranches officials described ICE's intention. "ICE requires approximately 1,500 to 2,000 new detention beds to meet local demand in the Miami Metropolitan area. Ideally, this demand would be met by one 1,000-1,500 bed facility, with the capacity to expand to 2,000 beds."

The proposed CCA-run facility, the Southwest Ranches Detention Center, would be almost three times the size of the Krome Detention Center in Miami, making it the largest such facility in South Florida. CCA said the \$75 million prison would create 300 "stable, well-paying local jobs and careers," and would be "community friendly."

Residents in Pembroke Pines, however, didn't buy the company's PR pitch. "We are concerned about an increase in crime, and increases in traffic," said Ryann Greenberg, a member of Residents Against SW Ranches ICE Detention Center, who noted the facility would be located near residential areas and several schools.

Residents envisioned seeing armed guards watching busloads of prisoners and escapees prowling local neighborhoods. They also were concerned about the negative impact on property values, liability issues and the burden on the city's public services as a result of the proposed detention center.

Greenberg and other citizens opposed to the CCA facility formed a Facebook page, staged public protests, put up "no prison" signs, distributed fliers, filed

public records requests, circulated a petition and packed city hall to express their concerns.

At the behest of the U.S. Department of Homeland Security, local officials were encouraged to say little about the immigration detention center project. "The less we say, the better off we will be," Southwest Ranches attorney Keith Poliakoff said in an email to town leaders. Southwest Ranches stood to benefit financially from the CCA facility – the company indicated it would pay the town \$1.5 million a year, including \$350,000 in property taxes.

A contract signed with Southwest Ranches in 2005 gave CCA the right to build whatever it wanted on the property it owned. "Legally, this facility can be built today as of right," said Poliakoff. "If the owner came in for a building permit to develop the site tomorrow, the town would legally have to issue the permit and construction could immediately commence."

There were reportedly 27 public hearings on the matter before the contract was signed, though they apparently were not well publicized, as local residents were caught off guard when CCA and ICE began moving ahead with the detention center. Protestors attended an October 2011 hearing on Pembroke Pines's contract with Southwest Ranches to provide water, sewer, fire and emergency medical services for the proposed CCA facility.

"We want them to rescind the contract so it doesn't include water and fire/EMS services for the detention center," Greenberg said. "If this detention center doesn't have water and sewer, it can't exist. In the agreement, [the contract language specifies], 'the willingness to provide these services,' and Pembroke Pines residents are not willing to provide this service, because we don't want [the facility] near our homes, schools or even our community."

U.S. Representative Debbie Wasserman entered the fray by issuing a letter in support of the proposed detention center, but criticized town officials for their silence on the issue. Broward County's property appraiser, Lori Parrish, also issued a statement about the property owned by CCA in Southwest Ranches.

Parrish cited potential tax evasion by the company. CCA had purchased the

land for \$5 million while it was appraised at \$3 million, resulting in a property tax bill of approximately \$60,000. However, CCA was only paying \$3,000 because it used a loophole in Florida law that allows agricultural tax exemptions when cows are on the property. CCA leased the land for \$10 a year to the Green Glades Cattle Co., a business owned by property developer Ron Bergeron, who had sold the property to CCA. The company's use of Bergeron's "rent-a-cow" business let it exploit the tax loophole.

"They don't make money on the lease. It's not to have the property make money on [the agricultural exemption]. In my opinion, it's tax avoidance," said Parrish.

County appraiser photos from December 2010 showed no cows on the site, but CCA spokesman Steve Owen attributed that to rotation of the cows from property to property. The tax exemption applies even if cows are on the land for only one day per year.

Beyond the property tax issue, the fight against the CCA detention center heated up in early 2011 as residents petitioned city officials in Pembroke Pines to take action against the facility. "They're selling our towns to lobbyists and special interests," said Greenberg.

They were joined by other activists, including the Florida Immigrant Coalition (FLIC), which was at the forefront of the issue and organized meetings and protests, set up a website ([www.ccagoaway.org](http://www.ccagoaway.org)) and advocated against the proposed immigration detention center. They also learned that ICE had not conducted an environmental impact study when selecting the Southwest Ranches site.

"Some residents wanted to push the message that criminals were coming into their community and that they would lose their safety, but the facts showed that the enemy was CCA and that the detainees were victims of a profit-driven system that puts their health, safety, their very lives at risk so CCA could make more money," FLIC stated.

The city commissioners for Pembroke Pines listened, and on March 7, 2012 voted to withdraw from their agreement with Southwest Ranches to provide water, sewer, fire and emergency medical services to the proposed CCA facility, despite having received conflicting legal opinions as

to whether they were obligated to honor the contract.

CCA filed a federal lawsuit against Pembroke Pines the very next day, arguing that the city was interfering with the company's plans to build the detention center. See: *CCA v. City of Pembroke Pines*, U.S.D.C. (S.D. Fla.), Case No. 0:12-cv-60427-WJZ.

The city in turn sued CCA in state court, seeking a declaratory judgment as to whether it was within its rights to withdraw from the agreement with Southwest Ranches, which included a nine-month termination for convenience provision. Further, CCA was not a party to that contract, which expressly disclaimed third-party beneficiaries. See: *City of Pembroke Pines v. CCA*, Circuit Court of the 17<sup>th</sup> Judicial Circuit for Broward County (FL), Case No. 12-7337.

Officials in Southwest Ranches and Pembroke Pines also engaged in a series of conflict resolution discussions, though little progress was made, with the former accusing the latter of breach of contract. "If you provide water and sewer to CCA, then this issue will go away," Southwest Ranches Mayor Jeff Nelson said to city commissioners for Pembroke Pines.

Ultimately, though, it was the federal government that decided the issue. On June 15, 2012, ICE announced it no longer needed a detention center in the area, effectively killing the proposed CCA prison. "ICE has reevaluated its need for an additional detention facility in South Florida and has decided that it will no longer pursue a facility in the Town of Southwest Ranches," the agency said in a written statement.

"It's a great day!" exclaimed Pembroke Pines resident Heidi Jones. "We're just very, very grateful. It was a very long fight. It's been a yearlong battle and there was always doubt [that we'd win.] I just knew there had to be some voice of reason somewhere and we just had to keep throwing everything at it we could."

"Having ICE walk away from this detention center is definitely a step in the right direction," added Kathy Bird, an organizer for the Florida Immigrant Coalition. "This shows that our government is listening to us, finally. That's at least how I feel today."

Despite CCA's claims of being "community friendly," it is still proceeding with its lawsuit against Pembroke Pines, which has spent at least \$125,000 in legal fees in connection with the proposed immigra-

tion detention center.

According to Pembroke Pines commissioner Angelo Castillo, defending against the suit is part of the price the city has to pay for standing up against CCA. "The cost of doing the business of government can't be an excuse for government not to do its job," he said. "We are doing the job we're supposed to do."

Sources: *Tampa Tribune*, [www.floridaindependent.com](http://www.floridaindependent.com), [www.local10.com](http://www.local10.com), [www.ccagoaway.org](http://www.ccagoaway.org), [www.noprisonswr.org](http://www.noprisonswr.org), [www.sun-sentinel.com](http://www.sun-sentinel.com), *Miami Herald*

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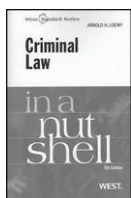
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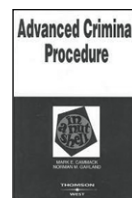
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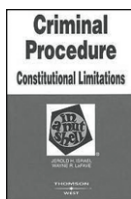
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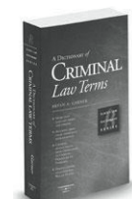
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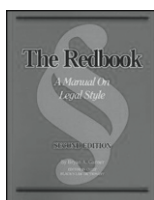
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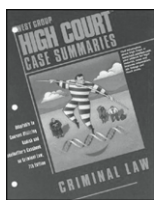
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# PLN Settles Censorship Suit Against Sacramento County, California Jail

On July 17, 2012, *Prison Legal News* settled a lawsuit against Sacramento County, California and Sheriff Scott R. Jones for \$300,000 plus policy changes in the county's jail system.

The suit was filed in federal court in April 2011 after Sacramento County jail staff refused to deliver PLN's monthly publication to prisoners and failed to notify PLN of that censorship in violation of the First and Fourteenth Amendments to the U.S. Constitution. The publications were rejected because they included small staples (used to hold the magazine together) and had mailing labels or stickers, which jail officials said posed a security risk.

The federal court granted PLN's motion for a preliminary injunction on March 7, 2012, with U.S. District Court Judge John A. Mendez finding that the jail's censorship of publications sent to prisoners was "an exaggerated response to any security concerns posed by PLN."

The court further held that PLN had "demonstrated a likelihood of success on the merits of its First Amendment claim," and that the defendants' "policies and practices including refusing to deliver PLN publications and mailings to prisoners because they contained staples and/or a mailing label are not supported by a legitimate penological interest and do not leave open alternative means for PLN to exercise its First Amendment rights."

A settlement agreement followed four months later.

In addition to the \$300,000 payment to PLN for damages and attorney fees, the jail agreed to change its mail policies to allow prisoners to receive publications that have staples or mailing labels, provided that staff may remove the staples and labels. The jail also will supply "adequate written notice and an administrative review process" to PLN and other publishers when any publication, correspondence or documents sent to prisoners are rejected. Finally, the county agreed to purchase four 5-year subscriptions to PLN for each jail library.

The settlement, in the form of a consent decree, specifies "that providing prisoners with access to reading materials promotes positive contact with the communities into which prisoners will eventually be released and is therefore consistent with

the Defendants' public safety mission."

"We are pleased that Sacramento County has agreed to adopt lawful mail policies for its jails and stop engaging in unconstitutional censorship," said PLN editor Paul Wright. "But we would have been more pleased had the jail not censored our publication to begin with, which necessitated our filing a lawsuit to protect our First Amendment rights."

"There has been an unfortunate trend recently for local jails to adopt all kinds of restrictions on reading materials," added Ernest Galvan, one of the attorneys who represented PLN. "Reading materials are

not a threat to safety. On the contrary, access to a wide range of reading materials helps people learn that there are lawful non-violent ways to solve the problems that they will inevitably face when they return to the community."

PLN was represented by attorneys Sanford Jay Rosen, Ernest Galvan, Kenneth Walczak and Blake Thompson of Rosen, Bien, Galvan & Grunfeld LLP, a San Francisco law firm, and by Human Rights Defense Center chief counsel Lance Weber. See: *Prison Legal News v. County of Sacramento*, U.S.D.C. (E.D. Cal.), Case No. 2:11-cv-00907. ■

## U.S. Supreme Court Holds AG Rules Required Before SORNA Sex Offender Law is Applied Retroactively

by Derek Gilna

On January 23, 2012 the U.S. Supreme Court, in a 7-2 decision written by Justice Stephen Breyer, reversed the Third Circuit Court of Appeals, which had held that the federal Sex Offender Registration and Notification Act (Act) applied retroactively even in the absence of a rule by the U.S. Attorney General setting forth specifics as to registration requirements for previously-adjudicated sex offenders.

The Supreme Court found in favor of plaintiff Billy Joe Reynolds, who had challenged federal district and appellate court decisions that he had violated the Act, which requires people convicted of certain sex crimes to give state governments information such as their names and current addresses for registration purposes.

The Act also states that "[t]he Attorney General shall have the authority to specify the applicability of the [registration] requirements ... to sex offenders convicted before the enactment of this chapter..." § 16913(d). According to the Court, "In our view, these provisions, read together, mean that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply."

The Act became law on July 27, 2006, and on February 28, 2007 the U.S. Attor-

ney General promulgated an Interim Rule which indicated that the Act applied to "sex offenders convicted of the offense for which registration is required prior to the enactment" of the law. 72 Fed.Reg. 8897 (codified at 28 CFR § 72.3). Additional rules were promulgated by the Attorney General in 2008, 2010 and 2011, but the case before the Court concerned the time period between July 27, 2006 and February 28, 2007.

Reynolds was a pre-Act offender who was indicted after moving from Missouri, where he was registered as a sex offender, to Pennsylvania, where he did not register. He filed a motion to dismiss the indictment, claiming that the Interim Rule was invalid because it violated both the Constitution's "non-delegation" doctrine and the Administrative Procedure Act's requirement for "good cause" to promulgate a rule without "notice and comment," as the Attorney General admittedly had done. Reynolds argued that since the Interim Rule was invalid, he must be treated as a "pre-Act offender who traveled interstate and violated the Act's registration requirements before the Attorney General specified their applicability."

The district court rejected Reynold's challenge to the Interim Rule but the Third Circuit did not reach the merits of that argument on appeal, rather focusing

on its view that the Act's registration requirements applied to pre-Act offenders like Reynolds from the date of the law's enactment without the issuance of any rules by the Attorney General. Under that reasoning, any defects regarding the Interim Rule would be immaterial.

The Supreme Court noted a conflict between the various Circuits regarding

when the Act could be applied retroactively, and observed that the government's legal arguments "overstated the need for instantaneous registration of pre-Act offenders...." The Court concluded "that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies." The Third Circuit's ruling to the contrary was

accordingly reversed and remanded for further proceedings.

Justice Scalia, joined by Justice Ginsberg, dissented, finding the Attorney General's power to immediately enforce the Act was "little more than a formalized version of the time-honored practice of prosecutorial discretion." See: *Reynolds v. United States*, 132 S.Ct. 975 (2012). ❏

## New Mexico Sheriff Sentenced for Selling County Property on eBay

On July 20, 2011, former Santa Fe County, New Mexico Sheriff Greg Solano, 47, pleaded guilty to five counts of third-degree fraud for selling county property on eBay and keeping the proceeds. The property, which was reportedly worth over \$75,000, included everything from cell phone chargers, printer cartridges and blank CDs to bulletproof vests, holsters and other law enforcement equipment.

Originally charged with 252 counts of embezzlement and fraud, and facing up to 100 years in prison, Solano entered into a plea bargain to reduce his maximum potential sentence to eight years.

"Solano was elected to protect and serve, not steal and profit," said special prosecutor Matt Chandler. "In an era where public trust has become the topic of the day, I believe it is time to send a message that gross misconduct by public officials will be strictly punished, and I believe an eight-year prison sentence will send that message."

Solano, free on \$25,000 bail, said financial problems, including back mortgage payments, led him to embezzle from the county. However, there were also allegations that he was gambling at casinos in Nevada and New Mexico. Solano resigned in November 2010 after admitting to his misconduct; he had

served as sheriff since 2002.

In September 2011, Solano was sentenced to 120 days in the Santa Fe County jail and four years of probation. He will also have to pay \$25,000 in restitution, though he was not required to repay the \$64,200 cost of an audit conducted by the county to determine the extent of the fraud. At his sentencing hearing he said,

"I was desperate, and I was stupid."

Solano was released from jail in October 2011 after serving 6 weeks of his three-month sentence, which was reduced for good behavior. He spent his jail time in protective custody. ❏

Sources: *Reuters*, [www.correctionsone.com](http://www.correctionsone.com), *Santa Fe New Mexican*, [www.kob.com](http://www.kob.com)

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# Eleventh Circuit Upholds Florida DOC's Ban on Pen Pal Solicitations

by David M. Reutter

The Florida Department of Corrections (FDOC) may ban all pen pal solicitations between pen pal services and Florida prisoners, the Eleventh Circuit Court of Appeals held on December 22, 2011. The appellate decision affirms a federal district court's January 2011 summary judgment order that found the FDOC's Pen Pal Solicitation Rule, F.A.C. Chapter 33-210.101(9), does not violate the First or Fourteenth Amendments. [See: *PLN*, Oct. 2011, p.11].

The challenge to the FDOC's pen pal rule was brought by Joy Perry, who operates Freedom through Christ Prison Ministry and Prison Pen Pals, and by WriteAPrisoner.com (WAP). Each service solicits pen pals for prisoners and non-prisoners by providing them with a list of pen pals or placing pen pal ads online. WAP charges a fee to put prisoners' ads for pen pals on its website; it also provides other services for prisoners, such as access to educational programs, an online résumé posting service and a program that grants scholarships to prisoners' children or victims of crimes. Perry does not charge any fees for her pen pal services.

The FDOC said it enacted its ban on pen pal solicitation to prevent prisoners from using pen pal services to defraud people. "Although the FDOC does not cite any specific instances of fraud within Florida, the district court found the testimony of a former FDOC employee and anecdotal evidence from newspaper reports throughout the country persuasive evidence of this fraudulent activity," the Eleventh Circuit wrote.

That finding proved to be dispositive, as the court applied a "rational basis review." The Court of Appeals acknowledged that ordinarily outgoing prison mail is reviewed under the higher standard set forth in *Procunier v. Martinez*, 416 U.S. 396 (1974). But James Upchurch, Chief of Security Operations for the FDOC, had submitted an affidavit that stated "outgoing correspondence poses a direct threat to internal prison security because pen pals might give money to prisoners who will then use it to bribe officials and order hits on other inmates"; thus, the four-prong test of *Turner v. Safely*, 482 U.S. 78 (1987) applied rather than *Martinez*.

The Eleventh Circuit found that requiring prisoners to obtain "pen pals through personal associates and not pen pal compa-

nies" was rationally related to the legitimate penological interests of protecting the public from fraud and ensuring internal prison security. An alternative for WAP was to advertise its non-pen pal services to prisoners. As for prisoners, they could still correspond with pen pals and use services that provide "one-to-one matching" rather than blanket solicitations or ads for pen pals.

Allowing mail from pen pal services, the appellate court held, would cause a significant increase in the "roughly 50,000 pieces of mail" the FDOC receives daily, requiring it to reassign guards to review the increased volume of correspondence and to "shift inspectors to investigate possible pen pal scams." Finally, the Court

of Appeals found the FDOC's pen pal solicitation ban was not an exaggerated response by prison officials.

After deciding there was no First Amendment violation, the Eleventh Circuit held the plaintiffs had received all the process they were due to challenge the denial of their pen pal advertisements. The district court's summary judgment order was therefore affirmed. See: *Perry v. Secretary, Florida Department of Corrections*, 664 F.3d 1359 (11<sup>th</sup> Cir. 2011).

Another federal appellate court – the Seventh Circuit – has upheld a similar ban on prisoners' pen pal ads, in Indiana's prison system. [See: *PLN*, May 2012, p.24]. ■

## Former Florida Sheriff Cleared in Theft Investigation and PHS Contract Fraud Suit

Following a two-year investigation and a jury verdict in a civil suit, a special prosecutor announced in June 2011 that criminal charges would not be forthcoming against Bill Balkwill, former sheriff of Sarasota County, Florida.

The jury verdict was entered in a lawsuit filed by Prison Health Services (PHS) that alleged Balkwill had improperly awarded a contract to another company to provide medical care for jail prisoners. The criminal investigation focused on Sheriff's Office property that was found in Balkwill's possession months after he retired.

PHS's lawsuit, filed in circuit court, claimed that Balkwill awarded a \$9 million jail medical contract to Armor Correctional Health Services in August 2006 after he received gifts and perks from Armor officials. One of those perks involved a fishing trip on Lake Okeechobee. Armor's CEO and lobbyist also took Balkwill and his wife to expensive dinners prior to the contract being awarded. [See: *PLN*, Dec. 2009, p.22; Jan. 2009, p.36; March 2008, p.44].

In an attempt to prove that Balkwill had communicated with Armor executives before awarding the contract, PHS sought to examine his laptop for emails and other evidence.

The Sheriff's Office began an investigation in April 2009. It found that Balkwill had pressured the department's former Information Technology Director,

Jeff Feathers, to fill out a form claiming the laptop was worth only \$10. The form designated the laptop as junk to be recycled.

The laptop, however, was later found during a search of Balkwill's home; he then "scrubbed" it of certain files before turning it over. He claimed the 11,000 files he deleted were personal photographs and files that contained national security information, though the judge in PHS's lawsuit held that Balkwill had destroyed the files despite a court order not to tamper with the computer. Former Armor CEO Doyle Moore had also deleted files from his laptop before surrendering it as evidence in the case.

"The destruction of files subject to production and inspection, both by Balkwill and Moore, cannot be excused," the court wrote. "The deletions were intentional and must be viewed as attempts to thwart discovery."

PHS had hoped to find communications between Armor's CEO and Balkwill, his "good friend." A Florida Department of Law Enforcement forensic review of Balkwill's laptop revealed nine emails pertaining to the disputed jail medical contract; most of the deleted messages and files could not be recovered.

During the search of Balkwill's home, investigators also found a leather office chair with an engraved eagle and three pistols. The \$650 chair had been purchased



with a Sheriff's Office credit card. Sarasota County prosecutors rejected potential theft charges related to the chair, advising detectives that it "did not rise to the level worthy of criminal prosecution."

Two of the guns belonged to the Sheriff's Office prior to Balkwill writing a check to buy them for \$200, which was far below their market value. As to the purchase of the guns, Sheriff's Captain Jeff Bell wrote, "This seemingly skirts the application of criminal laws but certainly gives rise to ethical concerns."

Detectives believed that Balkwill's possession of the laptop constituted criminal theft, as the \$2,600 computer would normally be replaced after five years but Balkwill had it valued at \$10 and slated for recycling before he took it home. Sarasota County prosecutors recused themselves

due to a conflict of interest, as they had worked with the former sheriff during his eight years in office.

A special prosecutor, Wayne Chalu, was assigned to the case. In a ten-page memo issued in June 2011, Chalu announced that no charges would be filed because as sheriff, Balkwill had the authority to decide when Sheriff's Office property should be destroyed. Chalu also determined that Balkwill had a "legitimate concern" that confidential files on his laptop would become public before he could destroy them. Thus, he did not face any criminal prosecution.

Previously, in November 2010, the jury in PHS's civil lawsuit held that the county and Balkwill had done nothing wrong when awarding the jail medical contract to Armor. The jurors found that

the Sheriff's Office had exercised its "honest discretion in awarding the jail contract to Armor, Balkwill was not improperly or corruptly influenced by Armor in awarding the contract, Balkwill did not act arbitrarily and capriciously in awarding the jail contract and Armor did not use unfair methods of competition or trade." See: *Prison Health Services v. Balkwill*, Circuit Court of the 12th Judicial District for Sarasota County (FL), Case No. 2007-CA-10652 NC.

Armor CEO Bruce Teal reportedly cried when the jury ruled against PHS and in Armor's favor following the hard-fought litigation. Balkwill did not testify during the trial. ■

Sources: [www.heraldtribune.com](http://www.heraldtribune.com), [www.yoursun.com](http://www.yoursun.com)

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## Pro Se Virginia Prisoner Settles Religious Exercise Suit

Virginia state prisoner Rashid Qawi Al-Amin, proceeding pro se, reached a settlement with prison officials that requires them to purchase Islamic reading materials, CDs and DVDs for the prison chaplain's library. The state also agreed to pay him \$2,000.

Al-Amin, a prisoner at Greensville Correctional Center (GCC), filed a lawsuit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2004. In 2005, U.S. District Court Judge Raymond A. Jackson dismissed the case on procedural grounds, but it was reinstated by the Fourth Circuit Court of Appeals two years later. See: *Al-Amin v. Shear*, 218 Fed.Appx. 270 (4<sup>th</sup> Cir. 2007).

Judge Jackson dismissed the suit again in 2008, citing a lack of merit. The Fourth Circuit again reversed. See: *Al-Amin v. Shear*, 325 Fed.Appx. 190 (4<sup>th</sup> Cir. 2009). Al-Amin rejected an offer of counsel, and discovery ensued over the next two years. When Jackson set the matter for trial he asked the parties to try to settle the case.

The May 2011 settlement agreement requires prison officials to "purchase up to \$2,500" of "new library materials which have been selected by the Muslim Chaplain Services as being appropriate and adequate to assist Muslim inmates in the study of their religion." Al-Amin was allowed to submit a list of proposed materials to be purchased for the library.

The settlement also requires prison officials to "hire and maintain a Muslim inmate" to work in the prison chaplain's library at GCC. The duties of the Muslim Chaplain's clerks will include performing "an annual inventory of the Muslim contents of the Chaplain's library." Further, prison officials will implement a process that allows prisoners to make donations to the library.

When he first arrived in prison, Al-Amin was known as Donald Tracey Jones. Shortly after he began serving a 52-year sentence for a drug-related murder, he converted to Islam and changed his name. Prison officials refused to acknowledge his Muslim name. The settlement changes that policy, and requires prison officials to amend their records "to permit Plaintiff to use the name Rashid Qawi Al-Amin in conjunction with his offender number to access services and property generally available to inmates."

In addition to posting notices on

GCC bulletin boards that list approved religions, plus "a statement that there shall be no discrimination by staff or prisoners based on their religious beliefs or practices," prison officials must also include Muslim prisoners in the preparation of religious meals. Finally, the state agreed to pay Al-Amin \$2,000 to cover the costs he incurred in litigating the case.

A prison chaplain's association was not pleased with the outcome. "That's a terrible settlement. It sets a very bad

precedent," said Gary Friedman, communications director for the American Correctional Chaplains Association. "Public funds should not be used to purchase sectarian materials."

Prison officials and the state Attorney General's Office had no comment on the terms of the settlement agreement. See: *Al-Amin v. Johnson*, U.S.D.C. (E.D. Vir.), Case No. 2:04-cv-00346-RAJ-FBS. ■

Additional source: [www.hamptonroads.com](http://www.hamptonroads.com)

## \$50 Million in Grants Targets HIV in the Criminal Justice System

The National Institute on Drug Abuse (NIDA), a division of the National Institutes of Health, is awarding almost \$50 million in grants to fund research projects that target HIV among prisoners, parolees and probationers.

The grants will be distributed over a five-year period to 12 research teams, which will conduct studies in locations that include the Los Angeles County Jail; the jail system in Cook County, Illinois; Rikers Island in New York; prisons in North Carolina, Illinois, Texas, Wisconsin and Rhode Island; and jails in the District of Columbia.

"These important and wide reaching research grants will focus on identifying individuals with HIV within the criminal justice system and linking them to highly active antiretroviral therapy (HAART) during periods of incarceration and after community re-entry," stated NIDA Director Dr. Nora D. Volkow. "We hope this effort will lead to decreased HIV/AIDS-related illness and death among those in the criminal justice system, as well as decrease HIV transmission in the community at-large, making an important impact on public health."

Illinois will receive \$7 million in grants. Researchers from the University of Illinois at Chicago will focus on prisoners in the Cook County Jail and more than two dozen state prisons.

The researchers plan three phases. The first will allocate money to implement HIV testing for all prisoners upon their entry into the prison system, unless they refuse. That policy change conforms to recommended guidelines from the Centers for Disease Control and Prevention, and will hopefully reduce the number of prisoners

who are unaware of their HIV status.

Researchers will also examine whether linking prisoners to HIV care via telemedicine results in better treatment. "Prisoners have typically been managed by prison physicians who are generalists, not sub-specialists, so they don't really have access to specialist care," said Dr. Jeremy Young, one of the lead researchers. Telemedicine will connect prisoners with medical specialists and save the cost of having doctors drive across the state to see HIV+ prisoners.

While telemedicine may be better than no medical treatment, it should be noted that patients in the freeworld, under the community standard of care, see doctors in person and not via long-distance telemedicine video.

The third part of the NIDA-funded project in Illinois will track HIV+ prisoners after they are released. "In the past, prisoners have gotten two weeks of meds and an appointment [for follow-up care] in the city," said Dr. Young. "The problem is, when prisoners go out into the community, many of them start taking drugs and hanging out with old friends, and they don't show up for appointments and get lost in the follow-up."

Additional case managers will be hired with the NIDA grant; they will contact newly-released prisoners and connect them with mental health services, drug counseling and the state's AIDS Drug Assistance Program.

Researchers at the University of North Carolina will use the grant funding to study whether prisoners contract HIV while incarcerated or if they mainly enter the prison system with pre-existing infections. "I think HIV spreading in

prison is so blown out of proportion,” stated UNC School of Medicine professor David Wohl.

It is estimated that one in seven people who are HIV+ passes through the

criminal justice system each year, which presents an opportunity for interdiction and treatment. Approximately 2 percent of prisoners have HIV – which is around six times higher than the infection rate in

the general population. [See: *PLN*, July 2010, pp.28, 43].

Sources: *Sun Times*, [www.nih.gov](http://www.nih.gov), [www.dailytarheel.com](http://www.dailytarheel.com)

## \$3.5 Million Settlement in Teen's Death at New York Juvenile Facility

A \$3.5 million settlement has been reached in a lawsuit over the death of a juvenile offender who was restrained by two staffers at the Tryon Boys Residential Center in Fulton County, New York.

The suit claimed that the civil rights of Darryl Anthony Thompson, 15, were violated as a result of excessive force used by Tryon employees in November 2006. The incident that led to Thompson's death began after he was denied recreation and engaged in a shouting match with Tryon aide John P. Johnson. After being pushed by Thompson, Johnson and another aide, Robert Murphy, restrained him facedown on the floor.

Johnson put his weight on Thompson's torso and raised his arms behind his back as Murphy sat on his legs. Thompson said he couldn't breathe, but Johnson and Murphy continued to restrain him until he

stopped struggling and was unconscious, according to the complaint. Several minutes elapsed before anyone tried to revive him.

“You have a child lying on the floor that you know is in distress, and you do nothing. It's unforgivable,” said Elmer R. Keach III, the attorney who represented Thompson's family in their federal lawsuit.

The medical examiner ruled Thompson's death a homicide because the force that was used on him led to stress that caused a heart arrhythmia. Yet, as typically occurs in prisoners' deaths, Johnson and Murphy did not face criminal charges – though they reportedly no longer work for the state.

A settlement agreement in the suit was finalized in November 2011. Thompson's mother, Anntwanisha Thompson, will receive approximately \$2.28 million

of the settlement, with the rest going to attorney fees and costs. “No amount of money will bring this young man back to life; no amount of money can compensate his loved ones for his absence,” Keach remarked. See: *Thompson v. Johnson*, U.S.D.C. (N.D. NY), Case No. 6:08-cv-01241-DNH-ATB.

The Tryon facility was closed in 2010 as part of a statewide effort to downsize juvenile prisons in favor of day treatment centers closer to youths' homes. A 2009 federal investigation found that employees at four New York juvenile facilities, including Tryon, had used force as a primary means of restraining youths, causing serious injuries. [See: *PLN*, Nov. 2011, p.32].

Sources: *Associated Press*, *Times Union*, <http://wnyt.com>

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# Texas: Helping HIV+ Prisoners Receive Post-Release Meds

by Matt Clarke

When Diana Harris was released from a Texas prison more than a decade ago, she received no information on how to continue her regimen of HIV medication. The prison issued her a 10-day supply of meds and when that ran out she basically ignored the problem for the next two years.

"I didn't want to tell my family that I [was HIV+], so I couldn't ask them for help," said Harris. "I was on my own and didn't really know where I should go to keep myself healthy."

Harris now works to address problems with continuity of care for newly-released Texas prisoners who are HIV+. She is a peer advocate with the AIDS Outreach Center in Fort Worth, and meets with releasees in Tarrant County to help them understand the medical system in the free world.

"Navigating a hospital system is daunting if you have been incarcerated since 19 and never had to deal with it," noted Shannon Hilgart, associate executive director of the AIDS Outreach Center. "Getting into a clinic, getting through the paperwork.... It's a whole new learning process."

Fortunately, the system is vastly improved compared to what was in place when Harris was released from prison.

"We can get same-day approval" for a releasee's HIV meds, said Austin HIV medication program worker Brenda Herndon Johnston. "They have it working without delays so, when the client comes in, we get the process rolling as quickly as possible."

That is good news for prisoners who are released to Austin, Fort Worth and other Texas cities with HIV medication support systems in place. Why, then, did a 2009 study headed by Dr. Jacques Bailargeon at the University of Texas Medical Branch at Galveston (UTMB) find that only 17.7 percent of 2,115 HIV+ prisoners had received post-release medication within 30 days of their release from Texas prisons between January 2004 and December 2007? Some medical officials place the blame squarely on the prisoners.

"Once they leave prison, we no longer have any control over what they do," stated Owen Murray, vice president for prisoner health services at UTMB, which provides about 80% of the medical care

in Texas' prison system. "We can't drive to their houses and make sure they go to the clinic. I really think the state is doing everything it can."

Instead of criticism, however, what newly-released HIV+ prisoners need is practical help with obtaining their medication – such as reminders about medical appointments, help with transportation to clinics, and assistance in filling out paperwork and dealing with the health care system bureaucracy.

Janina Davis is the re-entry coordinator for the Texas HIV Medication Program, which provides HIV meds to low-income Texans. She said state officials held a summit to discuss the problem of continuity of HIV medication for released prisoners, and decided to pursue several strategies to connect prison health care

services with services available from various community organizations. While not as effective as the state providing HIV medication to releasees directly, it is a way to make efficient use of existing resources.

"Prisoners receive such good [HIV medicine] regimens in prison that most are released with undetectable viral loads," said Davis. "If they lapse, that is such a waste of what was expensive medication."

Which is all the more reason for prison officials to ensure that HIV+ prisoners receive the resources and support they need to continue their meds once they are released. ■

Sources: *Fort Worth Star-Telegram*, [www.thebody.com](http://www.thebody.com), [www.jama.com](http://www.jama.com)

## Texas Legislator Uses Prisoner-Made Goods as Gifts for Campaign Contributors

by Matt Clarke

When Republican Texas State Representative Debbie Riddle scheduled her "Riddle Executive Leadership Summit" at the Lanier Theological Library in August 2011, the agenda mentioned several "esteemed discussion leaders," a buffet reception and special gifts for large campaign donors. According to an article in the *Houston Chronicle*, those gifts – which were produced by state prisoners – included heirloom-quality furniture and other items made in Texas Correctional Industries (TCI) programs.

The invitations Riddle sent to her supporters included a request for campaign donations at several "participation levels," ranging from \$1,000 to \$20,000. Each participation level had a corresponding gift, such as prisoner-made replicas of furniture from the Capitol, a hand-tooled leather-topped coffee table with matching chair, a hand-tooled leather duffel bag, a Lone Star flag cutting board, a hand-tooled leather rifle case and a hand-carved rocking horse with leather saddle.

The furniture included hand-carved Capitol benches, constitutional chairs, judge's chairs and desks. "Please note that the donor gifts are exclusive and can-

not be purchased on the open market," the invitation stated. "The descriptions seem inadequate for most of these items, and you will find an enclosure with photographs to show their beauty."

Outside the Texas prison system, the only individuals who can purchase goods made in TCI programs are lawmakers. When questioned about giving gifts to campaign donors that were obtained by virtue of her legislative position, and whether that was uncomfortably close to using an elected office to raise campaign funds, Rep. Riddle demurred.

"It's no different than 'if you donate that you get a T-shirt and a coffee mug,'" she said. "We can purchase these items from the prison system as gifts. We can buy them, but we cannot sell them. I am not selling these any more than I am selling a T-shirt" given to someone who makes a donation.

The difference, of course, is that there is no restriction on who can purchase and then give away T-shirts or mugs. But items produced in TCI programs are not available to the general public and can only be acquired by government agencies and lawmakers.

Riddle was candid about her actions.

"It is not at all uncommon for elected officials, way, way long before I got here, if they have a donor who has been very generous to them, to give them a constitutional chair or a judge's chair [the styles of chairs used in the Capitol] or something like that," she said. "I am an open book. I'm not doing anything different than anyone else has done, except maybe I've been a little less subtle. Maybe I'd be a better politician if I learned how to play tricks."

State Rep. Charlie Green, who chairs the House Administrative Committee, when asked about rules for the purchase of TCI-made items by state legislators, said it was "up to the individual member" so long as they did not resell what they bought. Asked about using such purchases as gifts for campaign contributors, he said he had never heard of that practice before and would not do it personally.

State ethics laws expert Buck Wood, an Austin attorney, added that while there was no specific prohibition against using TCI products as donor gifts, it didn't pass his smell test. "You can't use the prison system as a manufacturer to attract campaign dollars," said Woods. "I'm sure there are instances where as a

token of their appreciation – not necessarily in connection with a fundraiser – that legislators have [given gifts]. I find that very different from what you have described here. This is 'give me money and I will reward you by using my access to prison industry materials to get you things.'"

Rep. Riddle continued to defend her position, saying she could have had the gifts made elsewhere but "this is my way of helping those guys behind bars earn some money. There are some really fine craftsmen that have made bad decisions."

The only problem with that reasoning is that most prisoners employed in TCI

programs receive no pay for their work – a fact that any Texas legislator should know. Thus, all that Riddle accomplished was to exploit the prison slave labor of those "really fine craftsmen" while using her elected office to reward campaign donors with prisoner-made gifts. ■

Source: *Houston Chronicle*

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# BOP's RDAP Program Unevenly Administered and Unnecessarily Costly

by Brandon Sample and Derek Gilna

A comprehensive review of the federal Bureau of Prisons' (BOP) Residential Drug Abuse Program (RDAP), enacted by Congress in 1994, indicates that almost 20 years after its creation RDAP has yet to fulfill its full potential and is unnecessarily expensive.

The enactment of 18 U.S.C. § 3621, which authorized RDAP, was originally designed to provide not only substance abuse treatment to a large number of BOP prisoners but also to instill lifestyle changes that would reduce recidivism. The program was formulated by Congress to help decrease the rapidly escalating federal prison population by addressing behaviors that result in prisoners committing new crimes after they are released.

Unfortunately, although a positive initiative, RDAP was not initially embraced by BOP prisoners, who objected to the more difficult aspects of the program. As a result enrollment was low and many prisoners accepted into RDAP failed to complete it.

This low level of participation continued until the BOP elected to follow Congress' legislative mandate in its entirety, specifically § 3621(e)(2), which provides that non-violent prisoners who successfully complete RDAP are eligible for a sentence reduction of "not more than one year." Paragraph (e)(5)(A) of the same statute additionally provides that the program must be "at least 6 months" in duration.

Simply put, any eligible federal prisoner who puts in the time and effort necessary to complete RDAP will receive up to an additional year off their sentence, along with the usual 15% sentence reduction for "good time" plus placement in a halfway house that further reduces time spent in prison – with the latter being subject to availability and BOP policy. For example, a non-violent prisoner with a seventy-eight month (6½ year) sentence could conceivably be released from prison in just under five years if he received the maximum allowable credits, completed the RDAP program and was released to a halfway house for 6 months.

However, the BOP's implementation of RDAP has failed to substantially reduce the federal prison population, which continues to expand. The BOP, like many federal agencies, has the authority

to formulate rules to execute laws enacted by Congress, and there is a set period of time for public comment regarding that process. After the public comment period expires, the rule is incorporated into BOP Program Statements and has the force of law unless specifically abrogated by subsequent Congressional action. Unfortunately the BOP has a history of watering down Congress' legislative intent, as demonstrated by its implementation of both RDAP and the Second Chance Act.

The Second Chance Act was designed to address the growing BOP prison population, now approximately 217,800, by providing funding to programs to help prisoners transition back into society – with the ultimate goal of reducing recidivism. However, the Second Chance Act has not made a dent in the BOP's prison population, which stands at record levels. Further, a recent examination of Department of Justice data indicates that a large amount of the limited funding for the Second Chance Act goes to state and local governments, including corrections and law enforcement agencies, rather than to community-based programs that assist released prisoners. [See: *PLN*, July 2012, p.46].

Further, the Second Chance Act specifies that prisoners may be assigned to a halfway house for up to 12 months – doubling the previous length of a halfway house stay. Yet while the average amount of time prisoners are assigned to halfway houses has reportedly increased, in the vast majority of cases the BOP is not providing a full year of halfway house placement for prisoners nearing release, and federal prison officials have indicated that most prisoners will receive a maximum of six months at a halfway house.

Sadly, it appears that RDAP has also fallen victim to the BOP's practice of implementing rules that may not coincide with Congressional intent. The BOP, via its rule-making authority, has established RDAP as a 9- to 12-month program even though Congress set the minimum duration at six months. BOP Program Statement 5330.11 specifies that RDAP has a "duration of 9 to 12 months," plus a Transitional Drug Abuse Treatment (TDAT) component of up to six months – which all prisoners who successfully

complete RDAP's in-prison program must finish after they are released to a halfway house.

This lengthy and somewhat arbitrary amount of time necessary to complete the RDAP program costs taxpayers millions of dollars a year. Keeping in mind that most community-based substance abuse treatment programs are generally 30 to 60 days in duration, with some extending up to 6 months, an in-prison RDAP program of 9 to 12 months appears to be excessive. It is also expensive.

Based upon an estimated 18,000 prisoners graduating from RDAP each year, and the average cost of incarceration for federal prisoners running about \$28,000 annually (based upon BOP data), requiring an RDAP duration of 9 rather than six months costs approximately \$126 million in additional annual incarceration costs. For a 12-month RDAP program the extra cost is around \$252 million. Lengthening the RDAP duration also limits the number of prisoners who can enroll in the program and reap its benefits.

In the past, the BOP has been criticized for failing to ensure that all eligible prisoners can participate in RDAP; in 2007, for example, only 80% of federal prisoners eligible for RDAP were enrolled in the program. The BOP's Annual Report on Substance Abuse Treatment Programs for Fiscal Year 2008 stated, "Without additional funding, the agency will [be] unable to meet [Congress's goal] of treating 100 percent of eligible" prisoners. [See: *PLN*, Jan. 2010, p.45].

According to the BOP's 2013 budget request, the department intends to expand RDAP to "all eligible inmates" as required by § 3621, assuming it receives funding to do so. Whether the BOP will in fact provide all eligible prisoners with access to RDAP, and whether federal prison officials will administer that program in a more efficient and cost-effective manner in the future, remains to be seen. ■

Sources: *OJP Awards by Solicitation and State, Bureau of Justice Assistance Grants for Fiscal Year 2011 (as of Sept. 30, 2011)*; *Department of Justice, Bureau of Prisons, report on cost of prisoners (Dec. 28, 2011)*; 18 U.S.C. § 3621; *BOP Program Statements 5331.02 and 5330.11*; [www.famm.org](http://www.famm.org)



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# Tenth Circuit Holds Sex Offenders Who Leave U.S. Must Still Register

by Derek Gilna

The Tenth Circuit Court of Appeals held on December 23, 2011 that a Utah sex offender must register in his home state even if he intends to permanently leave the U.S. to live in another country. Kevin Daniel Murphy, convicted of aggravated sexual assault and aggravated sexual abuse of a child, absconded from the Bonneville Community Correction Center in Salt Lake City in 2007 before fleeing to California, Mexico and then to Belize.

Murphy moved to Belize under an assumed name because he erroneously thought that Belize's government would not extradite him. However, he was deported to the United States because he lacked proper immigration papers, and was subsequently prosecuted and convicted in federal court for violating the Sex Offender Registration and Notification Act (SORNA), 48 U.S.C. § 2250. Murphy appealed his conviction and two-year sentence.

The Tenth Circuit found that Murphy's intention to leave the country did not relieve him of his obligation to register. "For [registration] purposes, a sex offender continues to reside in a state even after a change in residence or employment, both of which trigger reporting obligations, even if the offender eventually leaves the state," the appellate court wrote. "Therefore, even if an offender abandons his current residence and job with the intention of moving out of the country, he must update his registration to reflect his new status. Although SORNA does not require sex offenders living abroad to continually return to the United States to update their registrations, Murphy violated SORNA by failing to notify Utah of a change of status – specifically, his escape from Bonneville – that occurred while he was still residing in that state."

Based on the ruling in this case, sex offenders must notify the jurisdiction in which they live and are registered of any change in address or status, which includes permanently moving out of the state or country. According to SORNA, and following the appellate ruling in *United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010), *cert. denied*, a "permanent abandonment of an abode constitutes a change of residence ... Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration

requirements by moving out of state ... the record demonstrates Murphy knowingly violated SORNA by failing to update his registration...."

Judge Carlos F. Lucero dissented, saying that "these facts are not in dispute, but their legal implication is...." He noted that after absconding, Murphy was in Utah "mere hours" while leaving the state on a bus, and that the court must first accept an "absurd premise" that a moving bus constitutes a "home or other place where [an] individual habitually lives" in order to

invoke penalties under SORNA.

"We should look to the statutory definition of the term and begin with the ordinary meaning ... of the term ['resides']," Lucero wrote, citing *Hackwell v. United States*, 491 F.3d 1229 (10th Cir. 2007). He disagreed that *Van Buren* applied and concluded by stating, "Our duty as a court is to apply SORNA's plain language and leave it to Congress to change the statute if it desires to do so." See: *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). ■

## Florida Reports Indicate Restoration of Civil Rights Reduces Recidivism

by David M. Reutter

Advocates of automatic restoration of civil rights for ex-offenders have long maintained that such a policy helps former prisoners reintegrate into society and therefore reduces recidivism. Two reports by the Florida Parole Commission (FPC), released in 2011 and 2012, lend support to that argument.

Since the end of the Civil War, Florida has banned the restoration of civil rights for ex-felons unless their rights are restored by the state clemency board. Historically, the restoration process has been laborious and prolonged.

Former Florida Governor Charlie Crist pushed for full restoration of rights for offenders after they completed their sentences or terms of supervised release. He greatly streamlined the restoration process in 2007, but also had to compromise.

Objections from Crist's cabinet forced him to exclude certain violent offenders and sex offenders, but the less restrictive process still resulted in over 154,000 ex-felons regaining their rights. [See: *PLN*, Jan. 2009, p.26].

When Governor Rick Scott took office in January 2011, however, he and Attorney General Pam Bondi moved to rescind the Crist policies. They decided that ex-offenders must wait five years without committing another offense and then apply to have their civil rights restored. [See: *PLN*, Sept. 2011, p.28].

As a result of this regression to Jim Crow-era laws, 60,000 ex-felons were

ineligible for restoration of their rights: They were prohibited from voting, holding public office, sitting on a jury and obtaining certain state licenses. Governor Scott's new policy also required studies of those whose rights were restored under the Crist administration.

The first report, issued by the FPC on July 1, 2011, found that 30,672 offenders had their civil rights restored in calendar years 2009 and 2010 combined (including restoration of alien status for a small number of non-citizens). Of those, only 3,406 had committed offenses by May 31, 2011 that resulted in a return to prison or community supervision by the Florida Department of Corrections (FDOC).

This equates to a 11.1% recidivism rate for ex-felons whose rights were restored under Crist's policies, which contrasts with a 2010 FDOC report that found 33.1% of all state prisoners released from 2001 to 2008 reoffended within three years.

Scott and his cabinet have argued that the more restrictive restoration of rights process, including the five-year waiting period, is necessary to protect the public. "It's all window dressing to support an antiquated system of voter suppression," countered Howard Simon, executive director of the ACLU of Florida.

Attorney General Bondi applauded the FPC study. "I am pleased with the Parole Commission's report, which clearly demonstrates their hard work to ensure a smooth and expeditious application process for the

restoration of civil rights,” she said.

Of course, under Governor Crist, the “application process” was full restoration of rights for most non-violent offenders that, according to the FPC study, led to a reduction in recidivism rates by almost two-thirds.

The FPC’s report on restoration of civil rights for 2010 and 2011 (which

included some overlapping data from the 2009-2010 report), issued on July 1, 2012, had similar findings. Only 5,771 ex-felons had their rights restored in calendar years 2010 and 2011 combined – including a mere 52 people in 2011 under Scott’s new policy. During that same period of time 651 reoffended, for a recidivism rate of 11.3%.

Which is a good argument for expanding – not limiting – the restoration of civil rights, if only Governor Scott would pay attention to the recidivism data rather than rely on political rhetoric. ■

Sources: *Herald Tribune*; *Florida Parole Commission, Clemency Action Reports for FY 2009-2010 and 2010-2011*

## Tainted Chicken Sickness Hundreds of Prisoners, Staff at Pennsylvania BOP Facility

In late June 2011, around 320 prisoners and employees at USP Canaan in Pennsylvania, north of Philadelphia, became sick due to salmonella poisoning after eating “tainted chicken” used to make fajitas. Four prisoners were ill enough to require treatment at a local emergency room for dehydration.

According to Bureau of Prisons (BOP) spokesperson Lamine N’diaye, the facility’s kitchen was closed for cleaning following the outbreak but reopened after a BOP inspector deemed it safe. Neither N’diaye nor Russell Reuthe, USP Canaan’s human resource manager, would comment on the food or its source, but Reuthe confirmed it was all “wholesale food, prepared on site.”

A Pennsylvania Department of Health official said they were investigating the incident, adding that “we did provide assistance to the facility by taking stool samples and food testing.” According to the same official, all of the food in the kitchen was disposed of following the outbreak.

Salmonella is rarely fatal but can be serious if it spreads to the blood stream or the intestines, where it can cause a form of arthritis. The *Associated Press* first learned about the outbreak at USP Canaan from the Seattle-based law firm of Marler Clark, which specializes in cases involving food-borne illnesses. Two attorneys from the firm confirmed that families of multiple prisoners had contacted them to report the outbreak.

USP Canaan houses approximately 1,400 prisoners, and includes a 125-bed minimum-security satellite camp. During the salmonella outbreak, meals for the USP were prepared in the satellite camp’s kitchen until the cleanup was complete.

It is not unusual for the BOP to purchase meat such as hamburger and chicken in bulk, then distribute it system-wide to various prisons – indicating that the tainted food may have been sent

to other facilities, too.

According to Christine Cronkright of the Pennsylvania Department of Health, no new illnesses were reported after the initial outbreak at UPS Canaan and 90% of the prisoners who became sick had eaten the chicken fajitas. There were no reports of salmonella outside the facility

or in the greater Philadelphia area.

By July 20, 2011, operations at USP Canaan were back to normal. The U.S. Department of Agriculture is reportedly looking into the incident. ■


Sources: *Associated Press*, [www.wayneindependent.com](http://www.wayneindependent.com)

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# ACLU Challenges “Jail or Church” Program in Alabama

On September 26, 2011 the American Civil Liberties Union of Alabama (ACLU) sent a cease-and-desist letter to the City of Bay Minette, demanding that city officials “immediately end Operation Restore Our Community (ROC), which requires first-time, non-violent misdemeanor offenders to choose between jail time or attending church once a week for a year.”

While the ACLU said it supported alternative sentencing programs, it condemned Operation ROC because its use of the city’s “police power to mandate and enforce church attendance flagrantly violates the Establishment Clause of the First Amendment to the U.S. Constitution,” as well as Section 3 of the Alabama Constitution.

“The government is not supposed to serve as a conduit for church recruitment,” noted ACLU of Alabama legal director Allison Neal.

The ACLU’s letter addressed three specific points. First, that Operation ROC violates the Establishment Clause’s anti-coercion principle, which prohibits government officials from compelling church attendance or other participation in religious exercise. The letter cited numerous legal precedents which had “consistently held that the government may not condition offenders’ sentencing, probation, parole or release on their refusal or willingness to attend church or engage in other religious exercise.”

The ACLU contended that Operation ROC is coercive, as it presents defendants with a “choice” between “(1) going to jail, paying a fine, and developing a criminal record; or (2) going to church and having the charges eventually dismissed....”

Even Bay Minette’s Chief of Police, Michael E. Rowland, who championed the program, acknowledged that it provided no real option. “It’s an easy choice for me,” he said. “If I was given the choice of going to jail and paying a heavy fine or just going to church, I’d certainly select church.”

The second point of the ACLU’s letter asserted that Operation ROC violates the neutrality principle – another core tenant of the Establishment Clause. Local churches were solicited to participate in the program, and those that agreed “intend to proselytize the offenders and attempt to convert them into devout Christians.” Media reports also indicated that defendants

who participate in Operation ROC would be required to answer questions about the church services they attended.

“These actions (1) favor religion generally and Christianity in particular, (2) convey an impermissible message of religious endorsement, and (3) unconstitutionally entangle the court and police department with religious matters and entities,” the ACLU stated.

Finally, the demand letter urged the city to pursue constitutional alternatives to incarceration. The ACLU said it had advised and assisted government agencies in that regard in the past, and would be willing to help the city develop “law-

ful” sentencing alternatives. The letter concluded with a public records request seeking information related to the city’s development of Operation ROC.

In response, the Bay Minette City Council decided to delay the implementation of the alternative sentencing program, and voted in October 2011 to seek an opinion from the state Attorney General’s Office concerning the constitutionality of Operation ROC. As of mid-July 2012, the Attorney General had not issued an advisory opinion. ■

Sources: *Reuters*; *ACLU letter dated Sept. 26, 2011*; [www.al.com](http://www.al.com)

## “Fusion Centers” Gather Intelligence on U.S. Citizens

by Derek Gilna

Homeland Security-financed agencies called “fusion centers,” ostensibly formed to collect information to prevent 9/11-type terrorist attacks, have expanded their scope of operations to include ordinary street-level crime. The American Civil Liberties Union (ACLU) recently expressed concerns about a fusion center in Cleveland, Ohio, claiming the center’s secrecy and data-mining practices pose a threat to privacy.

“It really is an unprecedented amount of surveillance of Americans,” stated Mike Brickner, communications and public policy director for the ACLU of Ohio. “That’s a very big jump in my mind from where the mission started to where they are now.”

Julia Shearson, executive director of the Cleveland chapter of the Council on American-Islamic Relations, agreed, saying, “at minimum, we join those requesting that fusion centers be held accountable to taxpayers through increased oversight and transparency.”

The Department of Homeland Security describes fusion centers as “focal points within the state and local environment for the receipt, analysis, gathering, and sharing of threat-related information....”

William Schenkelberg, director of the Cleveland-based Northeast Ohio Regional Fusion Center, said the centers arose from the perceived failure of law enforcement agencies, pre-9/11, to share intelligence data. According to Schenkelberg, fusion

centers share criminal trends, tips and information among police agencies which might disclose potential national security threats.

“You get criticized for doing that level of crime analysis,” said Schenkelberg, “but you don’t know who it’s connected to.... We work on a local felony level. We get the region talking together, so that if something does happen, we have that communication.”

The ACLU, however, has countered that the secrecy and data-mining practices of fusion centers, as well as their use of subcontractors with little public accountability, reduces transparency and threatens people’s privacy. For example, some centers have issued bulletins that advocate the surveillance of political activists and racial and religious minorities. Many Islamic organizations have objected to fusion centers collecting information about citizens who are simply exercising their First Amendment rights.

Housed on the ninth floor of the Cleveland police headquarters, the Northeast Ohio Regional Fusion Center was founded in 2008. It now has a full-time staff of six and receives about \$1 million annually in Homeland Security grants. It is among 72 state and regional fusion centers nationwide.

Schenkelberg said the center has had a positive effect on controlling local crimes, including flash mobs. He cited several other fusion center success stories,



such as helping to crack a fake-ID ring with connections to China, obtaining information on criminal Gypsy gangs and assisting with the recovery of stolen firearms.

Schenkelberg claimed that the center does not access private messages or web pages, and collects online information that is available to anyone searching the Internet. He also said the fusion center answers to a governing board of city, county, state and federal officials.

The center revamped its counter-terrorism mission two years ago after criticism from law enforcement officials. "Is it hitting the core of what the mission is, as far as terrorism prevention? I don't think yet it's doing that," Cuyahoga County Sheriff Bob Reid said at the time.

Since 2010, fusion centers have been required by the Department of Homeland Security to follow federal privacy and civil rights policies, though there is little way

to verify such compliance. Further, the centers reportedly partner with the military and with private-sector companies to collect information.

The question remains as to whether the increased surveillance provided by fusion centers results in increased safety, and if so, whether that is accomplished at the expense of further erosion of people's privacy and civil rights.

As noted by the ACLU, "The lack of proper legal limits on the new fusion centers not only threatens to undermine fundamental American values, but also threatens to turn them into wasteful and misdirected bureaucracies that, like our federal security agencies before 9/11, won't succeed in their ultimate mission of stopping terrorism and other crime." ■

Sources: *Cleveland Plain Dealer*, [www.dhs.gov](http://www.dhs.gov), [www.neorfc.us](http://www.neorfc.us), [www.wkyc.com](http://www.wkyc.com), [www.aclu.org](http://www.aclu.org)

## Kentucky Supreme Court Adopts Mailbox Rule Retrospectively

The Supreme Court of Kentucky, in a modified ruling, adopted the "mailbox rule," allowing notices of appeal in criminal cases to be considered filed when they are placed in the prison's internal mail system.

Joe B. Jones and Michael Allen Hallum, Kentucky state prisoners, each filed a motion for post-conviction relief pursuant to RCr 11.42. Both motions were denied and Jones and Hallum separately filed notices of appeal and motions to proceed *in forma pauperis*. The Court of Appeals dismissed the motions because they and the notices of appeal arrived at the court and were filed more than 30 days after entry of the judgment being appealed, in contravention of RCr 12.04(3).

Both men had placed their pleadings in the prison's internal mail system several days before the 30-day period had expired, but they were not received and filed by the Court of Appeals until after the expiration date had passed. Jones and Hallum appealed to the Kentucky Supreme Court, which consolidated the cases.

While the cases were pending on appeal, the Supreme Court changed RCr 12.04(5) to read, "If an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal

mail system on or before the last day for filing with sufficient First Class postage prepaid."

Although the rule change would normally apply only prospectively, the Kentucky Supreme Court held that it should apply retrospectively to cases still pending when the rule was modified. Therefore, the decisions of the Court of Appeals were reversed and the cases returned to the trial courts for further proceedings consistent with the opinion. Jones and Hallum were represented by Frankfort Assistant Public Advocate Brandon Neil Jewell. See: *Hallum v. Commonwealth*, 347 S.W.3d 55 (Ky. 2011). ■



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# Termination from Drug Treatment Program Fails to State Liberty Interest Claim

The Eighth Circuit Court of Appeals has held that the decision of prison officials to remove a prisoner from a drug treatment program, which made him ineligible for a probated sentence, was insufficient to confer a liberty interest for due process purposes.

Missouri state prisoner Michael Louis Persechini brought a 42 U.S.C. § 1983 action against five officials at the Ozark Correctional Center (OCC), alleging they had violated his federal due process rights by terminating him from a long-term substance abuse treatment program. He sought damages and re-entry into the program. The district court dismissed his suit for failure to state a claim upon which relief could be granted.

After being convicted of second-degree burglary, Persechini was sentenced to fifteen years in prison. Following applicable state law, the court obtained permission from the Missouri Department of Corrections to sentence him as a chronic nonviolent offender with a serious drug addiction to OCC's long-term substance abuse treatment program. Successful completion of the program would make Persechini eligible for probation.

Persechini, however, was subsequently charged with violating a "cardinal rule" of the program. He was found guilty of theft and disobeying an order by taking a new towel from the property room. It was recommended, and approved by prison officials, that he be restricted to his living area for ten days and referred to the Program Review Committee. The Committee terminated Persechini from the substance abuse program, which resulted in his transfer to another facility to serve his 15-year sentence.

On appeal, the Eighth Circuit focused first on the disciplinary hearing. It held that "Persechini does not claim, and could not plausibly claim," that the sanctions of room confinement for ten days and referral to the Committee were hardships that were either atypical or significant. As such, there was "no protected liberty interest in the outcome of this routine disciplinary proceeding."

Turning to the more serious consequences that resulted from the separate action taken by the Program Review Committee, the appellate court noted that the Committee could have imposed "no fewer

than eight alternative recommendations," and that its decision to remove Persechini from the program was "not a mere ministerial action." Nonetheless, the Court of Appeals disagreed that the Committee's decision to impose the most severe sanction – termination from the program – created a plausible liberty interest that caused an atypical and significant hardship, as required under *Sandin v. Conner*, 515 U.S. 472 (1995).

The Eighth Circuit cited precedents that had established there is no protected liberty interest in a sentence reduction that may be granted for completing a substance abuse treatment program, in half-way house placement after completing a drug treatment program, in remaining in a work release program, in participating in drug treatment to qualify for early release, in remaining in a "shock incarceration program," or in participating in a sex offender treatment program.

A state statute mandated that Persechini was ineligible for probation upon his termination from the substance abuse program, thus the appellate court found he did not have a protected liberty interest in the discretionary probated sentence he

could have received had he successfully completed the program.

The Eighth Circuit did "acknowledge that the Supreme Court might conclude it is enough to confer a liberty interest in the Program Review Committee's decision to recommend termination from the program, rather than imposition of a sanction with less dire potential consequences on Persechini's term of incarceration."

However, "Persechini's failure to successfully complete the treatment program and, more importantly, the ensuing execution of his fifteen-year sentence were nonetheless consequences 'within the sentence [initially] imposed,'" the Court of Appeals found. "Thus, like a Bureau of Prisons decision to deny a sentence reduction after an inmate successfully completes its drug treatment program, we conclude that program termination did not confer a liberty interest because it 'mean[t] only that [Persechini] will serve the remainder of his original sentence under typical circumstances.'"

Accordingly, the district court's order dismissing Persechini's suit was affirmed. See: *Persechini v. Callaway*, 651 F.3d 802 (8<sup>th</sup> Cir. 2011), rehearing denied. ■

## California: ADA Protections Again Extended to Disabled State Prisoners Held in County Jails

On January 13, 2012, sixteen months following remand from the Ninth Circuit in the case of *Armstrong v. Schwarzenegger*, U.S. District Court Judge Claudia Wilken issued an order that again extended the protections of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, to disabled state prisoners housed in county jails.

The order requires California officials with responsibility over the state's corrections and parole systems to track and accommodate the needs of disabled state prisoners and parolees (referred to as *Armstrong* class members) who, for various reasons, are held in county jails, and to ensure that those class members have access to a workable grievance procedure. Similar protections had previously been ordered, and largely been in effect, since 1996 with respect to disabled prisoners

housed in state prisons (including segregation units and reception centers). See: *Armstrong v. Wilson*, 124 F.3d 1019 (9<sup>th</sup> Cir. 1997) [*PLN*, Sept. 1998, p.13].

On any given day, California houses a significant number of state prisoners and parolees facing revocation hearings in county jails – a number that is increasing due to the state's recent "realignment" initiative in response to the U.S. Supreme Court's ruling in *Brown v. Plata*. [See: *PLN*, July 2011, p.1].

In 2009, this included daily averages of 480 prisoners or parolees in the San Mateo County Jail, 1,000 prisoners or parolees in the Sacramento County Jail and 770 individuals in In-Custody Drug Treatment Program placements in jails throughout the state. Approximately 7 percent of this population is deemed to have mobility, sight, hearing and kidney

disabilities covered by *Armstrong*.

In September 2009, the district court held there was sufficient evidence to find that *Armstrong* class members housed in county jails were not receiving the ADA accommodations to which they were entitled, and ordered system-wide relief. See: *Armstrong v. Schwarzenegger*, 261 F.R.D. 173 (N.D. Cal. 2009).

The state appealed the order, and the Ninth Circuit affirmed in part and vacated in part, remanding the case for further proceedings. Specifically, the Ninth Circuit affirmed the district court's finding that the state has the legal responsibility to ensure ADA-compliant conditions for *Armstrong* class members housed in county jails. The Court of Appeals found the record in the case insufficient, however, to justify the system-wide relief ordered by the district court. Finding that "not much more evidence" was needed, the case was remanded for the taking of "such additional evidence as may be necessary." See: *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010) [*PLN*, Nov. 2011, p.28].

On remand, the state no longer disputed that California state prisoners and parolees with mobility, sight, learning and developmental disabilities were not being provided proper ADA accommodations while housed at county jails, that they did not have access to a proper grievance system or that they were suffering as a result. Instead, they primarily argued that, under recent state legislation authorizing the realignment initiative, state parolees, when held in county jails, should no longer be considered members of the *Armstrong* class. The district court rejected this argument, finding that while parolees may be in the simultaneous custody and control of the county and state, they "do not cease being state parolees while they are also county jail inmates." Thus, as before realignment, the state remains obligated to ensure ADA-compliant conditions for the prisoners and parolees they choose to house in county jails.

While its task was simplified by the state's failure to dispute what the district court characterized as "overwhelming and disturbing evidence" that *Armstrong* class members in jails throughout the state were being injured and denied access to programs and services due to failures to accommodate their needs, the court complied with the Ninth Circuit's instructions on remand by making additional findings before re-imposing system-wide relief.

On April 11, 2012, the district court ruled on the state's motion to correct or modify its January 13 order. The court made minor modifications to its previous order but no substantive changes. The district court also denied the state's request to stay its prior order pending another appeal, stating, "Defendants have not demonstrated a likelihood of success in overturning this Court's order finding that system-wide relief is necessary." See: *Armstrong v. Brown*, U.S.D.C. (N.D. Cal.), Case No. C 94-2307 CW; 2012 WL 1222928 (modified order). ■

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# State Awarded Statutory Attorney Fees, Costs for Dismissed Washington PRPs

by Mark Wilson

The Washington State Court of Appeals has held that the state is entitled to statutory attorney fees following the dismissal of a personal restraint petition (PRP).

After pleading guilty to witness tampering and burglary, Gregory Scott Bailey filed a PRP challenging the voluntariness of his plea. The petition was dismissed on October 7, 2010 and five days later the state filed a cost bill, seeking statutory attorney fees of \$200 plus \$206 for preparation of the 103-page response brief – at \$2.00 per page – for a total of \$406. On November 1, 2010, Bailey objected to the cost bill.

The Court of Appeals refused to dismiss Bailey's objection as untimely. Any purported untimeliness was waived because "the State's entitlement to statutory attorney fees in the costs for dismissed PRPs is an issue of first impression," and given "the number of PRPs the court considers each year, a decision on the merits would serve the ends of justice."

Washington law establishes the statutory attorney fee as \$200 for judgments entered by the Court of Appeals. Bailey argued, however, that RCW 10.73.160(2) prohibits such fees because attorney fees are "expenditures to maintain and operate government agencies."

The appellate court agreed that "RCW 10.73.160(2) should ... be understood to disallow inclusion of prosecuting attorney salaries in the costs imposed on an unsuccessful personal restraint petitioner. Such costs are public expenditures made irrespective of specific violations of the law."

The Court of Appeals determined, however, that "statutory attorney fees do not represent prosecuting attorney salaries that are paid irrespective of a particular case and are not intended to recoup 'expenditures to maintain and operate government agencies.'" Therefore, such fees are not prohibited by RCW 10.73.160(2), and the appellate court concluded that "the State is entitled to statutory attorney fees in its award of costs under RAP 14.3(a)."

The Court of Appeals also rejected Bailey's argument that \$2.00 per page was excessive, finding that "under RAP

14.3(b), the amount awarded per page is fixed by the Supreme Court" at \$2.00 per page. See: *In the Matter of the Amount Per Page for Original Documents*, No. 25700-B-367 (Wash. June 16, 1999).

The appellate court further rejected Bailey's argument that the state's 103-page response brief was unreasonably

lengthy. The court found that "the State's response was not excessively long. RAP 10.4(b). The State is entitled to costs of \$2.00 per page for 103 pages," plus the \$200 statutory attorney fee. See: *In re PRP of Gregory Scott Bailey*, 162 Wash. App. 215, 252 P.3d 924 (Wash.App. Div.3 2011). ■

## Fifth Circuit Rules on Prisoner's ADA Claim; Issues Superseding Opinion

On October 14, 2010, the Fifth Circuit Court of Appeals found that Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, does not abrogate a state's sovereign immunity when the misconduct complained of does not violate the Fourteenth Amendment. In a May 2011 superseding opinion following rehearing, however, the appellate court did not reach that question, instead finding the plaintiff had failed to adequately plead an ADA claim.

John Hale, a Mississippi state prisoner, filed a pro se federal civil rights action against prison officials under the ADA, 42 U.S.C. §§ 12131-12165, alleging that he was prevented from using community work centers, accessing satellite and regional prison facilities, working in the kitchen or attending school because he suffered from Hepatitis C, post-traumatic stress disorder, chronic depression, intermittent explosive disorder and antisocial personality disorder. The district court dismissed his lawsuit pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) after finding the defendants were entitled to state sovereign immunity. Hale appealed.

The Fifth Circuit appointed counsel to brief the issue of "whether Title II of the ADA validly abrogates Eleventh Amendment sovereign immunity for claims that violate Title II but are not actual violations of the Fourteenth Amendment." The Court of Appeals held that Congress has the right to abrogate state sovereign immunity, but only if it acts "pursuant to a valid grant of constitutional authority." The ADA "validly abrogates sovereign immunity insofar as it 'creates a private cause of action for damages against the States for conduct that *actually* violates

the Fourteenth Amendment.'" In this case, the parties agreed that "none of the defendants' alleged misconduct violates the Fourteenth Amendment."

The Fifth Circuit noted that the origin of Congress's power to abrogate state sovereign immunity in the ADA was § 5 of the Fourteenth Amendment. However, "Congress's § 5 powers do not extend to creating causes of action for ADA violations that are not 'congruent and proportional' to violations of the Fourteenth Amendment." Although legislation "which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional," its power under § 5 "is not unlimited."

Hale's claim implicated Title II's intent of enforcing the prohibition on irrational disability discrimination in the Fourteenth Amendment's Equal Protection Clause. "Under that clause, disabled individuals are not a suspect or quasi-suspect classification commanding heightened review of laws discriminating against them." Therefore, such discrimination is constitutionally permissible if "there is a rational relationship between the disparity of treatment and some legitimate government purpose."

In Hale's case there were rational relationships with legitimate purposes, such as protecting the health of a disabled prisoner, avoiding an "undue burden" or preventing a fundamental alteration in a program. Therefore, the exercise of Congress's authority in this case was not congruent and proportional, and state sovereignty was not abrogated by Title II for this type of claim. The judgment of



the district court was affirmed. See: *Hale v. King*, 624 F.3d 178 (5th Cir. 2010).

The U.S. government moved for rehearing as an intervenor, which was granted by the Court of Appeals. On May 26, 2011 the Fifth Circuit issued a superseding opinion that took a different approach to the case, and withdrew its prior decision.

The appellate court first addressed whether Hale had sufficiently pleaded an ADA claim, and held he had not. While Hale may have had an "impairment," that did not necessarily mean he had a disability as that term is defined by the ADA. "It is well established that '[m]erely having an impairment ... does not make one disabled for purposes of the ADA,'" the Court of Appeals wrote. "Hale failed to allege facts from which we can reasonably infer that Hale's medical conditions substantially limited a major life activity."

As Hale had failed to state a violation of Title II of the ADA, the Fifth Circuit vacated "the portions of the district court's decision below that address whether Hale's allegations established violations of the Fourteenth Amendment and whether Title II validly abrogates state sovereign immunity...."

Accordingly, the Court of Appeals reversed the district court and remanded the case to allow Hale an opportunity to

amend his complaint to adequately plead an ADA claim. See: *Hale v. King*, 642 F.3d 492 (5th Cir. 2011). ■

## Fourth Circuit: Where Offer of Judgment is Silent as to Costs, Prevailing Party Entitled to Recover Attorney's Fees

The Fourth Circuit Court of Appeals has held that "in an action brought under 42 U.S.C. § 1983, an offer of judgment pursuant to Fed.R.Civ.P. 68(a) which makes no mention of costs or attorney's fees cannot be interpreted, after the fact, to have included those costs and fees. Rather, in such a case, the prevailing party is entitled to recover costs and fees pursuant to 42 U.S.C. § 1988."

Brenda Bosley filed suit against law enforcement officials of Mineral County, West Virginia after her estranged husband, Dr. James Bosley, killed himself while the officials, alerted by a complaint from Mrs. Bosley attesting to her husband's instability, were attempting to take him into custody for a psychiatric examination.

After removing the case to federal court, the defendants served on Brenda

Bosley an offer of judgment pursuant to Fed.R.Civ.P. 68(a) for \$30,000 "as full and complete satisfaction of [Bosley's] claim against ... Defendants." After accepting the offer, Bosley moved for attorney's fees; the officials opposed the motion on the ground that their \$30,000 offer was inclusive of attorney's fees and costs.

The district court determined that the settled judicial interpretations of Rule 68 required it to award costs and attorney's fees – over and above the \$30,000 offer of judgment – to Bosley, who was the prevailing party.

The Fourth Circuit affirmed the district court, finding no merit to any of the defendants' arguments to the contrary. See: *Bosley v. Mineral County Commission*, 650 F.3d 408 (4th Cir. 2011). ■

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# Ninth Circuit Grants Qualified Immunity to California Prison Officials for Denial of Outdoor Exercise During Lengthy Lockdown

On March 17, 2011, the Ninth Circuit Court of Appeals granted qualified immunity to California prison officials who had denied a prisoner outdoor exercise during a 15-month lockdown precipitated by a “particularly violent armed riot ... against staff.”

Steve Joseph Noble IV was incarcerated in Facility “C” at the Substance Abuse Treatment Center at Corcoran State Prison. A former Crip gang member, he was classified as Level IV, the highest security level.

On January 9, 2002, Corcoran staff members were attacked by Crips and other prisoners on the Facility “C” exercise yard. The riot, which included an attempt to kill a prison guard, left more than 20 other officers with injuries. The incident led to a formal declaration of a state of emergency and the imposition of another in a long series of lockdowns at Corcoran.

During that lockdown, prison officials conducted an investigation into the immediate causes of the riot. The investigation ended on January 30, 2002 but was not conclusive. Over the following months, prison officials gradually restored privileges, including visitation in April, modified day room access in June, full day room access in July and, finally, limited outdoor exercise on August 1, 2002. The next day, however, another riot occurred – this time involving Hispanic prisoners. Another lockdown ensued and full exercise privileges were not restored until April 1, 2003.

Noble, who undisputedly was not involved in the January 2002 riot, filed suit pursuant to 42 U.S.C § 1983, alleging violations of his Eighth Amendment right to outdoor exercise from January 9, 2002 to April 1, 2003, during the lockdowns.

The district court granted qualified immunity to prison officials for the second lockdown period commencing August 1, 2002, but denied it – “counterintuitively,” in the view of the Ninth Circuit – for the period in the immediate aftermath of the riot, faulting the officials for not justifying with “specific facts” the extension of lockdown restrictions following completion of their investigation on January 30, 2002.

The Ninth Circuit reversed and remanded the district court’s order, with

instructions to enter judgment on behalf of the prison officials. Relying principally on *Norwood v. Vance*, 591 F.3d 1062 (9<sup>th</sup> Cir. 2010), the appellate court held that a prisoner’s right to outdoor exercise during a lockdown imposed in the aftermath of a prison riot was not clearly established in 2002.

“[I]t would not have been clear to a reasonable officer that his or her conduct vis à vis the declaration of an emergency, the lockdown, or the curtailment of use of the exercise yard was unlawful in the

situation he or she confronted,” the Ninth Circuit wrote. “If anything, the record demonstrates that the officials were continuously, prudently, and successfully looking out for the safety, security, and welfare of *all* involved, staff and prisoners alike.” See: *Noble v. Adams*, 636 F.3d 525 (9<sup>th</sup> Cir. 2011).

The Court of Appeals entered an amended, superseding opinion on August 2, 2011, which did not change the outcome of the ruling. See: *Noble v. Adams*, 646 F.3d 1138 (9<sup>th</sup> Cir. 2011), *cert. denied*. ■

## Tenth Circuit Affirms Denial of Qualified Immunity to Oklahoma Jail Official Who Failed to Follow Prescribed Medical Instructions

On October 14, 2011 the Tenth Circuit Court of Appeals affirmed a district court’s denial of summary judgment, on the ground of qualified immunity, to Payne County, Oklahoma jail administrator Brandon Myers. The appellate court held that a reasonable jury could find that Myers was deliberately indifferent to pretrial detainee John David Palmer’s serious need for medical treatment, in violation of the Due Process Clause of the Fourteenth Amendment. *PLN* readers should note that deliberate indifference claims for pretrial detainees are brought under the Fourteenth Amendment while similar claims involving convicted prisoners are brought under the Eighth Amendment.

In August 2007, while being held pending trial at the Payne County Jail, Palmer suffered from a serious infection commonly known as MRSA. He was transported to an outside doctor, who administered an injection of an antibiotic. The doctor instructed Palmer to return for a follow-up visit in two days, but warned that if he developed a fever or reported increased pain, he should be taken to a hospital immediately. It was undisputed that this information was conveyed to Myers.

Upon his return to the jail, Palmer’s level of pain increased to the point that he was vomiting and crying. He reported this to Myers, along with the outside doctor’s instructions, and requested that he be taken to an emergency room. According

to Palmer, Myers told him to “shut the fuck up or go back to the main jail where you got the disease.”

Palmer was eventually transported to the emergency room, but only after a delay of about a day. He underwent surgery for the MRSA infection and claimed to suffer both nerve damage and scarring. Additionally, he reported incurring over \$24,000 in medical costs.

The Tenth Circuit had little trouble dispensing with Myers’ arguments on appeal that he did not know or appreciate the seriousness of Palmer’s condition and, in particular, did not know that Palmer was suffering from MRSA. As the Court of Appeals put it, “such lay ignorance of medical matters is precisely the reason for the rule ... that noncompliance with the treatment prescribed by medical professionals is one form of deliberate indifference.”

Moreover, the appellate court noted, there was no support for Myers’ argument that a jail official could ignore a prisoner’s complaints of pain merely because those complaints were subjective. See: *Palmer v. Board of Commissioners for Payne County, Oklahoma*, 441 Fed.Appx. 582 (10<sup>th</sup> Cir. 2011) (unpublished). ■

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# First Circuit Holds that Delay in Treating HIV May Constitute Deliberate Indifference

The First Circuit Court of Appeals reversed the grant of summary judgment to a physician assistant at the York County Jail (YJC) in Maine, concluding that a material dispute existed as to whether the physician assistant acted with deliberate indifference to the serious medical needs of an HIV-positive detainee.

In April 2008, Raymond D. Leavitt, a Maine state prisoner, filed suit pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act (ADA), seeking injunctive relief and monetary damages against various correctional officials and healthcare providers. He alleged that he was denied HIV treatment for the entirety of his 167-day stay at YJC and for the first 17 months of his incarceration at the Maine State Prison (MSP), where medical care was provided by Correctional Medical Services (CMS).

Leavitt, who had been taking HIV medications before he was incarcerated, claimed that the delay in reinitiating his antiretroviral therapy for HIV resulted in short- and long-term negative conse-

quences to his health.

Initially proceeding pro se, Leavitt eventually obtained the services of an attorney. In March 2010, the district court granted summary judgment in favor of the defendants, finding insufficient evidence that they had acted with deliberate indifference to Leavitt's serious medical needs.

On appeal, Leavitt dropped his ADA claim. With respect to the 17-month delay in reinitiating Leavitt's antiretroviral therapy at MSP, the Court of Appeals noted an acknowledgement by MSP's healthcare providers that "the care [Leavitt] received ultimately fell short of the mark," and the Court therefore urged "[t]hose responsible for the operation of the Maine correctional healthcare system ... [to] focus on the troubling implications of that acknowledgment."

The First Circuit concluded, however, that because the medical department at MSP operates on a clinic model where no particular healthcare provider is charged with following any particular patient, Leavitt could not carry his burden of dem-

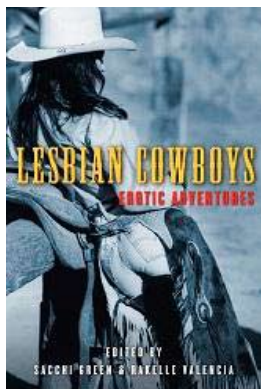
onstrating that any individual provider was sufficiently aware of his circumstances to actually draw the inference that he faced a substantial risk of serious harm. Thus, the grant of summary judgment to the MSP and CMS defendants was affirmed.

By contrast, with respect to Leavitt's treatment at YJC, the First Circuit observed that physician assistant Alfred Cichon was the president of ARCH, the corporation that provided healthcare services at the jail, and that, as its largest shareholder, a jury could infer that Cichon had a financial incentive to keep treatment costs low. Such an incentive could explain Cichon's "unfortunate" overlooking of a medical report that would have alerted him to the need to "precipitously" refer Leavitt to an infectious disease specialist.

The Court of Appeals therefore reversed the grant of summary judgment in favor of Cichon, and remanded the case for further proceedings. See: *Leavitt v. Correctional Medical Services, Inc.*, 645 F.3d 484 (1st Cir. 2011).



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## New York Court of Appeals Holds Sex Offense Does Not Prove Parental Neglect

The New York Court of Appeals, the state's highest court, has held that the fact that a defendant was convicted of a sex offense against a minor, was a level-three registered sex offender and had not received any sex offender treatment was insufficient to prove that he or the mother who allowed him to continue living with her and his minor children were guilty of parental neglect.

In this case brought against an anonymous defendant, a New York father had pleaded guilty to charges related to his having sex with a prostitute under the age of 15. He was released on time served and not required to participate in sex offender treatment. The state Sex Offender Registration Act (SORA) required him to register as an untreated level-three sex offender. He returned home to live with his wife and five children, who were between the ages of four and fourteen.

The Dutchess County Department of Social Services (DSS) filed neglect petitions against both the father and mother pursuant to Article 10 of the Family Court Act. The DSS's theory was that, because the father was an "untreated" sex offender whose crimes involved minors, he was a danger to his children and the mother had "failed to protect the children" from their father by allowing him to live with them.

At a fact-finding hearing, the DSS caseworker testified that he filed the petition based upon the father's SORA registration, without any specific knowledge about the crimes or any evidence that the father had been sexually inappropriate with his own children. The father testified that he had pleaded guilty to the prostitution charge based on the advice of his attorney and alleged that he had sex with the prostitute only after she was 18, but exercised his Fifth Amendment rights when asked whether he had ever had sex with minors. The Family Court drew a negative inference from the father's denial of the crimes and his failure to testify, concluding that both parents had neglected their children. The parents then appealed.

The Appellate Division reversed the Family Court, denied the neglect petitions and dismissed the proceedings, holding that "the mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the children." It also

held that "the evidence was insufficient to establish that the father posed an imminent danger to the children." The DSS appealed.

The Court of Appeals upheld the decision of the Appellate Division, rejecting "any presumption that an untreated sex offender residing with his or her children is a neglectful parent," even when the sex offender's victim was a minor. The DSS

had failed to prove that there was an actual danger to the children caused by a parent's failure to exercise a minimum degree of parental care. Since the father had not been shown to pose an actual danger to his children, the neglect petition against the mother for allowing the father to live with his children also failed. See: *In the Matter of Afton C.*, 17 N.Y.3d 1, 950 N.E.2d 101 (N.Y. 2011). ■

## New Jersey Appellate Court Holds Attorneys for Female Prisoners Temporarily Transferred to All-Male Facility May be Entitled to Fees

The Appellate Division of the Superior Court of New Jersey has held that the attorneys who represented a class of female prisoners temporarily transferred to the all-male New Jersey State Prison (NJSP) may qualify for an award of attorney's fees.

The answer will hinge on whether the prisoners are ultimately deemed to be "prevailing parties" in the litigation despite the fact that there was no trial court ruling on the merits of their claims. Instead, the underlying action was dismissed as moot after the female prisoners were transferred back to the Edna Mahan Correctional Facility (EMCF), from which they had been sent to NJSP.

The trial court had denied the prisoners' motion for attorney's fees on the ground that, in its view, there was no factual nexus between their lawsuit and the decision by prison officials to return the women to EMCF. In the court's words, the latter was simply "an operational decision made independent of this suit."

The Appellate Division reversed the denial of the prisoners' motion for attorney's fees and remanded for reconsideration in light of legal principles articulated by the New Jersey Supreme Court in *Mason v. City of Hoboken*, 951 A.2d 1017 (N.J. 2008).

Between March and September 2007, in an effort to alleviate overcrowding at EMCF (the state's sole women's facility), the New Jersey Department of Corrections (DOC) transferred approximately 40 female prisoners to NJSP, a maximum-security men's prison. In December 2007, four of those prisoners filed suit alleging

illegal confinement, discrimination, cruel and unusual punishment, and unconscionable violations of their privacy rights in association with their transfer to NJSP.

Over the objections of the defendant prison officials, the trial court certified the case as a class-action and granted preliminary injunctive relief, ordering the DOC not to send any other women to NJSP. Then, in December 2008, the DOC transferred all of the female prisoners at NJSP back to EMCF. It did so, it claimed, due to a determination that the population at EMCF had dropped sufficiently to allow their return. [See: *PLN*, Jan. 1, 2009, p.46].

The Appellate Division held that the trial court had misapplied the standards in *Mason*. Under the so-called catalyst theory adopted in *Mason*, a plaintiff can be awarded attorney's fees even without a final judgment on the merits, so long as 1) there is a factual causal nexus between the litigation and the relief ultimately achieved, and 2) the relief ultimately secured has a "basis in law."

The Appellate Division found that the "basis in law" prong had been satisfied because the prisoners' litigation was neither frivolous nor harassing. As to the "causal nexus" prong, the trial court erred, the Appellate Division held, in simply accepting the defendant prison officials' self-serving representations that the transfer of the women to NJSP had been intended, from the very outset, to be only "temporary." Rather, this "fact sensitive determination" required an evidentiary hearing for proper resolution of the prisoners' motion for attorney fees.

Further, even if the trial court finds no “causal nexus” that would result in a grant of fees under the catalyst theory, it

“shall then determine whether plaintiffs are otherwise entitled to a partial award of attorneys’ fees for successfully securing

preliminary injunctive relief.” See: *Jones v. Hayman*, 418 N.J.Super. 291, 13 A.3d 416 (N.J.Super.A.D. 2011). ■

## Single Incident of Deliberate Indifference Insufficient to Establish Policy or Custom

The Eleventh Circuit Court of Appeals has affirmed a district court’s grant of summary judgment on the grounds that the plaintiff’s evidence, which indicated a single case of a constitutional violation, did not prove a private medical provider had a policy, practice or custom of deliberate indifference.

The appellate ruling was entered in a civil rights action that alleged an Eighth Amendment violation for deliberate indifference to the serious medical needs of Henry Craig, who was approached by a police officer in Rome, Georgia on July 4, 2006. Craig had consumed methamphetamine hours earlier, was acting erratically and told the officer to shoot him.

Two other police officers arrived and one used a Taser on Craig. When he fell, a puddle of blood formed on the ground beside his head. He was transported to a hospital and examined. A doctor cleared him to be taken to the Floyd County Jail (FCJ), where he was placed under the care of the jail’s medical provider, Georgia Correctional Health, LLC.

The next day, nurse practitioner Susan Hatfield determined that the dried blood around Craig’s right ear was from a ruptured eardrum. He was coherent and expressed no other complaints about his health. Over the following nine days, Craig received sixteen evaluations by nine different Georgia Correctional Health employees, including nurses, nurse practitioners, a psychologist and a physician.

During some of those evaluations Craig did not complain about his medical condition, but during others he complained about not eating for five days, having urinated only once while in jail, and experiencing severe headaches, neck pain and a lack of hearing in his right ear. He received “acetaminophen, ibuprofen, other pain relievers and muscle relaxants” for the headaches.

Hatfield ordered a tomography scan of Craig’s head on July 13, 2006, which indicated he had air and bleeding in his skull along with several fractures. He was taken to a hospital where he received neurological surgery.

Craig filed a federal civil rights

complaint that alleged three “persistent and widespread practices” to support his deliberate indifference to serious medical needs claim against Georgia Correctional Health. He argued the company had a practice of not referring detainees to physicians, of erroneously relying on hospital clearance forms rather than doing its own diagnostic tests, and of using the least costly means to treat detainees. The district court granted summary judgment to the defendants and Craig appealed.

The Eleventh Circuit held that even if it assumed the practices cited by Craig represented constitutional violations, the evidence he had presented was insufficient to prove a widespread policy or custom by Georgia Correctional Health (the applicable legal standard under *Monell v. Dep’t. of Social Services*, 436 U.S. 658 (1978)). Craig had only addressed issues related to his own medical care and presented

the testimony of Dr. Jimmy Graham, who stated he did not have any knowledge of the FCJ or Georgia Correctional Health. His testimony relied solely on his experiences with other jails.

Since a single incident of an alleged constitutional violation was insufficient to prove a custom, policy or practice, the district court’s grant of summary judgment to the defendants was affirmed. See: *Craig v. Floyd County, Georgia*, 643 F.3d 1306 (11<sup>th</sup> Cir. 2011). ■

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# Texas Teenager Killed at Private Juvenile Detention Center

by Matt Clarke

On October 10, 2011, 14-year-old Jordan Adams was found unconscious on the floor of his isolation cell at the Granbury Regional Juvenile Justice Center (GRJJC) in Granbury, Texas. A sheet was wrapped around his neck. He died six days later at the Cook Children's Medical Center in Fort Worth without regaining consciousness, after being removed from life support. The cause of his death was manual strangulation.

The GRJJC is a 96-bed facility that houses juvenile offenders from various Texas counties; it is operated by 4M Granbury Youth Services, a for-profit company. Jordan's death at GRJJC was the first of a juvenile prisoner in Texas since 2003, according to Lisa Capers, deputy executive director and general counsel of the Texas Juvenile Probation Commission (TJPC). The TJPC and local police launched investigations.

"The sheet was around his neck," noted Granbury Police Captain Alan Hines. "We are investigating to determine whether this was an accident or there needs to be criminal charges for homicide."

The mystery is how someone could kill a child held in a locked isolation cell. Tanya Hernandez, 37, Jordan's mother, struggled with that question. "We've heard several different stories," she said. "I don't know what to believe at this point."

According to Hernandez, a "juvenile director" told her that Jordan had been engaging in the "choking game," a dangerous attempt to get high through oxygen deprivation.

"I'd never, ever heard of kids doing that, but now I hear that all over the United States, kids have been doing this," said Hernandez, who believes that Jordan's fragile mental condition might have made him susceptible to participating in the choking game.

"I'm just speculating, but I believe someone had talked him into doing that and Jordan had no idea of the consequences," she said. "The doctor told us all the ligaments and his main artery in his neck were so damaged that we don't really know if it was actually a game or if the [other] boy actually [purposely] did it. Everything on his neck was torn except his spinal cord. He must have pulled so hard."

But asphyxiation to get high is not the only explanation GRJJC officials have provided for Jordan's death. The first reason given to Hernandez, the press and

the TJPC was that Jordan was involved in a game of tug-of-war with another juvenile in a neighboring cell. According to that version of events, prisoners who grow bored with being locked in isolation cells combat the boredom by passing a sheet under their door and the door of a neighboring cell, then playing tug-of-war with the sheet. Under this theory, Jordan played tug-of-war with another prisoner but, for some inexplicable reason, wrapped the sheet around his neck so that his neighbor inadvertently choked him to death.

GRJJC facility administrator Ted Cooley stated he had never heard of prisoners playing tug-of-war and that such behavior would be strictly prohibited. He said structural changes were being discussed that would prevent similar incidents from occurring in the future.

Not only should such games be prohibited, they also should be known to GRJJC staff. Sheets passed between two neighboring cell doors would have to pass along the hallway, and guards are supposed to walk through the hallways when periodically checking the isolation cells. However, TJPC records indicate that GRJJC has a history of failing to comply with routine cell monitoring requirements.

A May 2011 compliance audit at GRJJC reported a failure to make the mandatory once-every-fifteen-minute cell checks in four of the 10 medical isolation cases reviewed. A failure to make required ten-minute checks of four juveniles who were determined to be moderate suicide risks also was noted. The state compliance officers further found that GRJJC logs indicated violations of routine cell checks.

Similar findings had been noted in a 2008 state inspection, when around half of the required cell checks were not performed. Additionally, a state inspection in 2009 reported "numerous unsanitary and unhealthy living conditions" at GRJJC.

Slacking by GRJJC staff may extend beyond cell checks and hygiene issues. In June 2011, the facility was cited for failing to promptly report a detainee's allegation of staff sexual abuse. Further, almost 200 complaints and serious incidents have been reported at GRJJC from late 2007 through October 2011, including assaults, physical abuse and suicide attempts.

Jordan had been diagnosed with

attention-deficit, hyperactivity and mood disorders. He had spent 10 days at the GRJJC earlier in 2011 after pulling a knife during a fight with his 17-year-old brother.

"They told him if he didn't get into any trouble for six months, they would drop the charge," said Hernandez. "It was kind of brothers being brothers that got out of hand."

But Jordan didn't make it through six months without getting into trouble. He was returned to the GRJJC after hitting another boy on a school bus – an incident that was captured on video tape.

Hernandez tried to get professional help for her son. He had been a mental health patient for six years and she had convinced GRJJC officials to transfer him to a mental health facility. The transfer was scheduled for October 13, 2011 – three days after Jordan was found unconscious in his cell.

This tragic incident underscores how inappropriate it is for private companies to manage detention facilities. For-profit corporations are primarily concerned about profit, not about the wellbeing of the prisoners under their custody and control. One way to increase profits is to cut personnel, which reduces payroll costs. When staffing levels decline, however, routine tasks such as cell checks are delayed or ignored – sometimes with fatal results.

"The only way they can make a profit is to decrease the salary or staff or reduce services," noted Ana Correa, director of the Texas Criminal Justice Coalition.

In January 2012, an unidentified 14-year-old juvenile at GRJJC pleaded guilty to the equivalent of criminally negligent homicide in connection with Jordan's death. No details were reported as to the nature of the charge or how Jordan had died.

Jordan's father, Kenneth Grant, who was incarcerated in a Texas state prison unit at the time of his son's death, has since filed a federal lawsuit against GRJJC, 4M Granbury Youth Services and other defendants. The case remains pending. See: *Grant v. Granbury Regional Juvenile Justice Center*, U.S.D.C. (N.D. Tex.), Case No. 4:12-cv-00357-A. ■

Sources: *Fort Worth Star-Telegram*, [www.ktxs.com](http://www.ktxs.com), *Reuters*



## Ninth Circuit Holds BOP Individual RDAP Determinations Not Subject to Judicial Review

Individualized decisions related to the Federal Bureau of Prisons' (BOP) Residential Drug Abuse Program (RDAP) are not subject to judicial review under the Administrative Procedure Act (APA), the U.S. Court of Appeals for the Ninth Circuit has held.

Philip T. Reeb sought habeas relief after he was expelled from the RDAP at FCI Sheridan in Oregon in 2008 for "exhibiting disruptive behavior in group counseling sessions on several occasions." In response to Reeb's petition, the government argued that the district court lacked jurisdiction to hear his claims because 18 U.S.C. § 3625 bars judicial review under the APA of "any determination, decision, or order under 18 U.S.C. §§ 3621-3625."

The district court disagreed that it lacked jurisdiction, but nonetheless found no error in the BOP's decision to remove Reeb from the RDAP. Reeb appealed and the government reasserted its jurisdictional argument before the Ninth Circuit.

Finding "no ambiguity" in § 3625, the Court of Appeals determined that "any substantive decision by the BOP to admit a particular prisoner into RDAP, or to grant or deny a sentence reduction for completion of the program is not reviewable by the district court." Further, the appellate court wrote, "the BOP's substantive decisions to remove particular inmates from the RDAP program are likewise not subject to judicial review." Reeb attempted to get around § 3625 by arguing that the BOP had violated its own program statement when expelling him from the RDAP, but the Ninth Circuit flatly rejected that argument: "A habeas claim cannot be sustained solely upon the BOP's purported violation of its own program statement because noncompliance with a BOP program statement is not a violation of federal law."

While § 3625 bars review of individualized determinations under the APA, the Court of Appeals noted that "judicial review remains available for allegations that BOP action is contrary to established federal law, violates the United States Constitution, or exceeds its statutory authority." See: *Reeb v. Thomas*, 636 F.3d 1224 (9th Cir. 2011).

Previously, the Ninth Circuit had held that the BOP's categorical exclusion from the RDAP of prisoners convicted of offenses involving possession, carrying or use of

firearms violated the APA, as the BOP had failed to adequately explain its rationale for excluding such offenders from the program. See: *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008) [*PLN*, June 2009, p.44].

*Arrington*, however, involved a general exclusionary rule, not an individualized determination to remove a prisoner from the RDAP as in Reeb's case. Breaking

with the *Arrington* ruling, the Third and Eighth Circuits held in 2009 that the BOP did not violate the APA by categorically excluding from the RDAP's early release provision certain prisoners whose sentences included firearms enhancements. See: *Gardner v. Grandolsky*, 585 F.3d 786 (3d Cir. 2009) and *Gatewood v. Outlaw*, 560 F.3d 843 (8th Cir. 2009). ■

## No Good Time for Time Spent in State Custody before Imposition of Federal Sentence

Good conduct time (GCT) may not be awarded to a federal prisoner for time spent in state custody before receiving his federal sentence, the U.S. Court of Appeals for the Ninth Circuit has held.

Russell Schleining was arrested in 2003 for burglary and attempted burglary. At the time of his arrest, he was discovered with a firearm. He was sentenced to ten years in state prison on the burglary charges; while serving his state sentence, Schleining was indicted in federal court for being a felon in possession of a firearm.

He pleaded guilty to the firearms charge, received his federal time and was returned to state custody for completion of his state sentence. After finishing his state time, Schleining was transferred to the custody of the Bureau of Prisons (BOP) to begin his federal sentence.

While at FCI Sheridan, Schleining complained to the BOP that he had been improperly denied good conduct time for the time he spent in state custody before receiving his federal sentence. He eventually filed a habeas corpus petition over the matter, which was denied. Schleining appealed.

Affirming the judgment of the district court, the Ninth Circuit held that "a prisoner can receive GCT only on time served on his federal sentence, and his federal sentence does not 'commence' until after he has been sentenced in federal court." As such, the appellate court concluded, "Schleining [was] not eligible for GCT credit for the 21 months he spent in state custody – serving a state sentence – before imposition of his federal sentence." See: *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011), cert. denied. ■



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# Washington State Court of Appeals Holds Payments to Class II Prison Workers Are “Wages” for Time-Loss Compensation Calculations

by Matt Clarke

On April 13, 2011, a Washington state Court of Appeals held that money paid to Class II prison workers counted as “wages” for purposes of calculating time-loss compensation.

James B. Hill, a former Washington state prisoner, was injured while performing a Class II prison job for which he was paid \$0.85 per hour. After his release from prison, Hill applied for time-loss compensation from the Washington State Department of Labor and Industries (L&I). L&I allowed compensation, calculating that Hill worked 7.5 hours per day for six days a week at \$0.85 per hour.

Hill appealed the order to the Board of Industrial Insurance Appeals, claiming that the money paid to Class II prison workers was a gratuity, not wages. The Department of Corrections (DOC) answered interrogatories stating that it did not pay wages to prisoners and did not report the gratuities to the Internal Revenue Service (IRS). Therefore, Hill moved for summary judgment. L&I filed a cross-motion for summary judgment and the DOC filed a brief supporting L&I.

The industrial appeals judge (IAJ) denied Hill’s motion and granted summary judgment to L&I. Hill unsuccessfully petitioned the Board for review of the IAJ’s decision. He then appealed the Board’s order in superior court. The superior court granted L&I’s motion for summary judgment, and Hill again appealed.

The Court of Appeals conducted a de novo review. It noted that statutory law required L&I to base time-loss compensation on the monthly wages the worker was receiving at the time of the injury, disallowing gratuities not reported to the IRS (former RCW 51.08.178). The appellate court also noted that the legislature classified money paid to prisoners for their Class II labor as a “gratuity” (RCW 72.09.100(2)(e)).

Further, if Hill’s wages could not be reasonably and fairly determined for any reason, L&I would be required to calculate a monthly wage based upon “the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.”

The Court of Appeals looked to L&I regulations to determine whether Hill’s payments were a gratuity. It determined

that the money the DOC paid to Hill was for his labor and therefore qualified as wages, not a gratuity. The Court rejected Hill’s argument that the payments could not be wages as they were lower than the minimum wage set by law. The appellate court noted the fact that the legislature had specifically exempted prisoners from the Washington state minimum wage act (RCW 49.46.010(5)(k)), which would create problems in calculating time-loss compensation, but assumed the legislature

had to be aware of the problem and had failed to correct it because lawmakers decided that compensation based on prison wages was fair and reasonable.

Therefore, the Court of Appeals affirmed the trial court’s grant of summary judgment to L&I. The Washington Supreme Court declined to hear Hill’s appeal in September 2011. See: *Hill v. Department of Labor and Industries*, 161 Wash.App. 286, 253 P.3d 430 (Wash.App. Div.2 2011), review denied. ■

## Georgia Court Clerk Liable for Failure to Inform Prison Officials of Sentence Reduction

The Georgia Supreme Court has held that a court clerk is not entitled to official immunity in a lawsuit claiming negligent performance of a ministerial duty. At the heart of the case was the clerk’s failure to inform prison officials about a court order that reduced a prisoner’s sentence.

Calvin McGee filed suit against Juanita Hicks and Geneva Blanton, in their respective capacities as clerk of the Superior Court of Fulton County and an employee of that office, for negligence for failing to perform their ministerial duty under OCGA § 42-5-50(a), which requires the court clerk to notify the commissioner of the Department of Corrections within 30 working days following receipt of a prisoner’s sentence.

The trial judge had signed a one-page “amended order” that changed McGee’s sentence to provide for a May 27, 2001 maximum release date rather than a previously-ordered release date of June 27, 2003. Blanton received the order on July 20, 2000; she placed it in processing to be filed and took no other action. McGee was not released from prison until March 2003 – 22 months after his amended release date.

Blanton and Hicks moved to dismiss the claim against them in their individual capacity, which was denied by the trial court. The Court of Appeals affirmed. The trial court subsequently granted their motion for summary judgment on the basis that they were entitled to official immunity because the court order contained

no language that it was a reduction or modification of sentence, was not accompanied by a final disposition form and did not instruct the clerk to notify prison officials of a sentence reduction.

McGee appealed, the Court of Appeals reversed and the Georgia Supreme Court granted certiorari on two questions. As to the first, the Supreme Court held the appellate court had correctly found the trial court erred in deciding that Blanton and Hicks did not breach the ministerial duty imposed upon them by OCGA § 42-5-50(a).

The Supreme Court disagreed that the trial court’s order was a “type of non-sentencing order,” as the record directly contradicted a finding that it did not contain language that reduced or modified a sentence. Additionally, state law does not excuse the clerk from completing ministerial duties merely because the judge did not include a final disposition form or specifically order the clerk to take action.

“The amended order unambiguously involved a criminal defendant’s sentence whether or not appellants recognized it as such,” the Supreme Court wrote. The lack of that recognition may evidence “negligent performance of the simple, absolute, and definite act” required by OCGA § 42-5-50(a).

As to the second question, the Supreme Court found that the Court of Appeals had erred in its application of the “law of the case” rule, as the appellate court’s first opinion in McGee’s

case did not resolve the issue of whether the defendants were entitled to official immunity. Regardless, the Court of Appeal's judgment was affirmed and the case

remanded for further proceedings against Hicks and Blanton. See: *Hicks v. McGee*, 289 Ga. 573, 713 S.E.2d 841 (Ga. 2011), *reconsideration denied*. ■

## Former Mississippi Mayor Charged with Sexually Assaulting Prisoner

Federal prosecutors have charged the former mayor of Walnut Grove, Mississippi with sexually assaulting a prisoner while acting under color of law. He also was charged with telling the prisoner to lie during an investigation into the incident. [See: *PLN*, April 2012, p.1].

William Grady Sims, 61, was first elected mayor of Walnut Grove in 1981. He was accused of sexually assaulting a female prisoner held at the Walnut Grove Transition Center (WGTC) operated by GEO Group, the nation's second-largest private prison company.

WGTC houses prisoners from the Mississippi Department of Corrections. Ironically, Sims was employed as WGTC's warden in 2009 when he took the prisoner to a motel room and had sex with her.

Separately, state auditors found that Sims' relationship with private prison firms was illegally costing local taxpayers. On October 25, 2011, State Auditor Stacey Pickering ordered Sims to repay \$31,150 for ordering private prisons in the area to be

served by city employees and equipment.

"The demand against Mayor Sims represents multiple instances where city employees were directed by the mayor to do work at a private prison facility in Walnut Grove," Pickering said in a news release. "Taxpayers of Walnut Grove have been paying for equipment and labor to do work at these facilities that are for-profit, private prisons. In addition, town equipment and labor have been used on private property at taxpayer expense."

Sims pleaded guilty to a federal witness tampering charge in February 2012, and was sentenced on April 24, 2012 to seven months in prison and six months of home confinement, plus two years on supervised release. He also agreed to resign as mayor and not to run for public office or seek government employment in the future. See: *United States v. Sims*, U.S.D.C. (S.D. Miss.), Case No. 3:11-cr-00090-DCB-LRA. ■

Sources: *Associated Press*, [www.fbi.gov](http://www.fbi.gov)

## Florida Death Row Prisoners Cannot Challenge Sentence Pro Se

Citing its "constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner, as well as having an administrative responsibility to work to minimize the delays inherent in the post-conviction process," the Florida Supreme Court held on October 6, 2011 that prisoners sentenced to death do not have a constitutional right to act pro se in post-conviction proceedings.

That ruling came in a case involving death row prisoner Robert Gordon. The trial court had granted Gordon leave to file a successive post-conviction petition in a pro se capacity. When the court summarily denied the petition, Gordon filed a pro se notice of appeal with the Florida Supreme Court.

The Court temporarily relinquished jurisdiction so the trial court could offer Gordon appointed counsel, and an at-

torney was ultimately appointed for the appeal.

Before briefs were filed, Gordon and his appointed counsel filed separate motions to discharge or withdraw counsel. The Supreme Court then held that death-sentenced prisoners have no federal constitutional right to act pro se in direct appeals of post-conviction proceedings under U.S. Supreme Court precedent.

The Supreme Court in *Martinez v. Court of Appeal of California*, 538 U.S. 152 (2000) left the determination of a right of self-representation on appeal to the states under their respective state constitutions. The Florida Supreme Court found that no such right existed, and the decision in this case extended that finding to post-conviction proceedings by death-sentenced prisoners. See: *Gordon v. State*, 75 So.3d 200 (Fla. 2011). ■

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# **“Voluntary” Work Program in Private Detention Centers Pays Detained Immigrants \$1 a Day**

*by Yana Kunichoff*

**I**n the Stewart Detention Center in rural Lumpkin, Georgia, Pedro Guzman cleaned the communal areas, cooked, painted walls, ran paperwork and buffed floors. But Guzman was not brought into Stewart as an employee – he was a detained immigrant taking part in the detention center’s “voluntary” work program.

“I didn’t go more than a month without a job,” said Guzman, who spent almost 20 months waiting, and working, inside Stewart while his immigration case was resolved.

In private prisons around the country, immigrants languishing in detention centers are being put to work by profit-making companies like the Corrections Corporation of America (CCA) for far below the minimum wage. For doing a range of manual labor in the facility, the immigrants, many of whom are not legally permitted to work in the United States, are paid between \$1-\$3 a day.

The Obama administration’s move away from the workplace raids of the Bush years and toward an increasing reliance on Secure Communities, which critics say has functioned as a dragnet for immigrants who have committed low-level crimes or none at all, has flooded detention centers across the country.

Between 1996 and 2011, deportations increased by 400 percent and the Department of Homeland Security now has a daily detention capacity of 34,000 beds. Along with this trend has come the widespread privatization of the federal detention centers.

Guzman was paid only \$1 a day for cleaning communal areas in the detention center. When he moved to working in the kitchen – “an 8 hour job and you do get your full 30 minute break” – his pay shifted to \$3 a day.

Most of the work in Stewart was done by detainees, said Guzman, who was placed into deportation proceedings when a letter about his asylum case was sent to the wrong address. “Ninety percent of the jobs in CCA are run by detainees,” he said of Stewart.

Immigrant rights advocates have called the voluntary work program another dehumanizing avenue for companies

like CCA to profit from immigrants already in a vulnerable position.

“The whole nature of this program is problematic,” said Azadeh Shahshahani, director of the National Security/Immigrants’ Rights Project at the ACLU of Georgia. “At the end of the day, they are getting the detainees to work for a wage that is far below minimum wage and for the work that they would have had to hire personnel. Obviously they are deriving a profit whatever way you look at it.”

“The detainees need the money, the phone cards are expensive ... and the food that they get is not enough to sustain themselves,” said Shahshahani, editor of a “Prisoners of Profit” report about immigration detention centers in Georgia. “They really need the money to eke out somewhat of a normal existence.”

If undocumented workers, the people who pick America’s produce, mow its lawns, do its laundry, build its houses and cook in its restaurants, are not allowed to work legally in the United States, what are their labor protections when employed by a private detention company?

## **“Illegal” Workers Legalized in Detention**

According to a Freedom of Information Act (FOIA) request filed by Jacqueline Stevens, a professor of political science at Northwestern University, detainees in detention centers work in five main areas – recreation, processing, housing units, main hallway/traverse areas and the library.

At the facilities reviewed in the documents – Florence Correctional Center in Florence, Arizona; El Centro Service Processing Center in El Centro, California; Stewart Detention Center and Varick Detention Center in New York City – the maximum wage under the voluntary work program was \$1 a day.

“Detainees that participate in the volunteer work program are required to work according to an assigned work schedule and to participate in all work related training,” the response to the FOIA request noted. The maximum amount of work detainees were allowed to do was eight hours a day, 40 hours a week.

Immigration and Customs Enforce-

ment (ICE) calls the voluntary work program “one method of managing detained aliens to give them an opportunity to be gainfully occupied on a voluntary basis.” The program also contributes to the deportation program’s “ability to successfully perform its detention mission.”

Is there a loophole that allows CCA to use undocumented labor at below minimum wage to help run their detention centers, and what are the immigrants’ rights as workers?

In response to the question above, a spokesperson at the Department of Labor directed questions about workers in immigration detention centers to ICE. ICE did not directly address the question of what their labor position was. Instead, ICE said that the workers were not employees:

“The Voluntary Work Program, under conditions of confinement, does not constitute employment and is done by detainees on a voluntary basis for a small stipend.”

But some advocates say that this legal gray area covers something more sinister. Stevens, the Northwestern professor, said the voluntary work program is consistent with slave labor: “Forced to work at wages they can’t negotiate and far below the wages Congress set.”

“In any other context,” she continued, “these private companies would be penalized for hiring people who don’t have legal documents and paying them below the federal minimum wage.”

The ICE spokesperson said a federally mandated precedent makes it legal for undocumented workers in detention centers to be paid. The average rate of pay for immigrants – \$1 a day – was first set in the appropriations act for fiscal year 1979 and has held steady since. ICE considers the payment for work done by immigrants “allowances,” according to a section of the U.S. Code Classification tables, despite their undocumented status.

## **ICE Caps Its Payment for Detained Workers at \$1**

The amount ICE pays the contracting company for the immigrants it employs is capped at \$1 even though “contract companies such as CCA may choose to provide a higher level of compensation.”

At Stewart, CCA's payment to Guzman of \$3 a day for kitchen work makes it triple the ICE-mandated daily wage.

This payment was challenged in a 1990 lawsuit under the Fair Labor Standards Act, which "establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting employees in the private sector and in Federal, State and local governments," and says that workers are entitled to a current minimum wage of \$7.25 an hour.

In the lawsuit, 16 immigrants at a detention center in Texas sued the then-Immigration and Naturalization Services (INS), arguing that only being paid \$1 a day violated the Fair Labor Standards Act.

The final ruling in the case by the U.S. Court of Appeals for the Fifth Circuit upheld INS's right to pay detained workers only \$1 a day. The court noted that "alien detainees are not government 'employees'" and "the federal government usually authorizes the employment of aliens only under limited circumstances, none of which apply here."

Therefore, the ruling said, the detainees couldn't claim protection under the act because "alien detainees whose work is described by no statute authorizing use of taxpayers' money to pay government employees cannot claim such status." [See: *Alvarado Guevara v. I.N.S.*, 902 F.2d 394 (5<sup>th</sup> Cir. 1990)].

There are several treaties that try to govern the use of labor in detention. One is the Inter-American Principles on Detention, cited in a 2012 report on private prisons by the ACLU of Georgia as say-

ing: "All persons deprived of liberty shall have the right to work."

"This includes the right 'to receive a fair and equitable remuneration,'" the report noted.

Then there is the 13th Amendment, which has been used as a basis for the allowance of prison labor – with an average pay that ranges from \$0.93 a day to \$1.25 an hour – though the fairness of this has also been challenged.

But Stevens noted that even within the context of a corrections environment, an immigration offense is a civil one, and therefore the detention should not be punitive.

"Detention centers are not legal punishment," said Stevens. "They are for people who are trying to pursue their civil right to remain in the country."

### **The Money Earned by Detainees Makes Its Way Back to CCA**

Guzman said the work he did while detained at Stewart broke up the tedium of being locked up and the stress of dealing with his constantly delayed appeals. But he said there was another incentive to continue making the meager wage he was paid for working a 40-hour week in the kitchen.

"You would get paid once a week and it would go directly into your canteen money," said Guzman. And with that "you bought food, a calling card, a bar of soap, shampoo, toothbrush" – from the CCA-run store inside the detention center.

Stevens said her research has shown that the primary reasons for detainees to

take part in the voluntary work programs is "so that they can buy food and hygiene products. If they don't have relatives on the outside to pump up their commissary accounts then they'll buff floors."

If some of the money being paid to undocumented workers taking part in the voluntary work program goes back to CCA, how much are private prison companies earning from these workers?

Companies like CCA are paid a lump sum by ICE for housing detainees – and then from whatever costs they can cut on food, labor or facilities, comes their profits. CCA, "the nation's largest owner and operator of partnership correction and detention facilities and one of the largest prison operators in the United States, behind only the federal government and three states," had net income of \$31.7 million for the first quarter of 2012.

"The colossal 'savings' from paying people a small fraction of the legal wage makes possible these centers," wrote Stevens in a blog post on the voluntary work program in private detention centers. "How much exactly is being saved?"

According to Stevens' analysis of figures in her FOIA requests, the monthly payments from just one detention center break down like this:

"Each dollar is a day's payment's to one detainee, so July 2009 at 5,815 = 5815 individual days or shifts of labor. Not all of the shifts are 8 hours but they go up to that. If the range of hours worked for this example is 4-8 hours [a] day, then the payments that should have been made for July 2009 under federal minimum wage laws



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## Immigrant Work Program (cont.)

would be \$168,635 to \$337,000. Again, what actually was paid was \$5,815.”

“In brief,” said Stevens, “the ICE jails are paying people \$1/day for work that minimum wage laws would require compensated at \$29-\$58/day.”

This is only a small window on the earnings from this program. Among the questions CCA declined to answer, despite repeated requests for comment over a period of several weeks, was how widespread the voluntary work program was and how many immigrants were involved in it nationally.

### Abuse?

ICE and CCA descriptions of the program stress the term “voluntary,” but a recently released ACLU report shows otherwise, detailing instances of detained immigrants being forced to work at Stewart Detention Center:

“Omar Ponce was subjected to disciplinary action for refusing to work and for organizing a work strike in 2010. He was in the segregation unit for a week before he had his disciplinary review hearing. Another detainee was threatened with segregation if he refused to work less than eight hours per day. This is not atypical.”

In response, CCA representative Mike Machak said: “The incident described in the ACLU report was reported to CCA staff, was dealt with appropriately and was reported to ICE in accordance with detention standards and contract requirements.”

Oversight, said Machak, is provided by “our longstanding government partner [ICE], including on-site ICE staff.”

### The Irony

Critics of private detention like Bob Libal, a Texas organizer for Grassroots Leadership focusing on the expansion of the private federal detention system, stress the unfairness of people criminalized as workers detained and then made to work.

“I think it’s pretty disturbing that private prison corporations are padding their bottom line by exploiting undocumented labor in their facilities,” said Libal, “when it would be much more humane and beneficial for the sort of country as a whole to allow people to live and work outside of detention facilities while their immigration cases are processed.”

It’s an irony not lost on Guzman. “You will boot them out of the country because they don’t have papers to work in the U.S.,” he said when asked about the issue, “but then you give them a job and you underpay them. Why are you under-

paying them?”

*This article originally appeared on Truthout on July 27, 2012; it is reprinted with permission, with minor corrections by PLN. Copyright, www.truthout.org.*

## Vermont DOC Disbands Citizens’ Advisory Group that Critics Called “Window Dressing” for Transparency

by Ken Picard

Andy Pallito was on the hot seat on July 19, 2012 at a meeting of the Joint Legislative Corrections Oversight Committee. Vermont’s commissioner of corrections had failed to notify lawmakers that he had disbanded a citizen panel charged with advising his department.

Sen. Dick Sears, who chairs the Legislative Corrections Oversight Committee, first learned of Pallito’s decision via an *Associated Press* story that ran on July 16.

“I apologize for catching you off-guard,” Pallito told Sears and other lawmakers on the committee. “Frankly, in the realm of things I usually call you on, postponing the Corrections Citizens’ Advisory Group for 60 days didn’t seem like it rose to that level.”

Pallito explained: After he canceled its quarterly meeting scheduled for July 13, a CCAG member accused him of not taking the group seriously and “wasting his time.”

“That’s not the first time I’ve heard a member say ‘It’s a waste of my time,’” Pallito told legislators. “Those are pretty serious comments. So, I decided to put the group on hold, take a step back and see how the department has been utilizing it.”

Current and former CCAG members have complained for years that the group has delivered on few, if any, of its initial promises for more transparency and openness into DOC operations.

Evidently, the frustration runs both ways. Pallito told lawmakers that attendance at CCAG meetings dropped off once the DOC moved its operations from Waterbury to Williston after Tropical Storm Irene. “Frankly, I’ve spent more time managing the media on this issue than really being able to step back and contemplate its overall mission,” he added.

The CCAG was created in 2005 in response to widespread criticism of the DOC. In December 2003, the Agency

of Human Services hired Montpelier attorney Michael Marks and former New Hampshire attorney general Philip McLaughlin to investigate the deaths of seven Vermont prisoners as well as other problems in the correctional system.

In their March 2004 report, Marks and McLaughlin voiced criticism of “a culture within the Department that fails to embrace accountability.”

In its response, the DOC proposed the creation of the CCAG, which, among other things, would be granted “scheduled access to selected correctional facilities and the opportunity to speak to inmates or staff members in the facilities...”

In her email to lawmakers, former CCAG member Laura Ziegler said she participated in CCAG for about three years in the hope of gaining that “special access” to Vermont’s prisoners, facilities and records.

“This did not occur. Very little occurred,” Ziegler said. “The Department ran the meetings; there would occasionally be some meaningful dialogue, but the group’s primary purpose seemed to be window dressing.”

Robert Appel, executive director of the Vermont Human Rights Commission, concurred with Ziegler’s assessment. Also a founding member of the CCAG, Appel resigned from the group early on largely due to personal concerns about potential conflicts of interest. Appel heads an independent agency that occasionally sues the DOC over issues such as racial discrimination, sexual harassment and failure to allow prisoners access to religious observances and diets.

Appel found the few meetings he attended to be “less than meaningful. In other words, it was bullshit.”

“It’s institutional. Government officials, for whatever reason, want to be left alone to do their work,” Appel added.

"It always amazes me that, despite the rhetoric that 'We're open and transparent,' allowing everyday citizens to review governmental actions in a formal setting with some authority is resisted."

CCAG member Gordon Bock of Northfield is a former prisoner and an activist with CURE Vermont, the local affiliate of Citizens United for Rehabilitation of Errants. He said the advisory group's breakup is especially ill-timed given the number of problems at the DOC that have come to light in recent months.

Among them, Bock pointed to the Vermont Parole Board's falsification of an arrest warrant that resulted in convicted murderer Douglas Mason being released from prison three years early. Bock also noted the cancellation, in June, of Vermont's contract with the Greenfield Jail & House of Detention, which went undisclosed by the DOC until Bock learned of it and alerted the media. And there was the "white paper" documenting substandard living conditions for women in the Chittenden Regional Correctional Facility in South Burlington.

"Is this really the time," Bock asked lawmakers on the joint oversight committee, "for your esteemed committee to be the sole watchdog over DOC?" But not everyone blames the current commissioner for the CCAG's shortcomings. Sarah Kenney, associate director for public policy for the Vermont Network Against Domestic and Sexual Violence, has been a member from the beginning. She said the group's effectiveness has always "ebbed and flowed over the years" but has become increasingly dysfunctional.

"In recent years it's become less a forum for productive conversation about trends within the department and more a place for individuals to come and air their personal grievances with the department," Kenney said.

At last week's committee meeting, Sears invited current and former CCAG members to offer suggestions on what a newly constituted CCAG should look like. He also called on DOC staffers to research effective models in other states and get back to him for the committee's next meeting in September.

Bock knows what he wants the new CCAG to look like. He points to the Vermont State Police Advisory Committee, which has both independence and oversight authority established in law. Better yet, Bock suggested a model similar to the New York City Civilian Complaint Review Board, the independent agency

empowered to investigate, mediate, make findings and recommend actions about complaints against NYPD cops.

Another possible model for Vermont's commissioner to consider is in Colorado. In 1995, Dianne Tramutola-Lawson, president of International CURE, helped Colorado's corrections director create quarterly "citizen advocate meetings" to discuss systemic problems in that state's prison system.

Unlike Vermont's CCAG, Colorado's citizen advocate meetings have no formal membership, Tramutola-Lawson noted. The meetings, which are attended by the director of corrections as well as much of his staff, are open to the public, with agenda items warned in advance. Individual grievances cannot be aired; instead, the group addresses systemic problems only.

How effective are the citizen advocate meetings? Very, Tramutola-Lawson asserted. Just this year, for example, her group convinced the Colorado Department of Corrections to reduce its phone rates for prisoners.

"I just think the lines of communication for all of our families and people with loved ones incarcerated have really been streamlined," she added.

For his part, the HRC's Appel suggested that an open and effective model for feedback to the DOC is doable in Vermont, too. There's a delicate balance, he said, between a citizens' committee that informs policy and provides general direction and guidance, and one that "tries to run the organization."

"It's tricky," he added, "but I don't think it's unattainable." ■

*This article originally appeared in Seven Days, an independent Vermont publication, on July 25, 2012. It is reprinted with permission.*



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## News in Brief

**Arizona:** ASPC Florence prison guard Jeffrey Williams, 46, was arrested and booked into the Pinal County jail on April 20, 2012 after child pornography was found on his computer. Williams had taken the computer to a repair shop, which notified the sheriff's office about the child porn. He reportedly confessed to having downloaded the illicit images and videos, and was charged with ten counts of sexual exploitation of a minor.

**Australia:** Sean Stephen Hatten, 29, serving a 13-year sentence at the Capricornia Correctional Centre for attempted murder, slashed another prisoner's throat with a prison-issued razor on April 13, 2011. In court for that offense in May 2012, prosecutors said he told guards at the time that he was "having a bad day." Hatten received a 15-year prison term for the "calculated and premeditated attack" on the other prisoner, which occurred while he was standing in line to make a hot drink.

**California:** Anthony "Chopper" Garcia was in the news in 2011 when he was arrested for and convicted of murder, partly because he had had a picture of the crime scene tattooed on his chest. In March 2012, it was reported that Garcia

received over \$30,000 in unemployment benefits while in jail awaiting trial from 2008 to 2010. His father and two girlfriends were accused of cashing the unemployment checks and depositing them in his jail account and those of other gang members. Garcia's father, Juan Garcia, and his girlfriends, Sandra Jaimez and Cynthia Limas, were arrested on charges that included grand theft.

**Colorado:** In April 2012, the Arapahoe County Commission voted to change the name of the Patrick J. Sullivan Detention Center. The jail, named for the former sheriff, will now be called the Arapahoe County Detention Center. Sullivan, 69, was arrested in November 2011 and pleaded guilty to possession of methamphetamine and soliciting prostitution following an undercover sting involving his gay lover. He was sentenced to 30 days in jail, two years probation and a \$1,100 fine, and was released on April 21, 2012 after serving 17 days.

**Florida:** The Pinellas County Jail uses a video visitation system, which apparently is closely monitored by jail staff. Mitchell Thomas, 46, learned that the hard way when he visited his wife, who was incarcerated at the jail, and exposed

his genitals to her during their video visit on May 1, 2012. He was arrested on a misdemeanor charge for exposing himself. Such incidents evidently are not very common. "This is the first I've heard of it," said Pinellas County Sheriff's Office spokeswoman Cecilia Barreda.

**Georgia:** Clayton County prisoner Kevin Garard Guerrier, 26, was in court on April 6, 2012 for a hearing on child support and a temporary protective order when he became disruptive, was ordered removed from the courtroom and struggled with deputies. He was rendered unconscious and hospitalized, then died 10 days later. The sheriff's office and the Georgia Bureau of Investigation are investigating his death.

**Israel:** A majority of the 4,699 Palestinian prisoners held in Israeli jails refused to eat on Prisoners' Day, April 17, 2012. Around 1,200 prisoners said they would continue to fast in protest of unfair conditions, according to news reports. Most of the Palestinian prisoners (3,864) are from the West Bank; over 300 are being held under Israeli's policy of "administrative detention," in which suspects are imprisoned for an indefinite period of time without being charged. Palestinian

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prisoner Khader Adnan, 33, who was held in administrative detention and had previously staged a 66-day hunger strike, was released on April 17.

**Maine:** Cumberland County jail prisoner Arien L'Italien, 23, was caught on March 10, 2012 as he tried to crawl back to his unit after visiting a female prisoner and having consensual sex with her in her cell. Both L'Italien and his imprisoned paramour, Karla Wilson, 25, had jammed the locks on their cell doors to facilitate the late-night rendezvous.

**Maine:** In April 2012, the Maine Center for Disease Control and Prevention reported that one prisoner had died and around 40 other prisoners and several staff members at another prison were sick due to a flu outbreak. "Correctional Medical Services, which provides health services to both facilities reported that influenza vaccination coverage among inmates was very low (less than 10 percent), and coverage among staff members was unknown but believed to be low," according to the Center. Both prisoners and employees were offered vaccinations following the outbreak.

**Maine:** State prison guard Randall Carl, 46, was convicted of animal cruelty on April 23, 2012 for tying a captured bobcat to a pole and allowing hunting

dogs to attack and kill it. The February 2009 incident was videotaped as part of a "training exercise." After being convicted at a jury trial in Waldo County Superior Court, Carl received a 15-month sentence, suspended except for 10 days, and was fined more than \$1,300.

**Nebraska:** In a bizarre incident, a woman who didn't want to meet with her probation officer asked two friends to stab her so she could go to the hospital instead. Jessalyn A. Stierwalt, 22, had been drinking heavily and wanted time to sober up before meeting with her probation officer, who was going to install an alcohol-monitoring device. She therefore had two friends, Scott Roberson-Turman and Kerry L. Duke II, stab her in the shoulder and stomach. All three were charged with various offenses and pleaded no contest to misdemeanor obstruction of government operations. Stierwalt and Roberson-Turman were sentenced on April 18, 2012 to 12 months in prison. "It takes stupidity to a new extreme," noted Gage County District Judge Paul Korslund.

**North Carolina:** Mountain View Correctional Facility guard William Wright, 31, died on April 11, 2012 after falling down a metal staircase while on duty. He was taken to a hospital after the accident

and was released the following day, but died several days later due to complications from a head injury. His death is being investigated by state and federal authorities.

**Oregon:** Prison guard Michael Wilson Yann, 39, was arrested on April 15, 2012 after he shot at police officers with a 9mm pistol during a standoff at his home. Police had responded to a report of an intoxicated man in the street. Yann was booked into the Marion County jail on charges of aggravated attempted murder, attempted murder and disorderly conduct, and held without bond. He was placed on administrative leave by the Department of Corrections, where he worked as a transportation officer.

**Pakistan:** On April 15, 2012, 384 prisoners, including one sentenced to death, escaped from the Bannu Central Jail after the facility was attacked by members of the Taliban, who used assault rifles and rocket-propelled grenades. "There were huge explosions. Plaster from the ceilings fell on us," stated prisoner Malik Nazeef. "Then there was gunfire. We didn't know what was happening." The jail's metal gates were blown open and the attackers shot locks off doors. One of the escapees, Adnan Rasheed, was under a death sentence for trying to assassinate Pakistan

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**Pennsylvania:** A federal criminal information was filed on March 23, 2012 against BOP guard Donald E. Lykon, 30, who was accused of smuggling cellphones, tobacco and marijuana into USP Canaan over a four-month period in 2011. Lykon allegedly accepted over \$5,000 in bribes from prisoners to deliver the contraband. Concurrently with the filing of the criminal information, he pleaded guilty to felony charges of accepting bribes and distributing marijuana.

**Pennsylvania:** On April 2, 2012, a

Monroe County jury imposed a death sentence on former prison guard Michael Parrish, 26, who was convicted of first-degree murder for killing his girlfriend, Victoria Adams, and infant son, Sidney. Formerly a white supremacist, Parrish had converted to Islam; he shot Adams and his son a dozen times in July 2009, then told police the next day that he didn't deserve to live. The jury apparently agreed.

**Tennessee:** Court of Criminal Appeals judge Jerry L. Smith was arrested in Knoxville on April 23, 2012 on a misdemeanor DUI charge. He was pulled over because he was driving a car with the back hatch open; according to the arresting officers he smelled of alcohol, had slurred speech and

failed a sobriety test. Smith pleaded guilty to the DUI charge on June 23, 2012 – his license was suspended and he was sentenced to 48 hours in jail. He later returned to work. The Tennessee legislature has not removed a judge from office in 18 years.

**Texas:** The Crain Unit near Gatesville, which houses female prisoners, has become overrun by feral cats. According to an April 16, 2012 *Associated Press* article, a local non-profit group, Kathy's Kitties, volunteered to have the estimated 150 to 175 cats at the prison neutered at no cost to the state. The felines would also be treated for fleas and ticks, and receive rabies shots. Prison officials had been trapping the cats and euthanizing them. ■

## Criminal Justice Resources

### ***ACLU National Prison Project***

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### ***Amnesty International***

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***Family & Corrections Network***

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### ***Innocence Project***

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### ***Just Detention International***

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### ***Justice Denied***

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### ***National CURE***

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### ***November Coalition***

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### ***Partnership for Safety and Justice***

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. [www.safetyandjustice.org](http://www.safetyandjustice.org)

### ***The Sentencing Project***

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)



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# PRISON

## Legal News

VOL. 23 No. 9

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

September 2012

### Interview with Conrad Black, Former Federal Prisoner and Millionaire Media Magnate

*"I never ask for mercy and seek no one's sympathy. I would never, as was once needlessly feared in this court, be a fugitive from justice in this country, only a seeker of it."*

– Conrad Black

Conrad Black, born in Canada, is a member of the British House of Lords who controlled one of the largest newspaper publishing firms in the world, Hollinger International, Inc.

He was prosecuted in the United States in 2005 for defrauding Hollinger of \$60 million by allegedly diverting corporate funds to his own use. Convicted of three counts of fraud and one count of obstruction of justice in July 2007, and

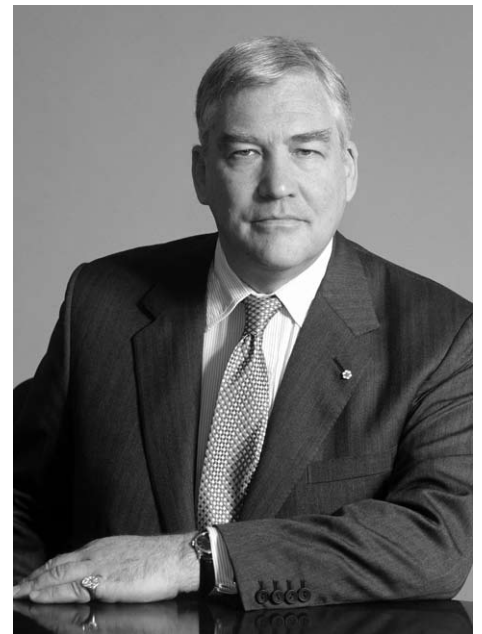
sentenced to 78 months in prison plus \$6.1 million in restitution, he appealed his case all the way to the U.S. Supreme Court. The Court ruled in Black's favor, limiting the scope of the "honest services" fraud statute in a June 24, 2010 ruling. See: *Black v. United States*, 130 S.Ct. 2963 (2010), citing *Skilling v. United States*, 130 S.Ct. 2896 (2010).

Following remand, Lord Black was resentenced to 42 months after two of the fraud charges were dismissed by the Seventh Circuit Court of Appeals; the remaining fraud charge related to the misappropriation of \$285,000 in company funds. He was released from federal prison on May 4, 2012 after serving just over 36 months. During and after his incarceration he wrote numerous articles concerning injustices in the U.S. criminal justice system, as well as a memoir, *A Matter of Principle*. He has denied wrongdoing and maintained that his prosecution was a miscarriage of justice.

PLN editor Paul Wright interviewed Conrad Black in New York City on August 26, 2011 while he was free on bail following the Supreme Court's decision, before returning to prison to complete his sentence. The following is an abbreviated transcript of that interview; Black has since returned to Canada on a temporary resident permit.

\* \* \*

**PAUL WRIGHT: So, Conrad, at one point you were the third biggest media owner in the world with an estimated net worth over \$400 million, homes in London, Toronto, New York City and Palm Beach. How did you get ensnared in the American**



Conrad Black

**criminal justice system?**

**CONRAD BLACK:** It was the third largest circulation newspaper group in the western world....

**PW: Okay.**

**CB:** Not overall media. It was a New York Stock Exchange listed company, the senior public company, it was an American company, so I was in the American jurisdiction.... [U]nfortunately one of my associates had done a few bad things, some really very sleazy things, of which I was the principle victim, and when that was discovered he rolled over and said in the manner of the American plea bargain, "well I can get you the big fish if you can get me an easier ride," and that's what happened.

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## Conrad Black Interview (cont.)

**PW: I think in the American criminal justice system some criminal defense lawyers say that the secret to being a successful criminal is always commit a crime with a more important person.**

**CB: Yes, at least with a more important person around so you purport to drag them into it, anyway.**

**PW: Ultimately, you were convicted in Chicago. How long were you in prison and where, and what was it like for you?**

**CB: Well, there were 17 counts and they didn't proceed with four, ultimately 13 went to the jury, 9 were acquittals, we lost those 4 counts, or I did, some of my co-defendants lost 3 counts and I lost four. I was sent to the Coleman Low Security Prison in Florida, where I resided for 29 months and I was released on bail. The U.S. Supreme Court unanimously vacated those four counts. Right from the start, we thought it was a sadistic act of the appellate court panel chairman, the former chief judge of the Court of Appeals....**

**PW: Is that [Seventh Circuit] Judge Posner?**

**CB: Posner, yeah, who conducted the most abominable farce of an appeal hearing I've ever heard. I got the audio, I was in prison at the time, but I got the audio and I read the transcript and my counsel is the longest-serving deputy solicitor general of this country, Andy Frey, a well regarded man, and he would not let him finish a sentence. He interrupted him all the time, nobody could actually make an argument. Posner was so obnoxious, but he was overturned unanimously by the Supreme Court.... [T]he trial judge did the minimum she could while still preserving fig leaf validity for this farcical proceeding, and so I went back so serve [another] 7.5 months.**

**That's still a long way short of what I was sentenced to.**

**And keep in mind they were seeking life in prison and \$140 million, and initially alleging that I had stolen \$500 million. [After remand] it's now that I had allegedly improperly received \$285,000, notwithstanding that was approved by the executive committee and ratified by the board of directors.**

**PW: And when it's all said and done at this point, you achieve a landmark Supreme Court decision that invalidated the honest services fraud statute under which, do you know how many people were convicted of**

**that statute before you struck it down?**

**CB: Oh, at least 500-600 I'm sure Paul ... and it was one of those catchments where they could catch anybody, like obstruction of justice.**

**PW: Yes, well, I think there's the comment about prosecutors using vague laws to ensnare the unwary and this seems to be one of those classic laws where they did just that. So basically, at the end of the day, they start out alleging theft at over \$500 million [and] when all is said and done, you have one conviction in place, and ... you served roughly 3 years in prison for....**

**CB: Three years, when they were going for life and I'll be out of pocket \$600,000 when they were going for \$140 million. Now the fact is I wasn't guilty of anything, but given the correlation of forces between the U.S. government and Conrad Black, I'm glad....**

**PW: Yeah, that is pretty good. One of the things too, though, is obviously you lost your liberty for three years, this has been a tremendous financial hardship and ostensibly this is all done on behalf of the shareholders of the company. Where is Hollinger today?**

**CB: They ruined it. The court-appointed directors and court-approved directors and officers vaporized \$2 billion of shareholder value, and the counsel of the special committee, the chief sponsor of the prosecution, he and his chums pocketed \$300 million for themselves, while they wiped out \$2 billion of shareholder value.**

**PW: So you spent \$30 million on your defense, and at the end of the day, you still wind up going to prison for 3 years. I think one of the wags said ... the American criminal justice system has the best justice system money can buy. What's one of the downsides of being a wealthy and well-known criminal defendant in the United States?**

**CB: Well, you're an easier target. But I have to say in the first place, if all my assets had been in the United States my money wouldn't have done me any good. They freeze it anyway. They make spurious allegations of ill-gotten gains.**

**PW: And this is [in] the context, too, that the United States purports to have due process protections....**

**CB: That's a fraud. This country, in my opinion no serious country should have an extradition treaty with the United States, it's not a society of laws in criminal matters.... Now what I was going to say was having the ability to get the money to**

## Conrad Black Interview (cont.)

pay for lawyers is a distinct advantage, no matter how famous you are or how much they go after you – and I am not even that famous in the U.S. and indeed I'm not that rich either.... But by the standards of "rich" in this country....

**PW: The Bill Gates, the Warren Buffett....**

**CB:** It wasn't 1% of what they have. And I don't begrudge that, I never held myself as a specially wealthy man – by the way, the specially irritating and disconcerting [thing] to my tormentors was that I held on to a lot more of the money that I had than they thought I could. But if you don't really have a lot of resources, and you would know this, Paul, they run you out of money right away. The lawyers in this country ... all know the prosecutors better than they know their client and they all know it's just theater. Now there are a few very good ones, very good and very expensive, who genuinely detest the prosecutors and fight like tigers for the client but you got to pay them at least \$10 million. And that's not accessible to other than very wealthy people, I mean comparably wealthy, and so the answer is you're better to have money than not, but if you're famous it's a negative because they'll exploit that....

**PW: Before going to prison you counted prime ministers, former presidents, generals, bishops and many other**

**prominent politicians as your friends and colleagues. Once the prosecution started and you became targeted by the criminal justice system of this country, how many of them stuck around? From the media accounts that I've read, your wife Barbara was generally the only person in court for your trial and sentencing.**

**CB:** I didn't ask any one of them to come to the trial. That's no criterion, I didn't ask anyone to do that. By the way my daughter attended every session and my sons both came to a lot but they had jobs they couldn't leave for indefinite times ... but actually a number of my friends did come from time to time but I never asked for that. I would say 80% of the people that I actually regarded as friends, including some quite prominent people, responded well....

**PW: As soon as you're going to prison you find out who your real friends are.**

**CB:** What I did find as a compensation, a very substantial compensation for the disappointments that occurred with people from whom I expected better who scurried just out the back door into the tall grass, was, right from the start, there was a significant number of total strangers who followed the case closely and who were total supporters. And that number grew and grew. And where I was, it was one of the facilities that had email on sort of the experimental basis. I think it's widespread in the BOP now, and you were allowed 30 email connections, but there was no limit to the number of emails you could send or


receive in a day. And indeed that was all profit to them, so they liked it. And correspondence with me was mainly through my office. So I would often get 200 emails a day, and most of them forwarded from my office....

**PW: And people were generally supportive?**

**CB:** 99% supportive and the numbers of them steadily grew, and if I may put it this way, the intellectual quality of the readers increased. In early stages, a lot of them were clearly nice people and good people, but not particularly legally worded people, but by the end I was getting a great many letters from lawyers and some from judges. And some from former prosecutors – I didn't get any from active prosecutors – and they were overwhelmingly supportive. And that, especially when you were defamed as I was and attacked savagely as I was for as long as I was, that kind of thing is very, very, very encouraging, very encouraging. I often felt that it was really a blessing that I wasn't in that era where you had almost no contact with the outside world other than the visitors you could have.

**PW: They do everything they can to further alienate and isolate prisoners, and there is a reason that my litigation forte is First Amendment and free speech issues. Prison censorship is my big thing....**

**CB:** Can you, I know you're asking the questions here, but do you know why in that case they went ahead with the email [in federal prisons] because that has hence



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reduced the isolation of prisoners?

**PW:** I'm not sure, I think that trend toward the email thing is they're seeing it as a further profit center, like prison telephones that they can further monetize....

**CB:** So what they should do, if they had just a modicum of intelligence – but of course if they had a modicum of intelligence they wouldn't be at the BOP, it's unskilled labor right to the top – but what they would do is have more phones, longer hours for the phones, more email machines, longer times you're allowed. You can only do an hour at a time, and I understand that because there are other guys waiting, and you have to give everyone a chance.... [S]o for 140 people you have four email machines and three telephones.

**PW:** Most state prison systems don't allow email.

**CB:** I've heard the state prison systems, at least in some states are utterly shocking, I mean I don't think the federal prisons are anything to write home about....

**PW:** And no they aren't, some of the federal prisons are really....

**CB:** The higher security ones are very rough, aren't they?

**PW:** Yeah, they are. In *Prison Legal News* we report extensively on the violence, medical neglect and everything else.

**CB:** When I came out after 29 months [on bail after the U.S. Supreme Court ruling], I went for extensive testing and extensive dental work. I never went to the dentist there because all they did was extract teeth and I wasn't interested in that, and I didn't get a toothache that required it. In 2.5 years everyone's got to go to the dentist, and at my age you do, otherwise there will be problems. For example, fortunately it was very early stage, I had a melanoma on my face, it was identified right away as suspicious and authenticated as malignant; in fact, it was very small by biopsy and it was removed with no danger. But if I had served my full sentence I would've had a serious problem, and in my opinion there is no chance that those nincompoops would have recognized it, or if they did they wouldn't have cared.

**PW:** Yeah, and unfortunately that's rather common.

**CB:** I found that the paramedics there were quite nice people, most of them. And the doctor that I actually saw twice a year, while he could stand a lesson in charm school, was not, I thought, a bad man,

and they had an outside ophthalmologist come in who seemed to be quite capable and civilized. But the fact is, you would sit all day waiting for something and they would misdiagnose. There were several cases where they shortened people's lives by their negligence. I mean, a friend of mine....

**PW:** And sometimes they just outright kill them, too.

**CB:** Well, a friend of mine when I was there, was a former occasional player for the Detroit Tigers, who was more at the top of the minor leagues, who sometimes was in the lineup and always at their Spring Training Camp, [a] very, very nice man. He made a mistake and it was sort of out of character for him, anyway they sent him there and he complained of blood in his stools and he was repeatedly told, "oh it's just hemorrhoids," and he said, "I don't have hemorrhoids." And they said "of course you do," and told him to go away. And finally he was diagnosed with rectal cancer and it was too late. They shipped him out to a prison hospital but it was too late. And he died and that need not happen.

**PW:** And unfortunately they do that on a rather frequent basis.

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## Conrad Black Interview (cont.)

**CB:** And I don't think they have any regrets about it.

**PW:** No they don't. You've written numerous historical books and biographies, and you're quite the fan of history and have a pretty good overview of would you say Western history over the past several hundred years?

**CB:** I would say in some areas of U.S. history I would qualify as an undoubted historian, especially in Roosevelt, Franklin Delano Roosevelt. In other countries I would say I've got a good informed personal, sort of hobby reader's knowledge of major Western countries over the past several hundred years, yes.

**PW:** I guess with that kind of context, and that kind of background, at this point the United States has 2.5 million people in prison, which is more people than any other country in the world, in human history has ever [been] imprisoned....

**CB:** Yeah, 5% of the world's population is in the United States, and 25% of the incarcerated people are in the United States.

And, by the way, half the world's lawyers [are] in the United States, too.

**PW:** Yes, and there may be a correlation. So as a historian, what do you think of this, what is your take on it, and one of the things is it sustainable, is it unsustainable?

**CB:** Well, unfortunately it's sustainable because, well, the cost is excessive [but] it's not terribly burdensome opposite other costs which get completely out of

control and producing these huge deficits, which could be addressed if the political class hadn't failed the country so badly, and eventually will be addressed. What it tells me is that one of the criteria of a national civilization, the civic standards of a country, is how it treats accused people and up to a point, how it treats convicted people. And the United States flunks the test....

**PW:** I think it's interesting too, because if we look at South Africa, which emerged from apartheid, I follow the South African constitutional court on a regular basis, and you know their decisions, they held the death penalty to be unconstitutional and uncivilized. So many other countries you look at how they differ from the United States and they are rather significant differences.

**CB:** This is a country that accuses far too many people and convicts far too many people and imprisons far too many people for far too long. I mean, Senator Webb of Virginia, in that essay I'm sure you've read, it's called "Criminal Injustice," pointed out that given that the United States has 6-12 times as many incarcerated people per capita as other prosperous democracies, specifically Australia, Canada, Britain, France, Germany and Japan, either those countries don't care about crime, which is rubbish, they do and have a lower crime rate than the U.S. does; two, Americans are uniquely addicted to crime, which is rubbish, they aren't; or three, the system isn't working well. Which is bingo, the truth.

**PW:** And what do you think accounts for that, why do you think that is?

**CB:** Look, first of all, I think you would probably know better than I. But I think, and of course it's complicated, I think that this country had, up until the mid 70s, it had approximately the same per capita incarceration rate as those other countries. Might have been a little higher, but not much, and I think what happened was, and there was a respectable penal reform movement that was almost a minority but was taken seriously....

**PW:** It existed.

**CB:** It existed and was frequently referred to, and not just scathingly ignored or mocked. And I think that three things happened. The country became frightened by black radicalism, especially after the riots at Attica and San Quentin. The view developed that black extremism, that African American extremism was a widespread problem that had to be cracked down on very severely. And along with that was the drug war, which of course has been a complete fraud. It's spent \$1 trillion incarcerating, I think, a total of over 2 million people, all of whom were easily replaced. They were small fry which I think is a perfect illustration of the virtues of supply side economics.... And when we have this outrage of the United States, instead of when it was seriously cracking down on middle-class university students and so forth, it just keeps combing through the ghettos, sweeping up the poor people. And the greatest military power in the world ostensibly can't control its own borders. The fact is, if the United States wanted to keep drugs out of the U.S., one division of the armed forces would do it. I mean they'd have to



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be trained specially and they'd have to be deployed carefully, and in order not to harass legitimate commerce and tourists, you would need a lot more border points and so forth, but it could be done.... The other thing that happened was that the feminist movement sold the theory approximately at that time, that there was a huge proportion of male Americans indifferent to crimes against women. And the only way to deal with all of these things was sort of this law and order business and all the politicians from left to right got on that show. Bobby Kennedy and Nelson Rockefeller were just as bad in that regard as Ronald Reagan and Richard Nixon, or Lyndon Johnson, who was kind of in the middle ideologically.

**PW:** That's one of the things that we'll just skip ahead on here, that's one of the things I was going to ask you about. Here in the United States you can say that mass imprisonment is antithetical to any notions of liberty, but you can say that liberals, conservatives, left or right, whatever, it's very much a bipartisan enterprise and everyone wholeheartedly embraces it. We haven't really seen any type of questioning of it, or dissent from it, not even the black middle-class – they've largely been silent about it.

**CB:** I was shocked. I was imprisoned when Obama was elected and Holder came in as Attorney General – first African American occupants of either position – and a lot of my African American friends thought, basically, they'll open the gates for us.

**PW:** Something's going to change!

**CB:** Exactly, but the disparity in the treatment in powder to crack cocaine was up to 100 to 1.

**PW:** It was 100 to 1, now it's 18 to 1.

**CB:** Yeah, and it's still scandalous. And I have never, to the best of my

knowledge, had a scintilla of cocaine at any time, and I don't know anything about drug use other than normal prescription drugs. It is impossible for me to see that that is anything other than a deliberate racial disparity.

**PW:** So now of course, by lessening the disparity we're only 18 times more racist, whereas before we were 100 times more racist.

**CB:** If they changed it to 1.5 times severe, just because they think crack is more dangerous or something, that I would understand, but moving it from 100 times to 18 times just draws attention to what's really going on.

**PW:** And the interesting thing, too, is that it took 23 years of reform efforts just to accomplish that.

**CB:** And it took a black president and a black Attorney General almost two years just to accomplish it. But you see, you would have noticed, the local news almost everywhere in this country is "the crime of the day," it's the only way they can get viewers.

**PW:** One of the things I was going to ask you about, especially given your background in the media, why don't we talk about the role of the media in perpetuating


the American police state.

**CB:** It's terrible in this country. It's frankly not as bad in other countries where they do spectacularly cover crimes, either crimes that are particularly odious or that do involve prominent people, of course they do, but not like they do here. Look at Strauss-Kahn, who at the time was the head of the IMF [International Monetary Fund]. Now all of the charges have been dropped; meanwhile, they threw him in Rikers Island.

**PW:** I think with the rest of the world, the American justice system doesn't carry much credibility.

**CB:** It's not respectable.... The U.S. justice system is treated and regarded with disdain or skepticism by almost everybody outside this country. The preoccupation with the death penalty, this fetish about the perp walk and putting everybody in handcuffs all the time....

**PW:** Which actually caters to the media, all these things about the perp walk. You ask the cops and they say we actually do this for the media and then the media, of course, [says] "we don't ask them to do it we just happen to be there to take pictures." Plaster them on the front page or have them on the six-o'clock newscast.



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## Conrad Black Interview (cont.)

**CB:** There's no doubt in my mind the media played a role in frightening this country in the 60s and 70s.

**PW:** I think they still do. There's been studies that have ... shown that over the last 10 or 15 years, as crime rates have gone down by dozens of percentage points, the media coverage of crime on the local level increased by 3, 4, 500%, so that the perception among people who, especially among those that watch local TV, is that the crime rate is going up when statistically it's actually going down.

**CB:** Sure. But that's the only way they can get viewers for the local news. It's the crime of the day even if the most frightful thing that's happened in the whole metropolitan [area] is someone stealing a \$.05 scarf, they'll turn it into "girl behind the cash register staring into the face of death" or something. Look at Nancy Grace; they just try people [in the media] who weren't even indicted yet. They'll say, "why is this person at large?"

**PW:** And I think what we see too much of, in this country at least, certainly with regards to large portions of media, is largely there is no critical analysis or a total suspension of disbelief, especially when covering criminal justice issues. That's one of the things that nominally objective journalism means: you get both sides of the story. Yet all too often on this stuff, there's only one side of the story. They go to the cops, they go to the prosecutor, they go to the prison officials, and that's the only view that gets reported. Do you think that that one-sided lopsidedness has basically helped get us to where we're at in this country?

**CB:** Yeah. I think it's a terrible problem. There are exceptions. Some journalists have done some wonderful work in exposing injustices, like Dorothy Rabinowitz for instance, but yeah, I think it's a terrible problem. I think the media has been inflaming public fear and let's just take this Strauss-Kahn business.... [E]ven though a very high profile was being accused of rather fantastic accusations from a rather dubious source, and it just came as a bolt from the blue that the case had collapsed. Because the prosecutors, or rather Strauss-Kahn's counsel, had exposed....

**PW:** If he hadn't had counsel, I think Mr. Strauss-Kahn would still be sitting in Rikers Island or in prison.

**CB:** Maybe they would have moved him up to better than that. But yeah, if he

hadn't had counsel or been able to afford it then he would have gone down.

**PW:** As someone who very closely monitors what goes on in media in this country, especially with what goes on in prisons and jails, for example, for one really good exposé or investigation into injustice or bad conditions, which is very much the exception, [it] is drowned out by the daily barrage of "it bleeds it leads" news coverage, [which] as you say is frightening people.

**CB:** But you know there are 47 million people in this country with a record.

**PW:** Right

**CB:** Admittedly, most of them are something that aren't stigmatizing, like a DUI 20 years ago or a drunken disorderly at a frat party 30 years ago when two guys were competing for the affections of the same girl or something. No one today would say that means this guy is an inferior character.

**PW:** One of the things that's interesting, for example this has come up with the stigmatization of sex offenders, where 30 years ago a gay man is convicted of public indecency and now 30 years later he's being told he has to register as a sex offender.

**CB:** It's awful. This is not my taste, but that's not the issue. Someone has a lot of distasteful photographs in his home, and he can be sent to prison for that.

**PW:** And I think that is one of the things too that this is a country that prides itself as being the home of liberty and freedom....

**CB:** Please, pass the sick bag.

**PW:** There was a case that came down in the 10th Circuit, it was about 10 years ago, I think it was the [Singleton] case, but there was a panel on the 10th Circuit that held that trading testimony in exchange for a lighter sentence violated, I forget what the exact holding for it was, they held it wasn't allowed. And of course when the decision came out, I thought, "This wouldn't last long," and of course they vacated it in a matter of months.

**CB:** It's a terribly abused system, and everybody knows it, you know? When they target someone they'll indict everyone in his family, his wife, his son....

**PW:** They put pressure on him and it's just one of those things, "Hey we'll drop the charges against your wife if you plead guilty, we won't go after your kids if you plead guilty," that seems to be the norm here. In one of your interviews, I think it was also [in] your book, you refer to the United States as a "prosecutocracy."

**CB:** I think I invented the word.

**PW:** I like the word, I think it's really good, and I guess that's one of the things too, I think we're used to the term "police state," but I would say that one of the things is that prosecutors don't come out of nowhere. They're all at least, at the state level here, they're elected by the local electorate, at the federal level they're appointed by the president.... What do you think about the political system that makes this possible? Basically, and I'm assuming you'll agree with this, there really are no checks or balances on prosecutors in this country. They're pretty much not accountable to anyone, and there are no remedies against abuse of prosecutors.

**CB:** And they have in practice absolute immunity. To me, they're a demonstration of a state within a state – they're just terrorizing everybody. It was when in the same year, they took down the chief of staff of the vice president, Scooter Libby, and as far as I could see they didn't have a case against him. But Washington, DC is so partisanly Democratic that the jury just wanted to stick it to the White House. And it was easy for the prosecutor. And then they went after, for good measure, Senator [Ted] Stevens from Alaska, a five-term Senator, powerful Senator.

**PW:** I think his conviction was reversed and that's because he had excellent counsel. If you talk to the people convicted for smaller charges that carry harsher sentences [but] don't have high legal resources, prosecutors in this country routinely hide exculpatory evidence.

One of the things is that police states need more than just cops, they need prosecutors and judges. What's your view on the role of the judiciary in perpetuating the system?

**CB:** Well, as far as I can see, most of the federal trial judges are ex-prosecutors, and in their mentality, they're still prosecutors.

**PW:** I think the joke is that the prosecutor is a cop in a suit and the judge is a prosecutor in a robe.

**CB:** Yeah, and the jury is mainly imbeciles.

**PW:** None of which is very good.

**CB:** Look, I am sure that many of the prosecutors must be decent and responsible people, it's just not believable to me that they're all unreasonable zealots who think it's more fun convicting an innocent person as much as a guilty one. But there is no shortage of such people, and they're tolerated far more than they

should be....

**PW:** What are your views on the war on drugs?

**CB:** Complete fraud. For the reasons I said. In the first place, I don't think they're conducting it seriously.

**PW:** My thing has been it's always more about public theater and show, because I think that if you're a believer in the law of the free market or the rules of the free market, the fact that you have illegal substances with no known supplier or distribution channel yet you can get them everywhere, from maximum-security

prisons in this country to every hamlet or village in America, that seems to indicate that there's really no serious hindrance to their dissemination or distribution.

**CB:** The greatest military power in the world can certainly control its own borders if it wanted to. As I said, one of my fellow inmates, when I was in prison, when I asked him what his occupation was, he said "I steal planes." One thing led to another, he was explaining to me how easy it was to steal a private plane, you see, and then he would fly it to Central America and they'd repaint it and things – this

wasn't his department, he would just take them and deliver them – but then they're used to import drugs. And I said, well, surely if it were serious, the U.S. Air Force or the Naval air force would stop that. And of course they could. Do you think that anybody is going to fly a drug plane if there are F-16s in the air?... They're just not serious and they're not really trying to stop it. And instead of trying to resolve the issues of the demand, they've got the effrontery to go tell other countries that they've got to stop the production or at least the transmission of it through their

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country, so you've got a civil war raging in Mexico.

And instead of imposing [the war on drugs] uniformly, as I said earlier, they really impose it on the politically and legally easy people to impose it on. If they actually had to conduct trials on the middle- or upper-family people all the time it would be much more complicated. And also, they go for imprisonment more than treatment, and treatment is much less costly and far more effective. I think the whole thing a colossal fraud. I used to think that someone like Barry McCaffrey, for instance, was an honest man and I think he probably is, and it's not for me to attack the individuals called drug czars, but I cannot believe that the hierarchy of that organization isn't completely riddled with people who either if they're not taking bribes, they're somehow gaming the system, because if the United States actually conducts a war it is normally very efficient and serious. This has been a complete failure.

**PW: What are your views on the death penalty?**

**CB:** Totally opposed.

**PW: And that's in the context that at this point, I think the United States and Japan are the only industrialized, capitalist countries that still execute their citizens....**

**CB:** I think the whole idea of the state ceremoniously taking a life is disgusting. And secondly, of course ... especially in this system, you're bound to convict innocent people.

**PW: And in this case, execute them.**

**CB:** If it's a murder case, and the accused is not a well-to-do person, he gets into the hands of the public defenders and they're stooges of the prosecutors, and their objective is not to provide a defense but to provide a fig leaf.

**PW: I think, in a lot of cases, they're well-intentioned but they just don't have the resources to compete with the government.**

**CB:** Some of them maybe, but in a lot of cases, Paul, they just foist upon their pro bono clients the comment that they have no choice, they've got to plead guilty, that they've got a deal for them with the prosecutor, and when they get to it, the prosecutor doesn't abide by the deal. And it's a scam. And as you know, there was a famous court decision, I think it was 1963

that's in that movie, *Gideon's Trumpet*.

**PW: Yeah, *Gideon v. Wainwright*, the right to counsel.**

**CB:** But you see, for example, in Britain and France, the death penalty was abolished after it became clear that an innocent man had been executed.

**PW: And I think the key thing is that in both those countries, it was the ruling class that turned against the death penalty, because at the time that the death penalty was abolished in both those countries it was tremendously popular, I think it showed 70-80% support ratings in public opinion polls....**

**CB:** I'm afraid if you had a referendum the death penalty might carry in a lot of countries, but they just don't treat it that way. [In] Canada, they suspended them in the early 60s and it was abolished in the late 60s. There's been no executions in that country for approximately 50 years. For a long time, I don't think it would happen now, but for a long time there was no doubt that had there been a referendum the public would have gone for the death penalty, they would have approved of it. But that is not the case now. I mean, we had a case in Canada where a man named Marshall in Nova Scotia was convicted for murder and spent I think 14 or 15 years in prison as a convicted murderer and then it was established he no more committed the murder than we did. And it wasn't like this ghastly business in Tennessee last week, where they found these three people that had been convicted and been in prison for 17 years....

**PW: Oh, that was Arkansas, the West Memphis Three.**

**CB:** One of them 17 years on death row. And they got them to plead guilty for a lesser offense; sentenced for 10 years so they served it and were released. And in their allocution they said this is a complete fraud, I didn't do this but just to be free I'll say it. The law is an ass ... and you can't expect a system like that to be respected. And the Marshall case in Nova Scotia, at least the Crown Law Office, the government apologized, paid him I think \$500,000 or \$750,000, but it was, you know, a significant amount, and wipe the slate. It doesn't give him back those 15 years, but it's the best they can do at least.

**PW: And it's interesting because here in the United States all too often prisoners are exonerated, they're conclusively proven through DNA evidence to be factually innocent, and the state still won't give them any money or compensation or apology. We've**

**been talking about the buildup of the police state here in the United States and how it's occurred with a bipartisan consensus....**

**CB:** I've got to say my chief complaint isn't with the police, my chief complaint is with....

**PW: The prosecutors?**

**CB:** With the politicians that introduce these draconian laws, the high courts who have sat like suet puddings while the 5th, 6th, 8th Amendment guarantees of due process, the grand jury's assurance against capricious prosecution, no seizure of property, the just compensation, access to counsel, impartial jury, prompt justice, reasonable bail ... all of that's been thrown out. No one in this country can expect any of it. And my chief complaint is with the prosecutors, the courts, especially the higher courts, and the legal profession – the leaders of [the] legal profession more than the police. I think in a lot of places the police do a fairly good job, there are some bad ones, and I don't think it's an over-policed country, but there's no doubt that many policemen are very conscious of, and perhaps irresponsibly so, of their ability to inconvenience people and throw their weight around. But in general I think police forces don't do a bad job....

**PW: And I think that is a very good point. Because when we lock up 2.5 million people in prison, I mean, hey, the police didn't put them there. They didn't prosecute them and it took a judge to send them to prison.**

**CB:** And better police work is part of the declining crime rate.

**PW: One of the things I was going to say was as far as the buildup of the prosecutorial state or whatever, there hasn't been any political opposition to it. Why do you think that is?**

**CB:** I think it's a political free lunch, and the public bought the line, they've been terrified, and there's no constituency for the accused. There's this Manichaean system, where once one of your stacked-deck courts convicts somebody, he's a non-person. In the old Stalinist terminology, he's repressed.

**PW: I think the American term, and I think this goes back to England as well, I think the term was civil death – that until fairly recently, the 1960s or 1970s, those in prison were civilly dead. They couldn't inherit, they couldn't get married, they couldn't get divorced. There is a rich American tradition on that as well.**

**CB:** Well it's a little better now, I wrote a piece on it when I was released and I



referred to them as the walking dead.

**PW: I know, I thought that was pretty good.**

**CB:** Don't misunderstand me; I'm not in favor of mollicoddling people who do seriously bad things, but....

**PW: There's a difference between mollicoddling and an inherent sense of decency and justice.**

**CB:** Exactly, and a kind of sadistic tormenting of them, which is what the system engages in.

**PW: And it's interesting because it's been institutionalized and bureaucratized on a mass level in this country**

**CB:** I gotta say, that the prison where I was, it was a low-security prison, there were some decent people and there were a few rotten apples.

**PW: In terms of philanthropy, criminal justice reform is less than 1% of philanthropic giving in the United States, which is pretty much like the lowest of any type of area of philanthropy. This is in the context that pretty much anyone that's paying attention would agree that America's criminal justice system is in dire need of reform for the better, so any idea why, or insights why, that number is so low?**

**CB:** No, you and I have talked about this before. I thought that by now you

would have one of these film stars, a lot of them are reasonably accessible for altruistic causes, and I would have thought that you would've had at least one of them taking up the cause.

**PW: Paris Hilton isn't taking my calls anymore.**

*[Laughter]*

**CB:** Some wealthy people, including some that I know that have had criminal-legal problems, my impression of them is that it was just a nightmare and they want to treat it like a nightmare. It came and it ended, and they don't want to think about it again. That would include Martha Stewart and Michael Milken, for example. I will say this: I think it is going to change when a couple of things happen, because they drag a million more people into the system every year.

**PW: One of the things, I think, is the more mass imprisonment grows, the better the chance for reform, because the more people it's affecting.**

**CB:** Well first of all, you'll get such an expansion of it through the population, not just the poorest people, that it will start to stir about a bit eco-politically. Secondly, and it's with some reluctance that I get into this, they've ruined unjustly the lives of so many people that eventually

there [will be] some murders of judges. Eventually it's going to become a more widespread phenomena, and I don't approve of that, I'm not encouraging that, I think that all the rhetoric will be "we will not negotiate with murderers," but they have to face the fact the only way anything happens in this country is through violence. I don't think there is any ... spirit of reform in this country at all. I don't think anybody does anything really seriously politically, as "let's make something better." It's just a Darwinian contest of different masses of strength.

**PW: I have to say this, as an advocate for prisoners' rights I have to look back and I look at the progress that has been made on gay rights in this country, and it's a little short of astounding. I was born in 1965 and it was still illegal, I think in at least 16 or 17 states for people of different races to marry. And fast forward that....**

**CB:** It's shocking that [such laws] went on for so long, isn't it?

**PW:** Yeah, and that was when you think it took the Supreme Court almost 102 years after the Emancipation Proclamation to say that yes, people of different races can get married, and then in less than 40 years from the time they have that ruling you now have basically *de facto* gay



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marriage in at least ten states.... It's just this massive, there's been a real social and political shift on that issue. And well, looking at it as an advocate, I think really I'm certainly very impressed. But I think some of the key things we've seen, there is a lot of time, effort and money put into that. There's been a legal strategy, there's been a political strategy and there's been a social strategy. And obviously, social acceptance for gays and lesbians is far more now than it was 30 years ago.

**CB:** All of these groups have been very effective....

**PW:** Yes, compared to what it was say 40 years ago. One of the things too when we talk about the prosecutorial system, and you see wealthy men like Bernie Ebbers, for example, the man in his 60s sentenced to basically life in prison and he reports to prison to die in prison. And unlike most people going to prison that are poor and have little in the way of resources, any insights on why people are doing that?

**CB:** You mean why do they go for these outrageous sentences?

**PW:** In a lot of these cases. You know who Mark Rich was?

**CB:** Sure, yeah, yeah.

**PW:** Take Mark Rich. Whatever anyone thinks of him, I think he's a pretty savvy guy, and he said rather than take my chances in a courtroom against this, I'm going to hightail it to Switzerland and wait it out there. And I think after twenty years he was pardoned.

**CB:** Yeah, well he contributed a fair bit to the government party. But in that case I think the statute under which he was convicted was nonsense....

**PW:** Yes, but he didn't take his chances with the criminal justice system.

**CB:** In my own case, I never considered that. I was going to fight it out. And partly it's because I didn't realize how corrupt and corroded the system and what a stacked deck it is. But even if I had, I would have done the same thing. I had a lot of assets in the United States and whatever happened I was determined to make the best case I could that I was not, in fact, guilty. But if I had not had any assets and wasn't particularly well known and hadn't a lot of friends here and valued their respect, I can't say it wouldn't have been tempting....

**PW:** What did you learn while you were in prison?

**CB:** I found it interesting in some ways, it was tedious of course. Normally, I do get on fine with people, but I didn't know if I would get on, because I hadn't had much experience with this milieu of people. But I got along fine. I had no trouble with any of the inmates, and indeed, I only had a couple of minor verbal exchanges with the regime.... So my job there was a tutor. I got quite involved with helping these people to pass their GEDs and we got more than 100 of them through, we doubled the graduation rate, my two colleagues and I, fellow tutors. It was interesting work and I got very interested in their, in these people, ones who opened up a lot, and it was none of my business but some of them became quite expansive you see. And so I ... have a higher appreciation than I had before of how many, and how seriously disadvantaged people are in a rich country like this, specifically this country which is a rich one. I found that a lot of these – now let's face it, a lot of these people are essentially scoundrels – but they're quite interesting. And I did tell the *London Daily Mail*, the composition of the [prison] I was in was considerably more interesting than the membership of a number of clubs I belonged to.

*[Laughter]*

I didn't specify which ones, as I didn't think that'd be appreciated by the management committee of the club, but it's true, a lot of them were quite interesting. And of course, you learn a whole lot more about the terrible wastage of human resources. I was in a place where very few people had been convicted of violent things, a few had been....

**PW:** I'm thinking with the BOP [Bureau of Prisons], these are guys, generally they've done a lot of time and they're working their way out of the system.

**CB:** Either that or they've had relatively light sentences to begin with. And some had come from max, to medium to low. There were different types; very few with a violent background. For example, when I started to look into this, there were just about 650,000 people in this country in the mid-seventies who were in mental asylums, or mental hospitals, institutions....

**PW:** Right, now they're all in prison.

**CB:** They're all in prison ... and they don't belong in prison. You'd see some of these people heavily medicated, shuffling around like zombies and talking to themselves. They don't belong in prison.

**PW:** And actually, I think the prison

officials are the first people to agree with that.

**CB:** They would say that, I'm sure they would say that. And on the other hand, I would say about 20% of the people there, if you opened the gates, took down the fences and took down the doors and said that everyone is free to go, they would cling to the furniture. Otherwise they'd be skid row bums. They've got companionship, a roof over their heads, they get three meals a day – it's not fabulous cuisine, but it's not like they'd be dining in fine restaurants if they were outside. And they watch television; it's a welfare system. And that's not what prison's for; it's not for people with mental problems, I mean, other than to the extent that their mental problems cause them to commit crimes, and even then, it probably isn't for them. And it isn't a substitute for an orthodox welfare system. I will say that some of them are probably incorrigible but not violent.... I never much thought about it, but prison is a completely stupid place for nonviolent people. I mean it makes no sense. It's only done because it's been done for centuries. But it's an utterly stupid remedy or penalty. I accept that violent people, that's a different matter, some of them may actually be a threat to other people, you have to be careful.

**PW:** If you had one piece of advice for prisoners what would it be?

**CB:** I can only speak to the low-security ones, but basically, no matter who it is, no matter what their philosophical or religious views if they have any, is just don't give up hope. The greatest enemy in those places is hopelessness. I'm not a blustering person and I'm not a pep-rally person at all, but I did counsel a number of people at the edge of despair and I will say in a couple of cases I maybe made a difference. But that's your greatest enemy. Once you lose hope, now I wasn't going to do that because I was conducting my appeals, on a worst case I would have served 5.5 years and still would have something to live for. Anyone has something to live for, but I still had some cards to play. And I had a wife and I had children who were very loyal to me, all of them, and there was no way I was going to end up with no money at all.... So I understand that I am more fortunate than most of them, but that's always the key: Mr. Churchill's phrase, "never despair." That's a trite message, but that would be the message.

**PW:** Well, I don't think it's trite at all.

I just wanted to make sure you got your plug in for your book [*A Matter of Principle*], so what's your book about?

CB: Ah, well, I wrote a book, an autobiographical book, about 20 years ago. So it brings that up to date. It has I think 15 chapters, and from chapter 4 on is really about my legal travails. It's a lot of – I tried to make it reader-friendly, there are a lot of humorous parts in it as well as rather disappointing parts, but I try not to mire the reader in the details of these things too much.... I'll leave to others to determine whether they like it or not. But to anybody with any interest in how the legal system works in the U.S., and there are some aspects of Canadian civil justice in it, which has some relevance to this country also, I do modestly recommend it because it lays out quite explicitly the appalling problems and shortcomings that I encountered. And that would certainly not be unique to me.

PW: And so in effect, once you're released from the United States BOP, you're going to be deported, and as a convicted felon you will not be allowed to enter the United States again, correct?

CB: Unless I choose to eventually make an application on the basis that my state, and I quote, "moral turpitude," is not such as to threaten the country. Now after the way I've been treated in this country I wouldn't be in any thundering hurry to apply. But I do know the country well, and I like it.

PW: What prospects do you see for any type of criminal justice reform in the United States?

CB: I just don't see it. There's no lobby for it. I think it will happen eventually. I think, as I said, it will come as a result of adding effectively a million people to those with a [criminal] record every year.... And unfortunately, I think a greater degree of violence by people whose lives have been unjustly ruined by the system against those they may consider to be symbolic of their problems. The combination of those will get something going eventually, but right now it's just a problem the country just doesn't like to hear about. And no one knows

that better than you.

PW: And anything you'd like to add, anything you'd like to say that I haven't covered?

CB: Since I'm not an American and will be leaving the country there's not much I can do. It is a terrible problem, and I cannot urge strongly enough – I said this when I put on my weekly column on the *National Review* online – the remarks I made when I addressed the court in June, in Chicago. I think I said, "My dear American friends, this is a terrible problem this country has." And it is. So if I may take the liberty, I just urge all your readers not to adopt the attitude that "I just had an awful time but it's behind me now and I'm going to pretend like it didn't happen." Because if you people don't take the lead in making the country aware of how defective its legal, criminal justice and custodial systems are, which we said earlier is one of the very principal criteria of judging the civil standards and humanitarian sophistication of society and a country, if you don't do it, no one else is going to, and you people are all victims of it. Even a person guilty of bad things, objectively bad things – not fatuous offenses that legislatures invent to help prosecutors cast the wider dragnet, but people who objectively did bad things – this country's departed as far as I can see from the principle that if you address the penalty meted out to you, you have a clean slate. It's an even balance sheet at that point. They don't. It's stigmatizing for life, and creates an under-under class of stigmatized and atrophied people. And that is uncivilized, on top of the stacked deck of the so-called due process and the clumsy heavy-handed way that the prison system is run. And in many states, the prison systems are utterly disgraceful.... So I think [prisoners] should be the vanguard [of reform efforts].

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# From the Editor

by Paul Wright

This month's cover story continues our series of interviews with some of the more prominent survivors of the American criminal justice system (for our first interview with former prisoner and famous movie actor Danny Trejo, see the August 2011 issue of *PLN*).

Prior to his incarceration Conrad Black was, in addition to being a huge media owner, also a noted historian and biographer. Which makes his perspectives on the American carceral state more rounded and grounded in a historical perspective than that of many other prisoners. I hope our readers find his views both interesting and informative as we continue our dialogue on contemporary criminal justice issues. I interviewed Conrad while he was out on bail, shortly before he returned to federal prison to serve the remainder of his sentence. He was finally released from the Bureau of Prisons in May of this year.

We have previously reported on the Prison Phone Justice Campaign, and asked that prisoners submit their comments to the Federal Communications Commission to ask that the FCC take action to cap the rates charged for phone calls made by prisoners across state lines. See the ad on page 39 of this issue for more details. Since we first ran the ad in the June issue of *PLN*, 118 letters have been posted to the public docket section of the FCC. If high prison phone rates have negatively affected you and your loved ones, please take a few minutes to write to the FCC and ask them to stop this injustice. The more people impacted by high prison phone rates who file public comments, the more likely it is that the FCC will act. Non-prisoners can post their comments online as well.

This month we are launching our annual fundraiser appeal. Unlike many other non-profits, we do not constantly bombard our readers or supporters with pleas for money. Instead we only do so once a year, which keeps our costs down and is less of a burden. The cost of a *PLN* subscription does not cover all the expenses of publishing the magazine nor maintaining our operations. To do so requires donations from readers and supporters above and beyond the cost of a subscription. Buying books from *PLN* also helps. Looking for that perfect gift for a prisoner who is lim-

ited in terms of what they can receive? A book from *PLN* is the perfect gift, and we have added several new titles recently; one of the new books is reviewed in this issue.

*PLN* continues to be censored by a number of prisons and jails. We recently settled our censorship case against the New York State Department of Corrections, whereby they agreed to deliver our books, pay damages and stop censoring *PLN*. We will report the conclusion of

that case once the matter of attorney fees is resolved. In the meantime, if you are a state prisoner in New York and your *PLN* subscription or book orders from *PLN* are censored, please notify us immediately so we can take appropriate action.

As we enter the holiday season, please encourage friends and family members to donate and subscribe to *PLN*, or to order the books we distribute.

Enjoy this issue of *PLN*. ■

## Birthing Behind Bars: A Campaign for Reproductive Justice in Prisons

by Victoria Law and Tina Reynolds

“I never thought of advocating outside of prison. I just wanted to have some semblance of a normal life once I was released,” stated Tina Reynolds, a mother and formerly incarcerated woman. But then she gave birth to her son while in prison for a parole violation.

“When I went into labor, my water broke. The van came to pick me up, I was shackled. Once I was in the van, I was handcuffed. I was taken to the hospital. The handcuffs were taken off, but the shackles weren't. I walked to the wheelchair that they brought over to me and I sat in the wheelchair with shackles on me. They re-handcuffed me once I was in the wheelchair and took me up to the floor where women had their children. “When I got there, I was handcuffed with one hand. At the last minute, before I gave birth, I was unshackled so that my feet were free. Then after I gave birth to him, the shackles went back on and the handcuffs stayed on while I held my son on my chest.”

That treatment, she recalled later, was “the most egregious, dehumanizing, oppressive practice that I ever experienced while in prison.” Her experience is standard procedure for the hundreds of women who enter jail or prison while pregnant each year.

Upon her release, Reynolds started Women on the Rise Telling HerStory (WORTH) to give currently and formerly incarcerated women both a voice and a support system.

In 2009, Reynolds and other WORTH members took up the challenge of fighting

for legislation to end the practice of shackling women while in labor in New York State. At rallies and other public events, formerly incarcerated women spoke about being pregnant while in jail and prison, being handcuffed and shackled while in labor, and being separated from their newborn babies almost immediately. Their stories drew public attention to the issue and put human faces to the pending legislation. That year, New York became the seventh state to limit the shackling of incarcerated women during birth and delivery.

In March 2012, Arizona became the sixteenth state to pass anti-shackling legislation. Thirty-four states still lack legal protection for women who give birth while behind bars. In Georgia and Massachusetts, formerly and currently incarcerated women and reproductive rights advocates are pushing for legislation to ban the shackling of incarcerated pregnant women during transport, labor, delivery and recovery.

Recognizing the power of women's individual stories to enact change, WORTH has launched Birthing Behind Bars, a project that collects stories from women nationwide who have experienced pregnancy while incarcerated. Birthing Behind Bars ties women's individual experiences to the broader issue of reproductive justice (or injustice) behind prison walls, and helps push a state-by-state analysis of the intersections of reproductive justice and incarceration.

WORTH wants to hear your stories of pregnancy behind bars. What was

medical care like? Did you birth your baby while incarcerated? What was it like to hold your baby for the first time? What happened in the moments after? To share your story, please write to:

Women on the Rise Telling HerStory  
(WORTH)

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New York, NY 10035

If you have access to a phone line, you

can also call in your story anytime on our toll-free hotline: 1-877-518-0606. (Don't worry if you make a mistake, as we edit all the calls).

Let your friends and family members on the outside know about our campaign! Ask them to visit our website and sign onto our pledge to end shackling and other reproductive injustices behind bars: [www.birthingbehindbars.org](http://www.birthingbehindbars.org). ■

## Ex-Warden's Wife Sentenced to One Year for Assisting Prisoner's Escape

On November 7, 2011, the wife of a former Oklahoma warden was sentenced to one year in prison for helping a prisoner escape 17 years earlier.

Bobbi L. Parker, 49, was married to Randy Parker, assistant warden at the Oklahoma State Reformatory, a medium-security facility in Granite, when Randolph Franklin Dial escaped from the prison on August 30, 1994. Bobbie Parker disappeared as well. Nothing was heard of the pair until authorities, acting on a tip after their story was aired on America's Most Wanted, discovered them living as husband and wife in a mobile home on an isolated chicken ranch in Campti, Texas in 2005. [See: *PLN*, Nov. 2005, p.23].

Parker claimed that Dial had drugged her, kidnapped her at knifepoint and kept her as a hostage by threatening that his "mob connections" would kill her family if she fled. Dial confirmed that that was accurate.

After being captured, Dial returned to prison to serve out the life sentence for murder he was serving at the time of his escape. He died in prison of cancer in 2007 at age 62. [See: *PLN*, July 2007, p.34]. To his dying day he maintained that both he and Bobbi Parker were telling the truth about him kidnapping her and holding her against her will; regardless, Parker was charged with helping Dial escape. [See: *PLN*, Nov. 2008, p.19].

According to the prosecutor's version of events, Parker met Dial and fell in love with him while they were working together in the prison's pottery program. The program was based out of the garage of her house, which was located on the prison property. During her four-month trial, which included the testimony of over 80 witnesses and almost 800 pieces of evidence, the prosecution produced

prisoner witnesses who testified that they saw Bobbi Parker and Dial behaving inappropriately in the assistant warden's house where she, her husband and her two young daughters lived.

During deliberations, the jury asked to travel to the prison to view the house. About two hours after returning from the trip, they returned a guilty verdict and recommended a one-year sentence. Although Parker faced up to ten years in prison for helping a prisoner escape, Greer County District Judge Richard Darby accepted the jury's recommendation and sentenced her to a year.

Proclaiming that she did not receive a fair trial, defense attorney Garvin Issacs vowed to appeal the verdict. "I will never quit until Bobbi Parker is a free woman," he said. "We had overwhelming evidence of Bobbi Parker's innocence.... We're going to have another trial in this case. This case will be reversed on appeal."

An alternate juror who did not help decide the case agreed, expressing surprise at the verdict. "I thought Mr. Issacs did a wonderful job. I think he proved she was kidnapped," said alternate juror Glenda Christian.

In May 2012, however, the Oklahoma Court of Criminal Appeals dismissed Parker's appeal after denying her additional time to purchase a copy of the lengthy trial transcript, which was estimated to cost about \$100,000. The appellate court had declined to find Parker indigent, meaning she was responsible for the cost of the transcript.

In the interim, Parker had been released from prison on April 5, 2012 after serving about seven months. ■

Sources: *Associated Press*, [www.correctionsonline.com](http://www.correctionsonline.com), [www.news9.com](http://www.news9.com), [www.tulsaworld.com](http://www.tulsaworld.com)



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# Prisoner Medical Care Costs Oregon Taxpayers Over \$100 Million Annually

As of July 1, 2011, the first day of Oregon's most recent budget cycle, the Oregon Department of Corrections (ODOC) had a population of just over 14,000 prisoners and a shiny new \$1.36 billion budget for the 2011-2013 biennium.

Many factors contribute to such an enormous budget. One of the most significant is medical and mental health care for an aging and increasingly ill state prison population.

During the 2011-2013 biennium, the ODOC will spend approximately \$203.9 million – or about 15 percent of its budget – on prisoner health care. That number has risen sharply over the past several years, from \$50.4 million (6.2% of the ODOC's budget) in the 2003-2005 budget cycle. Put another way, prison health care is now costing Oregon taxpayers more than \$100 million annually.

According to a budget information report issued by the Oregon Legislative Fiscal Office in September 2011, "Rising hospital costs, competition for health professionals, and increasing pharmaceutical costs all contribute to the increase in the health services budget" for the state's prison system.

Each year the ODOC spends an average of about \$567 per prisoner for health care. As prisoners age, however, those costs spike sharply. The annual health care cost for a prisoner in his 40s jumps to \$936, but then quickly rises to \$1,867 for prisoners in their 50s, \$3,514 for prisoners in their 60s and \$6,527 for prisoners over 70.

The ODOC has 674 prisoners older than 60, up from 258 a decade ago, and the two fastest-growing prisoner age groups are 46-59 and 60 years and older.

"Over the past 15 years, the average age of an inmate has increased, in part as a result of the changes in sentencing policy that have led to longer sentences," the budget report by the Legislative Fiscal Office noted. "Since health care costs generally increase as a person ages, the trend of an aging inmate population will likely increase costs in the future."

Additionally, thanks to hard living, chronic substance abuse and poor health care, many prisoners have medical issues that surpass their chronological age, stated Dr. Donald Kern, president of the Society of Correctional Physicians. A 50-year-old prisoner commonly has health care prob-

lems seen in 60-year-old patients in the community, according to Kern.

"I'm just seeing sicker and sicker patients," agreed Dr. Michael Puerini, Medical Director at the Oregon State Correctional Institution.

In 2010 alone, around 24 ODOC prisoners needed medical treatment costing more than \$100,000 each. The most expensive case involved \$1.1 million to treat a 40-year-old female prisoner's kidney disease and other ailments. She has since been paroled. Including that case, the top ten most expensive medical cases cost the ODOC approximately \$3.85 million in 2010 – such as \$481,889 to treat a 51-year-old prisoner's aneurysm, \$402,457 to treat a 36-year-old prisoner's cancer and \$216,238 to treat a 44-year-old prisoner's staph infection.

One prisoner abused ibuprofen, requiring surgery and three weeks in intensive care for internal bleeding at a cost of \$61,904. In a ten-month period in 2009-2010, the ODOC spent \$12.5 million for 4,358 outside hospital visits alone.

"There is an obligation to provide medical care for serious medical needs," said Dr. Kern. "We're not talking cosmetic surgery." ODOC administrators agreed. "If we're out of money, we still have to provide the treatment," stated Bill Hoefel, ODOC's health services administrator. By way of example, Dr. Puerini cited a short-term prisoner suffering from acute appendicitis. "That guy did not get a life sentence, but his illness, left untreated, could end up giving him a life sentence," said Puerini. "We can't let that happen."

Still, prison officials constantly seek to contain costs. In March 2009 the ODOC selected Colorado-based Correctional Health Partners (CHP) to become a "third-party administrator" of the prison health care system. [See: *PLN*, Feb. 2012, p.46]. CHP was paid \$1.2 million in the first year of the contract and continues to receive monthly payments of close to \$100,000.

Medical directors meet daily by telephone to quickly move prisoners out of hospital beds, or avoid sending them there at all. Chest pains, for example, may be something serious or simply feigned.

"A weekend in the hospital is a vacation from prison for some inmates," said CHP's Jeff Archambeau. Apparently, a weekend in the morgue would be more acceptable to CHP bean counters. The

ODOC and CHP scrutinize databases, attempting to detect trends suggesting that a prisoner is gaming the system in order to obtain medication, get out of work or go on "vacation" to the emergency room.

Other ODOC money-saving measures include an in-house dialysis unit that treats 26 prisoners who previously received more expensive community-based treatment, and a cardiology clinic that saves \$5,000 a month. A prisoner self-care chronic disease management program "shows real promise" of reducing the need for outside medical care, said Hoefel. Prison officials are also reviewing administrative practices, seeking to eliminate steps that waste time and money.

"We work really, really hard and spend a fair amount of time making sure we are managing taxpayers' money," said Dr. Puerini. Of course, some of the greatest cost savings may come from simply being less stubborn when it comes to providing prisoners with necessary health care. For example, ODOC medical staff treated a female prisoner experiencing heart failure with antacid, Tylenol and a heat pack, and told her to eat a sandwich and take a nap. She survived, filed a lawsuit and settled the case for \$390,000. [See: *PLN*, Sept. 2011, p.44; June 2010, p.32].

Mental illness is another major part of the problem. Prisoners are five times more likely than members of the general public to suffer from mental health conditions, according to a 2006 federal Bureau of Justice Statistics study. Ninety percent of prisoners with mental illness have also abused drugs or alcohol, the report stated.

In Oregon, about 70 percent of ODOC prisoners need some type of mental health care, costing about \$16 million annually. That includes over 3,300 prisoners with "severe" mental problems or who have the "highest need" for treatment. Since 2005 the prison system has added 525 mental health beds, bringing the total to 900 – nearly 300 more than Oregon's state mental hospital.

"The corrections environment is not good for a person with serious mental health illness," said Jana Russell, administrator of the ODOC's Behavioral Health Services Division. "We can't cure most people," acknowledged Dr. Kern. "We're managing a chronic problem. Is it an ideal setting? No."



For years, the ODOC attempted to “manage” the problem by housing mentally ill prisoners in solitary confinement, which exacerbated their mental illness and led to frequent suicide attempts. [See: *PLN*, Oct. 2008, p.10].

“The potential for preventing suicide attempts, preventing weaker inmates from being victimized and teaching skills to function within a highly charged environment is imperative,” a 2004 mental health task force noted. The task force proposed separate treatment units for mentally ill prisoners or a new prison to serve as a mental hospital.

The legislature approved a new facility located in Junction City that would have provided mental health care to Oregon’s most troubled prisoners. With a growing budget crisis, however, officials suspended construction plans in 2010.

“We were devastated,” said Russell. “We were hanging on by the skin of our teeth.” Originally slated to open in 2012, the prison may not be ready for nearly a decade. Until then, too many prisoners will not get the mental health treatment they need, observed Bob Joondeph, executive director of Disability Rights Oregon.

“There is a greater risk of suicide

among these inmates,” he said. “There is a greater risk to people who are vulnerable as a result of their mental illness.”

In what Russell described as the “craziest brainstorm,” in the fall of 2010, prison officials converted an Intensive Management Unit (IMU) into a 187-bed mental health unit for the most severely ill prisoners.

“This is not a great environment for doing this,” Joondeph noted following a tour of the unit, “but it’s what we have.” Prisons in eastern Oregon have resorted to teleconferencing to provide treatment to mentally ill prisoners, since psychiatrists are unwilling to work at the rural facilities.

During the last three budget cycles, the ODOC has not received funding for 24-hour mental health staffing. Oregon Governor John Kitzhaber, himself a doctor, did not recommend additional funding for prison mental health care staffing during the most recent budget cycle. Which means that the ODOC, and prisoners with mental health problems, will have to do the best they can with the limited resources they have. ■

Sources: *The Oregonian*, [www.leg.state.or.us](http://www.leg.state.or.us)

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# Habeas Hints: 2012 Supreme Court Habeas Highlights: Plea Bargaining Cases

by Kent Russell

*This column provides “habeas hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is on “AEDPA” (Antiterrorism and Effective Death Penalty Act), the federal habeas corpus law which now governs habeas corpus practice in courts throughout the United States.*

**Missouri v. Frye, 132 S.Ct. 1399 (2012)**

**Lafler v. Cooper, 132 S.Ct. 1376 (2012)**

In *Missouri v. Frye* (*Frye*) and *Lafler v. Cooper* (*Cooper*), the U.S. Supreme Court (SCOTUS) held that, when a plea offer by the State is rejected due to ineffective assistance of counsel (IAC), the defendant may be entitled to a second chance at accepting the offer – even if he subsequently pleaded guilty to less favorable terms, or went to trial, was found guilty and received a longer sentence than that provided for in the original plea offer.

In *Frye*, the defendant was charged with a felony for a fourth offense of driving with a revoked license. The prosecutor sent Frye’s lawyer a letter offering to reduce the charge to a misdemeanor if Frye pleaded guilty within a specified time period and agreed to a 90-day sentence. However, the lawyer never informed Frye of the offer before the deadline for acceptance, and the offer expired. Then Frye, ignorant that the plea offer had lapsed, pleaded guilty without conditions and was sentenced to 3 years in prison – more than 10 times the sentence he would have received had he accepted the plea offer.

In *Cooper*, the defendant was charged with assault with intent to murder after he shot a woman in the buttocks. Prosecutors offered a plea deal with a recommended term of four to seven years. However, Cooper’s lawyer advised him to reject the offer because the lawyer insisted that state law did not permit an attempted murder conviction for wounds inflicted below the waist. The lawyer’s advice was 100% wrong, but Cooper relied on it and rejected the plea offer. Cooper then went to trial, was convicted and received a mandatory minimum sentence of 15 to

30 years – more than 4 times greater than the sentence he would have received had he taken the plea bargain.

In both cases the State admitted that the lawyers had provided ineffective assistance at the plea bargaining phase, but maintained that this didn’t matter because there is no constitutional right to a plea offer in the first place. However, by a 5-4 vote, SCOTUS reversed both cases and sent them back to the trial court for a new round of plea-related proceedings consistent with the principles expressed in the majority opinion.

The first question that SCOTUS tackled in these cases was whether the well-established *Strickland* standard – which holds that a habeas petitioner can have his conviction and/or sentence reversed if he can show deficient performance by his lawyer and resulting prejudice – applies to rejected plea offers such as those implicated in *Frye* and *Cooper*. SCOTUS had previously held that *Strickland* applied where a defendant *accepted* a plea offer as the result of IAC; for example, where defense counsel misinformed the defendant of the amount of time he would have to serve before becoming eligible for parole [see: *Hill v. Lockhart*, 106 S.Ct. 366 (1985)], or failed to tell the defendant that his guilty plea would likely result in deportation [see: *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)].

However, in *Frye* and *Cooper* the defendants were not complaining that incompetent attorney advice had led them to accept a plea offer that turned out to be worse than they were led to believe by their attorney, but rather that IAC had caused them to *reject* a plea offer that provided for a lesser sentence than that later imposed after pleading guilty on less favorable terms, or going to trial and being found guilty.

The State argued that, unlike acceptance of a plea offer due to IAC, rejection of a plea offer makes the application of the *Strickland* standard inapplicable due to the additional speculation that comes into play when analyzing the effect of a plea offer that was never accepted in the first place (*Frye*); and because, once a defendant goes to trial and loses (as in *Cooper*), he forfeits the right to

complain about a plea bargain that was never implemented prior to trial. However, the SCOTUS majority rejected the State’s arguments because, with 94-97% of criminal convictions resulting from plea agreements, plea bargaining is such an essential component of the criminal justice system in the U.S. that the Sixth Amendment right to effective assistance of counsel at every “critical stage” of the process must apply to plea bargaining in all of its forms.

Having found that the *Strickland* test for IAC applied to the plea offers rejected in *Frye* and *Cooper*, and with the State having conceded that incompetent attorney advice caused the rejection of the original plea bargains in both cases, the SCOTUS majority had little trouble concluding that both Frye and Cooper had satisfied the “deficient performance” prong of *Strickland*’s IAC test. Nevertheless, what the Court gave with one hand it may well have taken away with the other by imposing very tough requirements in order to prove prejudice.

Specifically, a petitioner attempting to satisfy the prejudice prong of the IAC test as to a plea that was rejected due to incompetent attorney advice must demonstrate a “reasonable likelihood” as to all of the following: 1) that the defendant would have accepted the offer if competently advised by his lawyer; 2) that the prosecutor would not have withdrawn the offer before the court approved it; and 3) that the court would have accepted the offer. The first requirement is not very difficult to meet when a specific plea offer has been rejected, because all the petitioner has to show is that he received a longer sentence by rejecting the offer than he would have received had the offer been accepted.

But the second and third requirements are much more challenging to satisfy, because in virtually all states the prosecutor can withdraw a plea offer up until the time it is accepted and approved in open court; also, the judge has broad discretion to reject a plea offer even if both sides have agreed to it. Hence, for example, even though SCOTUS remanded the *Frye* case to the trial court for a hearing on whether the prejudice requirements had been met, the Court, noting that Frye had



been charged with another offense after the plea offer was tendered, stated “there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it ... unless they were required by state law to do so.” (*Frye*, at p.1411).

Based on the above, the following Habeas Hints are recommended before a prisoner decides to file a habeas claim based on the *Frye* and *Cooper* decisions:

- Don’t even think about making a claim based on *Frye/Cooper* if the prosecution didn’t make any plea offers at all. Both cases make clear that the State is under no obligation to make a plea offer of any kind. It is only after a plea offer is actually made by the prosecution that *Frye* and *Cooper* potentially come into play.

- You must be able to point to a specific plea offer that was rejected due to incompetent attorney advice. (The prosecution had decided to concede this issue by the time *Frye* and *Cooper* reached the Supreme Court, but you can’t expect the State to do that in your case). One way to accomplish this is to obtain trial counsel’s file and try to find letters or other documentation showing plea offers that were made by the prosecution and either not communicated to you at all, or which you rejected based on advice by your attorney that you can now show to have been faulty. If you can’t find such documentation in the existing file, try to obtain it by a) writing a letter to the D.A.’s office requesting copies of any plea offers communicated to the defense and not eventually accepted; b) requesting, in writing, that your defense counsel provide you with a letter setting

forth all plea offers made by the prosecution and the reasons why each offer was rejected or not accepted; and c) preparing your own sworn declaration explaining how faulty advice by your attorney caused you to reject a plea offer that you otherwise would have accepted.

- Look up and copy penal code sections showing that the sentence you ultimately received was longer than the sentence you would have received had you accepted a plea offer that, because of IAC, you rejected. Also state somewhere in your petition or in a supporting declaration that you would have accepted the more favorable offer had you been competently advised about it.

- Strongly consider using expert testimony to meet the prejudice requirement. Although you should check your state’s law to determine whether there are any statutory limits on the prosecutor’s right to withdraw a plea offer before it has been accepted by the defendant in open court, or whether there are any limits on the court’s discretion to refuse to accept a plea bargain after both parties have agreed to it, you should assume there are no such limitations. In California, for example, Penal Code § 1192.5 simply states that a plea agreement requires the “consent of the prosecutor” and the “approval of the court,” and there are no stated restrictions on the prosecutor withdrawing consent or the court refusing to approve a plea

bargain before it is formally accepted by all parties in open court. You will find that most, if not all states, have similar laws. Nevertheless, SCOTUS requires that to establish prejudice as to a rejected plea offer, a habeas petitioner must show “a reasonable probability that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.” (*Frye*, at p.1410). I recommend that you try to deal with this dilemma by using expert testimony. For example, consider retaining a public defender, prosecutor or judge who practiced in the county when and where you were convicted. Obtain a declaration from your expert stating that once a plea offer had been made by the prosecutor and accepted by the defendant, in the vast majority of cases the prosecutor would stand by the offer and the judge would accept it unless new facts unfavorable to the defendant or to the defense case came to light before a hearing on the plea offer. Then, assuming that you were not charged with any other offenses after arraignment and prior to trial (if there were new charges after arraignment, any claim based on *Frye/Cooper* is almost certainly a loser), show that no new “bad” facts are reflected in the record between the time the offer was made

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## Habeas Hints (cont.)

and the date when you accepted a worse offer or went to trial.

- Decide whether to argue that the *Frye* and *Cooper* cases proclaim a “new rule” or an “old rule.”

Even if you’ve successfully followed all of the Habeas Hints set forth above, you still have to deal with the thorny issue of retroactivity. In particular, “new rules” promulgated by the Supreme Court cannot be applied retroactively to cases which became final prior to the date the new rule is announced by SCOTUS, unless SCOTUS says they are retroactive (which SCOTUS did not do in either *Frye* or *Cooper* and is extremely unlikely to do in any future case), or a lower court finds the rules to be retroactive based on standards which are very difficult to satisfy. (See, e.g., *Whorton*, cited in the next paragraph). Given this challenge, if your case is recent enough that your conviction has not become final under state law, file a *Frye/Cooper* claim in state court and argue that the rules announced in *Frye* and *Cooper* are not “new” rules, but rather “old” rules that flow naturally from Supreme Court jurisprudence going back to the *Hill* decision in 1985. Do this by using excerpts from the majority decision, which trace *Frye* and *Cooper* all the way back to *Hill*. When you are denied in state court, file a timely habeas corpus claim in federal court on the same theory.

Alternatively, if you can’t use the “old rule” approach because your conviction has already become final under state law, bring your habeas claim within one year of the date that *Frye* and *Cooper* were published (i.e., before March 21, 2013), and argue that these cases proclaimed a “new rule” of federal constitutional procedure that should be applied retroactively because it is so important as to constitute a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” (See: *Whorton v. Bocking*, 127 S.Ct. 1173 (2007), recognizing this as a retroactivity exception but finding it to be rarely if ever applied in practice). Do this by citing the arguments in the dissents, which criticize both *Frye* and *Cooper* precisely because they supposedly represent a monumental change from previous decisions by the Supreme Court. ■

*Kent A. Russell specializes in habeas corpus*

and is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus under AE-DPA. The 5<sup>th</sup> Edition, completely revised in September 2006 and recently updated in 2011, can be purchased for \$49.99, which

includes priority mail postage. An order form can be obtained from Kent’s website ([www.russellhabeas.com](http://www.russellhabeas.com)), or simply send a check or money order to: Kent Russell, “Cal. Habeas Handbook,” 3169 Washington Street, San Francisco, CA 94115.

## PHS Hit with \$312,000 Verdict for Inadequate Care of Pennsylvania Prisoner

On February 17, 2012, a Pennsylvania state jury slapped Prison Health Services (PHS) with a \$400,000 verdict for inadequate medical care of a prisoner at State Correctional Institution (SCI) Albion. The award was reduced to \$312,000 because the jury found that prisoner Derrick Jones, also known as Derrick Alexander, was 22% responsible for his injuries.

Jones, 41, was hurt at SCI Albion on March 12, 2006 after he jumped off a bunk and landed on a boot. PHS failed to take an X-ray for five days, after which time it was discovered that Jones had broken his ankle. The ankle was set with surgical pins and placed in a cast, but Jones was ordered to return to his top-tier cell.

That required him to climb up and down metal stairs for meals and medical treatment. On March 19, 2006, Jones fell down 15 steps, injuring his neck, back and left knee. PHS did not provide him with an MRI to determine the extent of the injuries. Jones obtained an MRI after his release from prison in 2008, which confirmed that he had suffered herniated discs and torn knee ligaments.

PHS argued in court that it had provided appropriate care, and any lingering problems that Jones experienced were due to degeneration. “PHS similarly did not cause any of Mr. Jones’ claimed injuries or damages,” PHS attorney Kathryn Kenyon wrote in court pleadings.

Jones’ expert, a prison medical specialist, disagreed, finding that PHS’s care fell below acceptable standards. Another expert predicted Jones would have “permanent limitations on future employment,” as in addition to his injuries he had dropped out of school in the 10<sup>th</sup> grade and only had job experience as a janitor and in construction and demolition.

Jones’ attorney, Stuart M. Niemtow, said he was “quite pleased” with the verdict. “Prison Health Services dropped the ball many times in caring for Derrick over

a two-year period,” he said. The verdict will, sadly, be enjoyed by Jones from a jail cell, as several years after his release he was arrested on new charges.

Following the verdict, the trial court ordered a reduction of damages for future medical care to their present value under the state’s MCARE Act, after finding that PHS qualified as a health care provider under the Act. Niemtow said he intends to appeal the court’s reduction of damages. See: *Jones v. PHS*, Court of Common Pleas for Erie County (PA), Case No. 15262-08.

PHS has since merged with Correctional Medical Services to become Corizon.

The same day that the jury entered the verdict against PHS in Jones’ case, the *Huffington Post*, an online news site, published an interview with retired SCI Albion guard Kevin Barwell, who criticized poor medical treatment at the facility. Barwell cited the January 1, 2012 death of prisoner Dennis Austin, 48, who suffered from cancer and died with severe bedsores that covered his body.

“It’s happened before. This is a pattern that’s been ongoing,” said Barwell, who added that Austin’s death was “a direct result of negligence. They’re not doing their job.”

Barwell, who had retired from the prison system in 2008, stated he was familiar with the medical unit at SCI Albion. “We had one inmate who was in the infirmary who was paralyzed from the waist down,” he said. “He had bedsores right down to the bone on his buttocks. I saw them, and I could actually smell the flesh. He needed [rolling] several times a day.”

Austin’s family, through their attorney, has called for an investigation into his death. ■

Sources: *Erie Times-News*, *Huffington Post*



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# Ventura County, California Settles Wrongful Arrest Class-action Suit for \$350,000

In September 2011, the Ventura County Sheriff's Office (VCSO) agreed to settle a class-action civil rights lawsuit alleging that innocent people had been jailed when VCSO officials failed and/or refused to use readily available technological means (such as fingerprint identification) to verify that people being booked into the Ventura County jail system were actually the people named in arrest warrants rather than people who merely shared the same name as someone with an outstanding warrant.

The settlement agreement sets aside a fund of \$120,000 to resolve claims made by former prisoners who can establish they were booked into a jail operated by VCSO based solely on a warrant intended for another person, during the roughly three-year time period covered by the settlement beginning on December 30, 2008. For each verified "incarceration incident" during the specified period, a class member will receive \$3,000 so long as the total number of claims does not exceed 40.

If fewer than 40 claims are filed, any balance remaining in the class settlement fund will revert to the County of Ventura. On the other hand, if the number of claims exceeds 40, the total settlement fund will be distributed on a pro-rata basis per incident; e.g., verified claimants would each receive an amount equal to the settlement fund of \$120,000 divided by the total number of claims.

As of September 30, 2011 at least 10 plaintiffs had been confirmed as class members. The attorney representing the county estimated that about 100 people would file claims, with around 25 of those ultimately being confirmed as class members. Other attorneys, however, suggested that the number of verified claimants could be higher given the long-standing problem of misidentification errors by the VCSO. Notice of the class-action settlement was made to potential claimants via newspaper, TV, radio and Internet ads.

In addition to the monetary component of the settlement, the defendants agreed to make policy changes to ensure that prisoners booked into VCSO jails are the correct people named in arrest warrants. According to court pleadings, "As a result of this litigation, Defendants have agreed to substantial injunctive

relief provisions including significant changes in their policies and procedures which will adequately address claims of mistaken identity incarceration incidents and guard against future incidents. Most importantly, Defendants have agreed to shift their primary means of identifying suspects at the booking stage from names and aliases to electronic fingerprint identification."

Despite the settlement payouts and policy changes, the defendants, including Ventura County, the VCSO and then-Sheriff Bob Brooks, denied the allegations in the complaint and did not admit liability.

The class-action lawsuit was filed in 2010 after Charles Velasquez was arrested by VCSO officials on two warrants under his name as a result of identity theft by his ex-wife's boyfriend, Arturo Gonzalez. Velasquez was held in the Ventura County jail for nine days despite repeated protestations of his innocence and despite the fact that VCSO officials knew or should have known that Gonzalez had stolen his identity.

The identity discrepancy should have been apparent because, about nine months earlier, Gonzalez had been

booked and held in the same jail on a felony charge of falsely impersonating Velasquez; he had been convicted of that crime and sentenced to state prison; and a comparison of booking photos, fingerprints and/or physical characteristics (such as tattoos) would have revealed that Velasquez was not the person named in the arrest warrants.

It was only after two Los Angeles County detectives picked up Velasquez on a no-bail warrant from that county that the mistaken identity was discovered; the detectives compared Velasquez's likeness to Gonzalez's booking photo and immediately realized they had the wrong person. By then, however, Velasquez had lost his job as a forklift operator.

On July 10, 2012 the district court granted final approval of the settlement agreement, including \$175,000 in attorney's fees and costs, an additional payment of \$55,000 to Velasquez as class representative and appointment of a special master to oversee the injunctive relief provisions of the settlement. See: *Velasquez v. County of Ventura*, U.S.D.C. (C.D. Cal.), Case No. 2:10-cv-10080-CBM-PJW. ■

Additional source: *Ventura County Star*

## \$657,670 Settlement in Ohio Juvenile Facility Class-action Suit

Less than a year after the filing of a federal civil rights class-action, a settlement was reached in the lawsuit, which challenged conditions of confinement at the Washington County Juvenile Center (WCJC) in Marietta, Ohio. In October 2011, the parties to the suit submitted a consent decree for approval by the district court.

Under the terms of the settlement, damages of more than \$400,000 will be disbursed among the class members; the plaintiffs' attorneys, Al Gerhardtstein and Jennifer Branch, will receive fees and costs in the amount of \$220,000; and corrections expert Steve Martin will be appointed as a monitor "to promote and assist the parties in achieving compliance" with the injunctive relief provisions of the settlement. The consent decree will remain in effect for one year with an extension

of six months permitted if the monitor finds the defendants have not substantially complied with the remedial measures specified in the settlement.

The WCJC consists of two girls' bedrooms (each accommodating five girls), three boys' bedrooms (each accommodating five boys), day rooms, classrooms, offices, programming space, a dining room, a kitchen and a gym. There are also four "observation cells" – one on the girls' side of the facility and three on the boys' side – used for intake, suicide observation, isolation and detention. Video cameras monitor all four of those cells.

The class members covered by the lawsuit include all youths (under the age of 20) "who have been, are now, or will in the future, be held in custody" at WCJC.

The injunctive relief provisions prohibit WCJC from confining youths in

detention cells for longer than 24 hours unless a mental health practitioner recommends such placement for suicide watch purposes.

The remedial measures further provide that a youth held in detention between the hours of 7 a.m. and 7 p.m. shall be allowed a minimum of one hour of recreation time in the gym, and staff may not use physical restraints on such youths except when they are transported outside the facility.

Under the terms of the consent decree, the defendants will establish a "privacy zone" around the shower and toilet areas of the detention cells, so that, except in cases of suicide watch, the video cameras will not monitor those areas. The defendants also agreed not to conduct cross-gender searches of juveniles except in emergency situations.

With respect to medical and mental health care, the defendants agreed to the appointment of a physician as WCJC's medical director, who will provide medical evaluations for youths "at least once every week," ensure that medical coverage is provided at all times, train staff in the proper implementation of policies and procedures, improve intake screenings, and improve identification and treatment of youths at risk of committing suicide.

Additionally, the defendants are not to use "for-profit entities as community service sites" for juveniles required to perform community service work, shall "make a good faith effort to provide some form of Non-Christian religious services to youth seeking same" and "will end the practice of ordering parents/custodians to pay child support or social security to the County's General Fund."

Class members held in detention cells beyond 24 hours per incident and not released for school classes are eligible to

receive \$40 to \$60 for each day held in detention after the first 24 hours; those placed in a suicide gown while in detention without having been assessed by a mental health practitioner are eligible to receive \$160 per day; and class members in detention who had to wear shackles in the detention cell or while participating in recreation or school are eligible for \$50 per day. The eight class representatives will each receive \$2,500.

According to the consent decree, the defendants "shall also provide the total sum of \$100,000.00 to be used to compensate all of those class members who can establish serious and significant physical and/or emotional personal injury such as pain and suffering due to delayed medical or mental health care, or actions by staff."

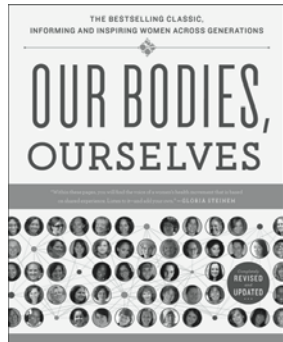
The consent decree was heartily endorsed by co-counsel for the class members, Al Gerhardstein, who stated, "I commend Washington County for addressing our concerns promptly and working with us to remedy the problems at the Center."

On November 21, 2011, the district court approved the establishment of a qualified settlement fund and the appointment of a fund administrator, and approved the parties' stipulation of dismissal of the case after the defendants had paid the "agreed upon initial amount" of \$650,170 plus \$7,500 for the administrator's fees and expenses into the fund.

The fund administrator filed a status report with the district court on July 31, 2012 that stated the settlement fund had been fully funded, and that 100 payments had been issued to class members totaling over \$215,000. Other claims remain pending. See: *D.D. v. Washington County*, U.S.D.C. (S.D. Ohio), Case No. 2:10-cv-1097-EAS-TPK. ■



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# \$93,000 Settlement for Georgia State Prisoners Beaten by Guards

The Georgia Department of Corrections has paid \$93,000 to settle a federal lawsuit filed by four state prisoners who were subjected to retaliatory beatings by guards at Hays State Prison.

At approximately 2:00 p.m. on August 12, 2010, the plaintiff prisoners – Miracle Nwakanma, Cornelius Spencer, Gregory Haines and Eric Towns – heard a commotion in their prison dorm, D2. At the front of the dorm, a group of prisoners were looking through the dorm's glass windows into the adjacent cellblock, D1.

When they observed dorm D1, they saw officers using excessive force against unresisting prisoners. Spencer saw a guard hit an unresisting prisoner with a radio. Haines watched two guards ram an unresisting prisoner into a wall, and saw another guard punching a handcuffed and unresisting prisoner in the back. Several of the prisoners in D2 yelled and banged on the window in an effort to stop the excessive force being used on prisoners in D1.

A short time later, numerous guards from the prison's Correctional Emergency Response Team (CERT) and other guards entered dorm D2, screamed "lock down," and fired a device that dispersed pepper spray. During the lock down process an unidentified prisoner assaulted a guard, which provoked retaliatory beatings. The four plaintiff prisoners, who did not lock down in time, were taken, singularly, to the Special Management unit to be beaten.

While handcuffed, Nwakanma was punched, stomped, kicked in the groin and face, struck with a flashlight, hit with batons and beaten until he was unconscious. He suffered injuries that included splintered teeth, a fractured toe, a fractured jaw and possible neurological damage. Oral surgery was later required to repair the damage to his face.

Spencer was also handcuffed when he was punched, kicked and beaten with a baton-like object until he vomited and lost consciousness. He suffered a baseball-sized hematoma to the head, a fractured toe and other injuries. Towns was kicked in the head, beaten with a baton on his bare feet and struck in the head with a baton while handcuffed until he was unconscious. Finally, Haines was handcuffed while he was kneed and kicked in the face and punched.

The February 17, 2012 settlement was the second time the Southern Center for Human Rights (SCHR), which represented the plaintiffs, had secured monetary compensation for prisoners assaulted by guards at Hays State Prison. A 1997 lawsuit on behalf of 14 prisoners who were beaten for no apparent reason resulted in a \$283,500 settlement, includ-

ing damages and attorney fees. [See: *PLN*, Oct. 1998, p.12].

"We think this recognizes that there is a problem with excessive force at Hays State Prison," noted Atteyah E. Hollie, an SCHR attorney, after the most recent settlement. See: *Nwakanma v. Clark*, U.S.D.C. (N.D. Ga.), Case No. 4:11-cv-00188-HLM. ■

## Iowa SOTP Requirement Does Not Violate Fifth Amendment

The Iowa Supreme Court has held that prison officials do not violate the Fifth Amendment by depriving convicted sex offenders of earned-time sentence reductions when they refuse to participate in a sex offender treatment program (SOTP) that requires them to admit their guilt.

On March 21, 2006, Iowa resident Robert Harkins was convicted of a sex offense and sentenced to 10 years in prison. After his conviction was affirmed on appeal, the district court imposed a special life sentence pursuant to Iowa Code § 903B.1 in addition to the 10-year sentence.

While incarcerated at the Mount Pleasant Correctional Facility, Harkins was on the waiting list for an SOTP. A position in the SOTP became available on July 2, 2008, but eligibility was contingent on Harkins signing a "Treatment Contract" that required him to agree "to be completely honest and assume full responsibility for [his] offenses and [his] behavior."

Harkins refused to sign and thus could not participate in the SOTP. The Iowa Department of Corrections (IDOC) responded on July 9, 2008 by suspending his earned-time pursuant to Iowa Code § 903A.2(1)(a) (2007). Under that statute, "an inmate required to participate in a sex offender treatment program shall not be eligible for a reduction of sentence unless the inmate participates in and completes a sex offender treatment program established by the [IDOC] director."

Harkins filed a state court action, arguing that "suspension of his earned-time credits for failure to participate in the SOTP violated his Fifth Amendment privilege against self-incrimination."

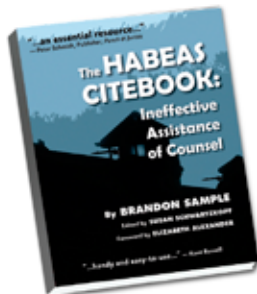
The district court held "that by

conditioning Harkins' earned time upon his participation in the SOTP, in which Harkins would be required to acknowledge his criminal conduct, the State was unconstitutionally compelling Harkins to give testimony" against himself. The court found, however, that the three-year statute of limitations for perjury expired on March 21, 2009, after which time Harkins' admission of guilt, which conflicted with his testimony at trial, would no longer be potentially incriminating. As such, "the district court ordered Harkins' earned time to be reinstated from July 9, 2008 through March 21, 2009, but suspended as of March 22, 2009, until he participated in and completed the SOTP."

Both Harkins and the State appealed to the Iowa Supreme Court. Following an extensive analysis of the Fifth Amendment in *McKune v. Lile*, 536 U.S. 24, 122 S.Ct 2017 (2002) [*PLN*, Oct. 2002, p.8] and numerous federal and state court decisions that applied *McKune* in similar cases, the Supreme Court found no Fifth Amendment violation.

"Harkins had every right not to be a witness against himself, a right he actually chose to waive at trial by taking the stand," the Court noted. "Now that he has been convicted as a sex offender, though, the State of Iowa may constitutionally establish an incentive for him to obtain treatment in prison by withholding earned-time credits if he declines to participate."

Accordingly, the Iowa Supreme Court vacated the district court's order reinstating Harkins' earned-time between July 9, 2008 and March 21, 2009. See: *State of Iowa v. Iowa District Court for Webster County*, 801 N.W.2d 513 (Iowa 2011), rehearing denied. ■



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# Bureau of Prisons Houses More “Terrorists” than Guantanamo

by Derek Gilna

According to the *New York Times*, the federal Bureau of Prisons (BOP) confines more than twice as many prisoners for “terrorism-related” offenses than the controversial and oft-maligned U.S. military detention facility in Guantanamo Bay, Cuba.

“As of October 1, 2011, the ... [BOP] reported that it was holding 362 people convicted in terrorism-related cases, 269 with what the bureau calls a connection to international terrorism, up from just 50 in 2000. An additional 93 inmates have a connection to domestic terrorism,” the *Times* stated. The *Times* also noted that many of those prisoners were prosecuted as part of the government’s “zero-tolerance” approach to any conduct remotely related to terrorism. The BOP, for its part, has set up two special Communication Management Units (CMUs) to house such prisoners, who are disproportionately black and Muslim.

At a time when many legal experts of both conservative and liberal persuasions are calling for an end to the draconian federal sentencing guidelines and decrying the rising federal prison population, the U.S. government is unrelenting in seeking maximum penalties for defendants with ties to terrorism, no matter how attenuated they may be.

The 9/11 terrorist attacks galvanized federal and state law enforcement into declaring a “War on Terror,” and sparked a reorganization of various independent agencies such as the Border Patrol and Immigration and Customs Enforcement into the Department of Homeland Security. Thousands of new federal officers now patrol the border and detain and deport hundreds of thousands of undocumented immigrants every year, while dozens of “fusion centers” have been formed nationwide to collect information about national security risks. [See: *PLN*, Aug. 2012, p.32]. The social and financial costs of these measures have been well-publicized and are the subject of rigorous debate.

However, the BOP, in full stealth mode, has largely evaded this level of public scrutiny. Those familiar with the operational style of federal prison officials are not surprised by this lack of transparency; the BOP rarely grants interviews, provides little background information related to its activities and discloses details concerning its funding and staffing only

to Congress, which is responsible for approving the BOP’s budget. Attempts to obtain information through Freedom of Information Act requests are routinely frustrated, forcing the media and concerned citizens to file federal lawsuits to compel compliance with public disclosure requirements.

As best as can be determined by the limited public information available, most of the approximately 170 prisoners confined at Guantanamo Bay are foreign nationals apprehended by American forces in various military operations in Africa, Afghanistan and Pakistan. Of those, 87 have been cleared for release by the government but remain incarcerated.

Federal officials have argued for years about whether or not military tribunals are the most appropriate way to deal with suspected terrorists detained at Guantanamo, and the Supreme Court has weighed in on the issue with rulings in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Boumediene v. Bush*, 553 U.S. 723 (2008). [See: *PLN*, Dec. 2008, p.20; Sept. 2006, p.27]. One fact that is not in dispute is the huge annual cost to house each prisoner at Guantanamo, which is around \$800,000. By comparison, the average cost of confining prisoners in a BOP supermax facility is approximately \$92,000 per year.

Compared to the relatively faceless, anonymous detainees held at Guantanamo, the BOP houses some of the most notorious foreign and domestic terrorists. Richard Reid, the shoe bomber; Terry Nichols, who was convicted along with Timothy McVeigh in the bombing of the Oklahoma City federal building; Ahmed Ressaam, the “millennium bomber”; John Walker Lindh, the “American Taliban”; and Eric Rudolph, convicted of bombing abortion clinics and the 1996 Atlanta Summer Olympics, are all held at the BOP’s supermax prison in Florence, Colorado, as are al-Qaeda members Zacarias Moussaoui and Times Square bomber Faisal Shahzad.

Prisoners confined at the BOP supermax are limited in their ability to communicate with the outside world, barred from using email and restricted to highly-monitored phone calls. Outside exercise is limited to two hours in what amounts to a large cage with little to no

contact with other prisoners. Human rights activists have condemned such conditions of confinement as “inhuman” and unworthy of a democratic form of government. There has been little outcry from the public, though, which apparently is not troubled by such restrictive conditions.

The CMUs are a more recent example of the BOP’s development of sophisticated ways to confine prisoners considered by the government to be dangerous or troublesome. They are a perfect illustration of what happens when governmental agencies are free to make their own rules with little or no oversight from Congress, the courts or the public. The CMUs are designed to be monuments to the federal government’s power to prosecute, convict and confine individuals who sometimes have only a tangential connection to terrorism.

While there is legitimate concern as to the dangerousness of some accused international terrorists, many of the American-born or naturalized U.S. citizens in BOP custody serving long sentences for “domestic terrorism” do not present as clear a threat.

Due to the questionable dangerousness of such prisoners, a group of researchers sought and won approval from the Department of Homeland Security in 2009 to study the issue, but was denied access to the prisoners by BOP officials. Professor Gary LaFree, director of a national terrorism study center at the University of Maryland, said, “There’s a huge national debate about how dangerous these people are. I just think, as a citizen, somebody ought to be studying this.”

One issue that is already well known is that people convicted of terrorism-related charges receive lengthy sentences. According to a September 2011 report from the Center on Law and Security, of the 204 people charged with what the Center calls serious jihadist crimes since the 9/11 attacks, 87 percent were convicted (lower than the average DOJ conviction rate, which is in the 90 percent range) and they received an average sentence of 14 years (compared to the overall average federal sentence of approximately 6 years).

The federal government’s decision to seek harsh sentences in such cases is reminiscent of the original rationale for the federal sentencing guidelines that grew out



of the “War on Drugs.” The clear purpose of draconian sentences for drug offenses was to incarcerate drug dealers for long periods of time to cripple the drug trade. Yet despite the flood of drug offenders entering the federal prison system, most experts agree that use of illegal drugs in the U.S. has remained fairly consistent.

Scholarly studies such as those by Professor William J. Stuntz of Harvard University, author of “The Collapse of American Criminal Justice,” have shown there is little to no connection between soaring incarceration rates and reductions in crime. Current downward trends in crime rates appear to indicate that increased and targeted policing has a much greater impact than sending more people to prison. Regardless, with respect to terrorism cases, federal prosecutors have demonstrated they are willing to go to extremes to obtain convictions despite widespread criticism of their methods.

In one case originating in Virginia, according to the *Times*, “prosecutors used the Neutrality Act, a little-used law dating to 1794 that prohibits Americans from fighting against a nation at peace with the United States. Prosecutors combined that law with weapons statutes that impose a mandatory minimum sentence in a strategy to get the longest prison terms ... said Paul J. McNulty, the United States attorney overseeing the case. ‘We were doing all we could to prevent the next attack,’” he stated.

That case involved 11 defendants charged with participating in a conspiracy to aid and abet terrorism. Their crimes? Playing paintball and firing legally-owned

firearms in a rural area, which was described as “paramilitary training” by prosecutors. Several of the defendants had also attended a training camp in Pakistan (a U.S. ally). Although belonging to a group that opposes India, which has long had an adversarial relationship with Pakistan, they committed no attacks or violence in the United States or elsewhere. Three of the defendants, Masoud Khan, Seifullah Chapman and Hammad Abdur-Raheem, all American citizens, went to trial; they were convicted and sentenced to prison terms of life, 85 years and 97 years, respectively.

“It was a deterrence strategy and show of strength,” said Karen J. Greenberg, a law professor at Fordham University. “The attitude of the government was: Every step you take toward terrorism, no matter how small, will be punished severely.” Of course, one questions whether such enthusiastic prosecutions would have deterred the 9/11 attackers, whose mission was to ram planes into buildings and die in the process.

In another case, Dr. Rafil A. Dhafir, a U.S. citizen, was prosecuted for sending millions of dollars to Iraq through a charity he founded despite U.S.-imposed economic sanctions on that country. He was convicted of fraud, money laundering, tax evasion and conspiracy charges, and sentenced in 2005 to 22 years in federal prison. He was not charged with promoting violence, though prosecutors accused him of terrorism-related conduct during sentencing. Dhafir was resentenced in February 22, 2012 after his case was remanded by the Second Circuit Court of Appeals, but still received 22 years. Ini-

tially confined in a CMU, he was released to the general prison population shortly before resentencing.

More than 300 prisoners have been prosecuted and convicted of domestic terrorist acts since 2001, completed their sentences and then been quietly released. Most were not accused of violent offenses but rather of “material support” for a terrorist group; financial or document fraud; weapons violations; and a range of other crimes,” according to the *Times*. Foreign nationals released from BOP custody after finishing their sentences were deported, but U.S. citizens returned to their homes and families. The recidivism rates for the latter group are well below that of the average federal prisoner, which tends to indicate that domestic “terrorists” are not the threat they are portrayed as being by federal prosecutors.

Faced with a lack of cooperation by the BOP and the reluctance of many released prisoners—most of whom are still on supervised release—to speak with the news media, the *Times* interviewed several prisoners currently serving time for terrorism-related offenses. One, Randall Todd Royer, now known as Ismail Royer, is a 38-year-old Missourian who converted to Islam.

Royer was active in the Council on American-Islamic Relations and the Muslim American Society, often traveled to Washington, D.C., and visited the White House. He is now serving a 20-year federal prison sentence after pleading guilty to “helping several American friends go to a training camp for Lashka-e-Taiba, an extremist group fighting Indian rule in Kashmir.... He trained at [the same]

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## **BOP Houses More Terrorists (cont.)**

camp himself ... in 2001, he was stopped by Virginia police with an AK-47 and ammunition in his car.” He denied ever planning to kill Americans. He was one of the 11 defendants in the Virginia case described above who trained with paintball guns and legal firearms, and committed no violent acts.

Royer received the statutory minimum sentence of 20 years, was divorced by his wife and is only able to have non-contact visits with his young children. After a stint at a CMU, he was transferred to the BOP’s Florence supermax facility.

One analyst, Chris Heffelfinger, author of “Radical Islam in America,” concluded that Royer’s prosecution was justified but that he received probably double the punishment that the crime deserved. “I think a strong law enforcement response to cases like this is appropriate nine times out of 10,” he said.

Another alleged domestic terrorist, Daniel McGowan, was placed in the CMU after receiving a 7-year federal prison sentence; he pleaded guilty in 2006 to arson-related charges in connection with fires set by environmental activists at a lumber company and tree farm research center. There were no injuries. Prosecutors pursued a terrorism enhancement at his sentencing, claiming McGowan’s offenses “either involved or were intended to promote a federal crime of terrorism.” Other prisoners held in CMUs have included animal rights activists.

“Many of the men here (both Muslim and non) are considered political prisoners in their respective movements and have been engaged in social justice, religious organizations, charities and humanitarian efforts,” McGowan wrote. “Another conception of the CMU is that it is a location designed to isolate us from our movements and to act as a deterrent for others from those movements (as in ‘step outside the line and you too will end up there’).”

In response to the high number of prisoners convicted of terrorism-related offenses, the BOP set up CMUs in the federal prison complexes at Terre Haute, Indiana in 2006 (in the former death row unit) and at Marion, Illinois in 2008. Derisively described by Muslim activists as MMUs, or “Muslim Management Units” because over two-thirds of the prisoners held in such units are reportedly Muslims, the CMUs house up to 80 prisoners, permit

no physical contact with visitors, and have closely-monitored and limited access to the BOP’s phone and email systems. Incoming and outgoing mail is read and scanned.

The Center for Constitutional Rights filed a lawsuit in March 2010 on behalf of five CMU prisoners and two of their spouses, challenging conditions in the CMUs; the suit remains pending on the plaintiffs’ procedural due process and retaliation claims. See: *Aref v. Holder*, U.S.D.C. (D. D.C.), Case No. 1:10-cv-00539-RWR-DAR. On October 7, 2011, twelve members of Congress sent a joint letter to the BOP, questioning policies and practices in the CMUs. More recently, a group of prisoners in the CMU at Marion went on a hunger strike in April 2012 to protest human rights violations by prison

officials and interference with the religious rights of Muslim prisoners.

One question that remains unanswered is whether or not the government’s approach of prosecuting “terrorism” offenses that only marginally involve actual terrorism, and imposing lengthy sentences and harsh CMU confinement on domestic “terrorists,” will protect the U.S. from future attacks. Assuming, of course, that that is in fact the government’s goal. ■

Sources: *New York Times*, [www.findlaw.com](http://www.findlaw.com), [www.ccrjustice.org](http://www.ccrjustice.org), [www.democracynow.org](http://www.democracynow.org), [www.cnycentral.com](http://www.cnycentral.com), [www.truth-out.org](http://www.truth-out.org), [www.thinkprogress.org](http://www.thinkprogress.org), [www.aclu.org](http://www.aclu.org), *Washington Post*, [www.supportdaniel.org](http://www.supportdaniel.org), [www.prisonabolitionist.org](http://www.prisonabolitionist.org)

## **CIA Slammed for Torture Abuses at Secret Lithuanian Prisons**

*by Derek Gilna*

Despite a lawsuit filed in the European Court of Human Rights by Saudi-born alleged terrorist Abu Zubaydah, Lithuanian prosecutors have declined to pursue charges related to two CIA-operated prisons located in that country. Human rights groups Amnesty International and Reprieve have claimed, according to the *Associated Press*, that Zubaydah was secretly flown by the CIA from Morocco to Lithuania in 2005.

Zubaydah had been arrested in Pakistan as a suspected high-level al-Qaeda operative who was involved in the 9/11 attacks. He said he spent about a year in the Lithuanian CIA prison before being moved to Afghanistan; he is currently being held in U.S. military custody in Guantanamo Bay, Cuba.

Zubaydah’s attorney filed a complaint with the European court alleging that Zubaydah was a victim of torture and secret imprisonment, and was subjected to simulated drowning and other torture techniques that included forced nudity, confinement in small boxes and sleep deprivation.

Amnesty International and Reprieve said they had provided “sufficient evidence” to the Lithuanian Prosecutor General’s Office to proceed with a probe into the existence of the secret CIA prisons. ABC television ran a story in 2009 that claimed Lithuanian officials had supplied the CIA with a building in the

capital of Vilnius in 2004-2006, where eight suspected al-Qaeda members were held and interrogated.

The two prisons – the second was at a former horseback riding school north of Vilnius – were reportedly established with the assistance of the Lithuanian security service. The riding school was acquired by a company called Elite LLC, which was registered in Delaware and Panama; according to news reports, the purchase of the riding school was arranged by the U.S. embassy in Vilnius.

An investigation by a committee of the Lithuanian parliament determined that the CIA prisons had existed and that secret CIA flights had arrived in the country without being subject to usual customs or border checks. However, the committee failed to determine whether any CIA prisoners had been brought into the country and held at the prisons.

According to the *Associated Press*, “During the last decade, hundreds of covert ‘extraordinary rendition’ flights shuttled prisoners between CIA-run overseas prisons and the U.S. military base at Guantanamo Bay. The Central Intelligence Agency has never acknowledged specific locations, but prisons overseen by U.S. officials reportedly operated in Lithuania, Poland, Romania, Thailand, and Afghanistan.”

In fact, secret CIA “black site” prisons have been confirmed in Poland,

Thailand and Romania in addition to Lithuania, and CIA officials have been accused of torturing detainees at the Bagram Air Base in Afghanistan. [See: *PLN*, June 2010, p.12; Oct. 2009, p.14].

The Lithuanian Prosecutor General's Office launched an investigation into allegations concerning the secret CIA prisons and found a "disciplinary offense" by some Lithuanian State Security Department officials, but the matter was dropped due to statute of limitations issues.

The director of the Human Rights Monitoring Institute, located in Vilnius,

criticized the decision not to prosecute, stating, "Prosecutors should not assume the functions of court and shouldn't decide whether prisons of the CIA were in Lithuania or not. They should investigate and then provide information for the court. Prosecutors are showing they are not independent and not professional."

In April 2012, five members of the European Parliament toured the former CIA prison at the riding school in Lithuania during discussions as to whether another investigation should be conducted. The

Parliamentary members urged Lithuanian authorities to continue investigating the matter, but Lithuanian officials said the U.S. had refused to cooperate.

It is ironic that with the collapse of the Soviet Union many countries of the former Warsaw Pact quickly joined the European Union and NATO, and just as quickly set up clandestine torture camps for international kidnapping victims. ■

Sources: *Washington Post*, *The Guardian*, *Fox News*, [www.abcnews.go.com](http://www.abcnews.go.com), *Associated Press*, [www.eubusiness.com](http://www.eubusiness.com)

## Economy Forces Oregon Jails to Eliminate Beds

Commissioners in Marion County, Oregon voted on October 19, 2011 to cut 128 jail beds, closing one pod and reducing the jail's capacity to 400 prisoners. In reality, however, only 56 beds were cut because the county is reopening 72 work center beds that had been downsized previously due to budget cuts. The commissioners also eliminated five guard positions at the jail that were vacant.

The changes came in response to a \$600,000 state funding reduction during the 2011-2012 fiscal year, according to Marion County Sheriff Jason Myers. Work release is half as expensive as detaining offenders in jail, he noted. For example, prisoners on work release must pay for their own medical care but those in jail receive medical treatment at the county's expense.

The loss of jail beds is not expected to cause a mass exodus of prisoners, Myers stated. The county will use a risk-assessment tool to determine the risk of reoffending posed by each jail and work center prisoner. When the jail is at capacity, the lowest risk offenders will be released; most affected prisoners, however, will be transferred from jail to the work center.

"It's disappointing we have to close jail beds," said Commissioner Patti Milne. "There's always going to be a risk of the public discomfort, and we don't want that."

Marion County is not the only county forced to eliminate jail beds, according to Clatsop County Sheriff Tom Bergin, who serves on the executive committee of the Oregon State Sheriffs' Association. For example, 2011 budget deficits forced Lane County officials to cut 84 beds at the county's jail in Eugene, Oregon.

"When you start taking things away from us that we've been using to make the community safe, that runs the risk of more criminal activity," said Bergin. "Once a machine is working efficiently, you don't change the gears in it."

As the economy remains sluggish, however, the machinery of the criminal justice system may need to be retooled. In February 2012, the Linn County Sheriff's Office announced that it was cutting 22 positions and 48 jail beds. The reductions are

expected to save the county \$1.5 million.

"Not in my worst nightmare did I think it would come to this," said Linn County Sheriff Tim Mueller. "Sadly, this is the only way we can make it through to the next fiscal year 2012-13." Of course no one in a position of authority seems to question whether mass incarceration is necessary in the first place. ■

Sources: *The Oregonian*, [www.gazette-times.com](http://www.gazette-times.com)

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## \$2.3 Million Jury Award in Washington, D.C. Wrongful Parole Revocation Suit

A District of Columbia (D.C.) federal jury has awarded \$2.3 million to a former prisoner who spent ten years in prison after his parole was wrongfully revoked based on unreliable hearsay evidence.

Charles Singletary was convicted of robbery, armed robbery and assault in D.C. Superior Court. He was paroled in 1990 after serving seven years, and turned his life around; he married for a second time and worked two jobs to support his family. Thinking that South Carolina was a better place to raise his children, he moved his family there with the permission of his parole officer.

Singletary's life took a dramatic turn when he was arrested in June 1995 for the murder of Leroy Houtman, even though the case was never brought before a grand jury and a D.C. Superior Court dismissed the charges at a preliminary hearing. Regardless, a year later the D.C. Board of Parole held a revocation hearing and revoked his parole based on the arrest.

"Nobody having personal knowledge of the relevant facts testified at the parole revocation hearing," Singletary alleged in his subsequent civil rights complaint. "The only information presented at the hearing consisted of multiple hearsay. That information consisted of (a) a narrative given by the prosecutor, and (b) testimony by a police detective, neither of whom had any first-hand knowledge of the facts."

Most of the information presented by the prosecutor and detective came from two sources, Verdez Smith and Terry Washington, who claimed to have learned about the murder from Carmelita Metts. None of the sources were named at the revocation hearing, nor were they present. The statements from Smith and Washington were inconsistent and conflicting. Smith was later charged with Houtman's murder, and implicated Metts as being involved.

Once Singletary's parole was revoked and he returned to prison, he endured "harsh living conditions" in high-security federal and state facilities that housed D.C. prisoners. He lost contact with most of his relatives, was deprived of spending time with his children, missed the birth of a child his wife had after his parole revocation, and lost his job and the ability to provide for his family. As a result, his wife divorced him.

The prisons where Singletary was held for 10 years after his parole revocation had poor medical care. As a result, when he began suffering from glaucoma he did not receive adequate treatment and went blind.

Singletary's efforts to reverse his parole revocation were met with denials by the D.C. Superior Court, the D.C. Court of Appeals and the D.C. federal district court. But on July 7, 2006 the Court of Appeals for the D.C. Circuit found that Singletary's due process rights had been denied at the revocation hearing. The appellate court held the evidence at the hearing consisted of multiple hearsay with no indication of reliability and several indications of unreliability, stating that while "the government is not required to carry a heavy burden in such proceedings, it cannot return a parolee to prison based on a record as shoddy as

this one." See: *Singletary v. Reilly*, 452 F.3d 868 (D.C. Cir. 2006).

At a new revocation hearing held by the U.S. Parole Commission, which had since taken over the functions of the D.C. Parole Board, no parole violation was found. Singletary sued the District of Columbia in 2009 and the district court found the city liable. Following a trial on damages, the jury awarded Singletary \$2.3 million on December 12, 2011.

On July 17, 2012 the district court denied the District's motion for a new trial or for remittitur of the jury award.

Singletary was represented by Washington, D.C. attorneys Edward C. Sussman, Steven Roy Kiersh, Steven C. Leckar, and Neal Goldfarb with Butzel, Long, Tighe, Patton PLLC. See: *Singletary v. District of Columbia*, U.S.D.C. (D. C.), Case No. 1:09-cv-00752-ABJ. ■

***The Mentally Disordered Inmate and the Law*, 2<sup>nd</sup> edition, by Fred Cohen (Civil Research Institute, 2008). 1,114 pages, \$237.50; and *Practical Guide to Correctional Mental Health and the Law*, by Fred Cohen (Civil Research Institute, 2011). 788 pages, \$149.50**

*Book review by Julia Etter*

The second edition of Fred Cohen's exhaustive reference book on mentally ill prisoners is a must-have resource. Divided into two volumes, *The Mentally Disordered Inmate and the Law* provides guidance to prison officials, civil rights attorneys, jailhouse lawyers and those involved in creating public policy around the treatment of prisoners with mental illness in the United States.

Fred Cohen is hailed as one of the nation's "foremost experts on correctional law and ... the leading scholar and practitioner in correctional mental health law." He has acted as a court monitor to ensure improvement of conditions for mentally ill prisoners in six jurisdictions over the past two decades, including the state of Ohio in *Dunn v. Voinovich*. Cohen currently serves as editor of the *Correctional Mental Health Report* and *Correctional Law Reporter*; most importantly, he is well-versed in the reality of prison reform and advocates the use of litigation as the

only effective means of improving conditions of confinement.

Like the first edition of *The Mentally Disordered Inmate and the Law* [see: *PLN*, July 1999, p.4], the book's initial chapters provide a framework of the mental health problem in prisons vis-à-vis relevant legal issues. Chapters Three and Four detail the legal identity and rights of prisoners, the right to demand care for medical needs and how the legal definition of "medical needs" encompasses treatment for serious mental disorders. Of interest to litigants, Chapter Four explains the legal standards for "serious medical needs" and "deliberate indifference," with case law to help successfully identify and challenge systemic failures to provide care.

Chapters Five through Ten generally define the obligations of prison and jail officials to ensure adequate care for mentally ill prisoners, including in the areas of intake and screening, record keeping and forging professional treatment relation-



ships. Chapter Seven, notably, focuses on case law concerning the treatment obligations of prison officials.

The rest of Volume I and Volume II's chapters address topics related to particular issues of mental illness among prisoners. Some chapters focus on special classes of prisoners, such as pretrial detainees, juveniles and the mentally disabled, while others examine expectations for administrative strategies that deal with concerns such as suicide, disciplinary proceedings and transporting prisoners for medical care.

Cohen's data in Chapter 11 on constitutional issues related to isolation, along with specific case studies regarding isolation techniques, speaks to the author's larger advocacy efforts to end "supermax" confinement practices. Another chapter, on "sexually violent predators," addresses the lack of constitutional impediments to civil commitment and discusses case law regarding due process and conditions of confinement. Appendices for the two-volume book include significant cases on mental health care for prisoners, the residential treatment unit for the Ohio Department of Rehabilitation and Correction, and the consent decree entered in *Dunn v. Voinovich*.

Like the first edition of this book, the page numbers are still organized by chapter, making a comprehensive search of the text difficult. Cohen did include attorney's fees and other settlement costs in the appendix of leading cases, per the suggestion of the reviewer of the first edition.

In 2011, Cohen published the *Practical Guide to Correctional Mental Health and the Law* to serve as a condensed and updated version of *The Mentally Disordered Inmate*. The *Practical Guide* includes three appendices that cover 1) leading recent cases involving deliberate indifference and systemic failures to provide treatment, 2) current issues in correctional psychiatry and 3) a "Practice Pointer" in how to prepare an expert report. The *Practical Guide* also includes analyses of *Graves v. Arpaio* and the *Coleman* and *Plata* decisions in California – important cases from the past two years that dictate how even the most merciless and ruthless "lock 'em up" states must provide care for mentally ill prisoners.

*The Mentally Disordered Inmate* and the *Practical Guide* are indispensable for anyone involved in prison or jail administration or prisoner advocacy. Cohen and his colleagues' efforts serve to enable advocates of mental health reform

to improve the care and conditions of mentally ill prisoners, and demonstrate Cohen's dedication to his assertion that "you have no right legally, morally, ethically, to take sick people and make them worse..." which, despite best efforts today, is common practice in most prisons and jails around the country.

*The Mentally Disordered Inmate and the Law*, 2<sup>nd</sup> edition, and *Practical Guide to Correctional Mental Health and the Law* are available from: Civic Research Institute, P.O. Box 585, Kingston, NJ 08528 (609) 683-4450; [www.civicrosearchinstitute.com](http://www.civicrosearchinstitute.com).

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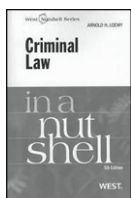
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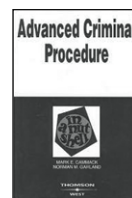
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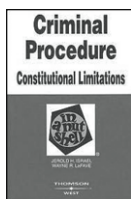
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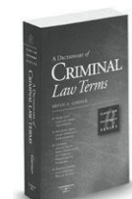
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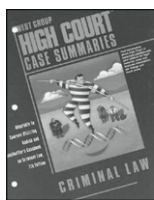
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## FEMA Funds New Orleans Jail Complex

The Federal Emergency Management Agency (FEMA) has committed approximately \$114 million to build a new jail complex that will be overseen by the Orleans Parish Sheriff's Office in New Orleans, Louisiana. The Orleans Parish Prison and sheriff's administration facilities suffered significant damage in the aftermath of Hurricane Katrina. [See: *PLN*, April 2007, p.1].

Before the storm, the prison complex contained close to 7,500 beds and housed city, state and federal prisoners in seven jail facilities.

Orleans Parish Sheriff Marlin N. Gusman originally proposed that a 4,300-bed prison complex be constructed using FEMA funds. The New Orleans City Council agreed in February 2011 to build 1,438 beds at an estimated cost of \$78.6 million. The old prison buildings are to be torn down upon completion of the new complex. [See: *PLN*, June 2011, p.28]. Gusman announced the closure of one of the old buildings, the Orleans Parish Prison House of Detention, on April 10, 2012.

FEMA has committed \$50.4 million towards the prison construction project, but there was haggling over cost increases and FEMA's contribution as the project was redesigned and expanded. Part of the amended plan is a new administration building that will share some of the same walls as the jail.

The four-story "all inclusive administrative facility" will include housing for staff, a television studio, an office for internal affairs and a bail bonds information office, stated Andre Cadogan, deputy director of FEMA's Louisiana Recovery Office.

Sheriff Gusman said the new complex "will be technologically advanced" as a result of using experts "who considered every aspect of preferred jail design relative to safety of inmates, visitors and deputies." FEMA is providing the grant money to the Louisiana Governor's Office of Homeland Security and Emergency Preparedness. As the Sheriff's Office incurs construction costs, it is reimbursed.

Another project within the jail complex is a 163,000-square-foot kitchen and warehouse facility for the jail and Sheriff's Office. FEMA agreed to pay the \$63.6 million construction cost of that building.

Of course, no one is asking why the Federal Emergency Management Agency

considers tens of millions of dollars in funding for a new jail complex to be part of its "emergency management" mission.

Any construction expenses not covered by FEMA will come from a \$63 million bond issue for the New Orleans Law Enforcement District, which was renewed by voters in 2008. That bond is funded by a \$2.9 million property assessment; it also supports construction costs for municipal and juvenile courts, as well as the coroner, district attorney and clerk of criminal court.

In June 2012, news reports indicated that Sheriff Gusman and city officials were considering the construction of a third jail complex building to house another 600 prisoners. According to emails from Gusman that were obtained via a public records request, the additional building would hold prisoners with medical and mental health needs, as well as minimum-security male prisoners and state prisoners who have been transferred to re-entry programs. A diagram of the third building posted on the city's website stated the construction costs would be paid by FEMA.

Community advocates have called on city officials to limit the size of the new jail complex to 1,438 beds as originally specified by the City Council. On April 24, 2012, the Micah Project, a faith-based group, held a meeting in New Orleans attended by over 400 church members who urged the city to keep the jail's population at 1,438 beds. Gusman, however, prefers a larger facility.

"We have to be realistic about the city we live in today," he stated. "We are engaged in a relentless struggle with violent crime."

The Orleans Parish Prison system, which currently holds around 2,600 prisoners, is the subject of a lawsuit filed by the Southern Poverty Law Center in April 2012 that alleges high levels of violence and sexual abuse. See: *Jones v. Gusman*, U.S.D.C. (E.D. LA), Case No. 2:12-cv-00859. The Parish's jail facilities have also been criticized by the U.S. Department of Justice, which has cited unconstitutional conditions and high rates of sexual assaults. [See: *PLN*, March 2010, p.3].

Sources: *The Times-Picayune*, [www.thelensnola.org](http://www.thelensnola.org)

## Hundreds Removed from Georgia's Sex Offender Registry

A May 2010 revision to Georgia's sex offender law, one of the toughest in the nation, has resulted in more than 440 people being removed from the state's sex offender registry as of October 2011.

Georgia has 20,676 registered sex offenders. The new law, passed as HB 571, removes those least likely to commit sex crimes from registration requirements. Additionally, about 13,000 registered sex offenders will no longer have to comply with housing restrictions that prohibit them from living within 1,000 feet of a church, school, park or other place where children gather. Previously, the law was applied retroactively to offenders who committed crimes before the statute's original enactment date of June 4, 2003.

Further, disabled and elderly sex offenders may be exempt from residency restrictions, and sex offenders will not have to provide law enforcement officials with their Internet passwords.

Legislators moved to change the state's sex offender law due to setbacks

from court challenges [see: *PLN*, March 2011, p.28; June 2008, p.40], and because the harsh requirements had resulted in extreme situations such as homeless sex offenders living in outdoor camps. [See: *PLN*, May 2010, p.20]. Further, law enforcement officials and lawmakers agreed that sheriff's departments were unnecessarily monitoring low-level offenders.

For example, Omar Howard, 37, had never been convicted of a sex crime but was required under the prior law to register as a sex offender. As an 18-year-old, Howard broke into a house to rob it in 1993. He was charged with false imprisonment of a minor when he ordered a young boy inside the home to lie on the ground. Under the old law he was classified as a sex offender.

"The former law suffered from a defect of diluting the registry with people like Howard who are not what we typically thought of as [sex] offenders," said Sarah Geraghty, a senior attorney for the Southern Center for Human Rights. "A

more tailored registry permits law enforcement officers to focus limited resources on people who commit serious sexual offenses.”

Gwinnett County District Attorney Danny Porter praised the change in the law. “We ought to be worried more about predators and less about people that got caught in cars when they were 16,” he said.

So-called “Romeo and Juliet” statutory rape offenses that involved teenagers close in age were previously classified as misdemeanors that required sex offender registration. The new law provides that upon completion of their sentences, people convicted of such crimes will be automatically removed from the registry. It also includes a “safety valve” that allows a superior court judge to release certain offenders from registration requirements.

The revised law permits a sex offender to petition the court for removal from the registry if he or she is a “level 1” or low-risk offender and has completed all prison, parole, supervised release or probation requirements; if the crime they committed became punishable as a misdemeanor after July 2006; or if ten years have elapsed since completion of prison, parole, supervised release or probation requirements for offenders convicted of more serious crimes.

When such a petition is filed, district attorneys and sheriff’s offices are given notice and an opportunity to object. The court then holds a hearing to decide whether the offender should be removed from the registry. Page Pate, an Atlanta attorney who has filed several petitions,

said judges typically deny the petitions when there is an objection.

Between July 1, 2010 when the new law went into effect and October 30, 2011, 442 people were removed from Georgia’s sex offender registry as a result of the statutory change. Of those, 146 were first-time offenders who had completed their sentences, while 136 were removed by a judge’s order and 160 had been convicted of misdemeanor charges that no longer required registration.

Howard said he was thankful he no longer has the stigma of being labeled a sex offender. “People, when they hear sex offense, they automatically think

pedophile,” he remarked. “They don’t necessarily think of guys who had a situation like mine.”

Sources: *Atlanta Journal-Constitution*, *Associated Press*

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# Arizona DOC Faces Lawsuit Over Inadequate Medical Care

by Joe Watson

There are cuts to health care and there are health care cuts. At least one Arizona prisoner has personal knowledge of the unfortunate difference.

Prisoners and their advocates have accused the Arizona Department of Corrections (ADC) of being so obsessed with reducing costs that prison officials routinely deny medical care for serious, even life-threatening conditions.

A diabetic prisoner alleged that he lost sight in one eye and partial sight in the other after waiting months for his insulin injections. Another claimed he was denied medication for epilepsy and suffered repeated seizures for weeks. And one prisoner's face was permanently disfigured after medical staff failed to treat a cancerous growth on his lip for seven months; consequently, doctors had to remove most of his lip and mouth.

But arguably the worst cut occurred after a prisoner discovered a growth on his penis which then went untreated for two years. The growth was ultimately diagnosed as a cancerous tumor, forcing the amputation of his penis. The cancer then spread to his stomach.

Coupled with Arizona's prisoner suicide rate, which is more than double the national average (14 suicides were reported in fiscal year 2011), critics such as Arizona Prison Watch point to these allegations of inadequate medical care as evidence of a failure in leadership under ADC Director Charles Ryan.

The Prison Law Office (PLO), a legal advocacy group based in San Quentin, California, addressed its concerns to Ryan in an October 2011 letter.

"State prison officials are deliberately indifferent to the serious health care needs of prisoners and to the prisoners' unnecessary and significant pain, suffering and even deaths," wrote PLO executive director Donald Specter.

To fend off the threat of litigation by the PLO, Ryan agreed on November 17, 2011 to investigate the allegations. The ADC apparently considered the PLO's threat to be legitimate, especially given the Prison Law Office's landmark victory in May 2011 against the California Department of Corrections and Rehabilitation. The U.S. Supreme Court decided, 5-4, that California was required to release about 40,000 prisoners to mitigate unconstitu-

tional prison overcrowding that resulted in deficient medical care. [See: *PLN*, July 2011, p.1].

According to a December 2011 report in *The Arizona Republic*, however, Ryan's initial investigation did not uncover any widespread intentional negligence in denying medical care to prisoners. "We don't see any systemic indication of problems or evidence of deliberate indifference," he stated.

ADC's general counsel, Karyn Klausner, advanced the department's defense further, saying that in the cases involving a prisoner's loss of sight, another's disfiguring facial surgery and the penis amputation, prison medical staff had provided appropriate care. Delays in treatment, she said, were not the cause.

"Are there instances where [a prisoner] didn't receive medications or treatment in a timely fashion? Yes," Klausner acknowledged. "But is it systemic? No."

Some critics point to laws passed in 2009 by Arizona's Republican-led legislature as being responsible for the decline in prison health care. That year, lawmakers voted to privatize the ADC's medical system and to pay providers at a rate no higher than what they would be paid by the Arizona Health Care Cost Containment System, the state's Medicare provider. Lawmakers advocated the shift to privatization as a cost-cutting measure, and the state's spending on prison health care dropped 27 percent from fiscal year 2009 to 2011.

According to ADC officials, the legislation created a domino effect throughout the system. Prison medical employees across the state began quitting en masse in anticipation of layoffs. Contract providers such as Carondelet Health Network cut ties with the ADC because their reimbursement rates were too low.

Even before the 2009 legislation passed, more than 25% of correctional health care positions were vacant and the average wait time for outside medical treatment was 11 weeks.

According to prisoner advocates, those numbers have only gotten worse. Both the Eyman prison complex in Florence and the Tucson prison complex, which house more than 5,000 prisoners each, are supposed to have five doctors on staff. But as of April 2011, Eyman

had only two doctors and a third working "half-time," while Tucson employed just two. And at the state's women's prison in Perryville, prisoners are forced to wait six months or longer to receive mental health services.

"The delays are just incredible," said Donna Hamm, a former judge and director of Middle Ground Prison Reform, based in Tempe, Arizona. "I've advocated for people who've been diagnosed with a lump or growth and who are supposed to be biopsied and have to wait six months, eight months, extraordinary amounts of time before being diagnosed."

What is most distressing to Arizona Prison Watch – which has tracked more than 30 suicides in the state's prisons since January 2009 – is what it calls the ADC's "outrageous neglect."

"These are not just isolated incidents or the consequences of budget cuts made years ago," according to an Arizona Prison Watch posting in November 2011. "It is no wonder that so many prisoners have grown so demoralized that they've killed themselves in [ADC] custody in record numbers."

Ryan and Klausner defended the ADC, however, saying the department had improved both mental health and medical care – providing six hours of training in suicide prevention to more than 8,800 staff members and filling 172 health care positions since June 2011, including the vacancies at both the Eyman and Tucson complexes.

The Prison Law Office had agreed to delay filing any lawsuit for three months from November 2011, when Ryan said he would conduct an investigation into inadequate prison health care. Apparently, however, the ADC failed to make good faith efforts to improve medical treatment for prisoners during that time period.

For example, ADC prisoner Ferdinand Dix had requested care for symptoms that included a chronic cough and shortness of breath. A prison doctor told him to drink energy shakes. After Dix's liver swelled to four times its normal size and his abdomen became grossly distended, he was taken to an outside hospital where he was diagnosed with advanced lung cancer. He died in February 2012; he had been serving a five-year sentence that turned

into a death sentence due to grossly inadequate medical care.

On March 6, 2012, attorneys with the PLO, the ACLU Foundation of Arizona, the law firm of Perkins Coie, LLP and the Arizona Center for Disability Law filed a 78-page amended complaint in an existing federal lawsuit, alleging that the health care provided by the ADC was "grossly inadequate and subjects all prisoners to a substantial risk of serious harm, including unnecessary pain and suffering, preventable injury, amputation, disfigurement, and death."

The amended complaint claimed that some prisoners had begged for medical treatment but were told by prison officials to "be patient," that "it's all in your head," or that they should pray. The suit further challenged the ADC's use of solitary confinement "in conditions of extreme social isolation and sensory deprivation, leading to serious physical and psychological harm." See: *Gamez v. Ryan*, U.S.D.C. (D. Ariz.), Case No. 2:10-cv-02070-PHX-JWS (MEA).

"The prison conditions in Arizona are among the worst I've ever seen," said PLO director Donald Specter. "Prisoners have a constitutional right to receive adequate

health care, and it is unconscionable for them to be left to suffer and die in the face of neglect and deliberate indifference."

The lawsuit was dismissed 15 days after the amended complaint was filed, however, after the judge held that the original plaintiff did not have the court's permission to add additional plaintiffs or seek class-action status. The suit was refiled as a separate case the next day, and remains pending. See: *Parsons v. Ryan*, U.S.D.C. (D. Ariz.), Case No. 2:12-cv-00601-NVW.

Meanwhile, Wexford Health Sources, a for-profit company, won a contract in April 2012 to provide medical care for ADC prisoners systemwide. [See: *PLN*, May 2012, p.36]. Under the contract, which went into effect on June 1, 2012, Wexford is required to increase medical employee staffing; provide nursing staff at all prisons 24 hours a day, seven days a week; train guards on how to deal with mentally ill prisoners; and provide mental health services to prisoners held in solitary confinement, among other provisions. Wexford will receive \$116.3 million a year for taking over the ADC's health care services.

Unfortunately, like other private

prison medical care companies, Wexford has a poor track record in terms of placing profits over adequate treatment for prisoners. [See: *PLN*, June 2011, p.12; Dec. 2010, p.27; Nov. 2009, p.16].

"There are reasons for great skepticism," said Caroline Isaacs, director of the American Friends Service Committee's office in Tucson. "One is that Wexford has a clear pattern of not living up to its commitments in other contracts." Indeed, in documents provided to Arizona officials, Wexford listed 20 contracts in other jurisdictions in which it lost a rebid or did not submit a rebid, in some cases due to poor performance by the company.

Wexford acknowledged, for example, that it had been fined numerous times for failure to meet contractual obligations, including a \$106,000 fine in Ohio in 2009 for contract violations, a \$50,000 fine in Virginia in 2006 for insufficient staffing, and \$273,000 in fines in Florida in 2005 for "service-delivery issues."

None of which bodes well for Arizona prisoners who require medical care. ■

Sources: *The Arizona Republic*, [www.azcentral.com](http://www.azcentral.com), *Arizona Prison Watch*, [www.aclu.org](http://www.aclu.org)

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# Bail Bond Companies Profit While Poorest Defendants Remain in Jail

by David M. Reutter

As America's prison population has swelled over the past three decades to become the largest per capita in the world, the number of special interests that feed off the so-called prison industrial complex has grown. The expansion of companies that benefit from crime and incarceration is no accident; it is the result of extensive lobbying by businesses that profit from other people's misfortune—primarily the misfortune of the poor, who are vastly overrepresented in our nation's prisons and jails.

Often overlooked among the special interests that profit from the criminal justice system in the U.S. is an industry that portrays itself as one dedicated to helping people get *out* of jail. In actuality, though, it is involved in keeping people incarcerated in order to protect its bottom line.

Just twenty years ago in most jurisdictions nationwide, the services of bail bondsmen were only required by defendants who had a high bond set by the court, which typically occurred in cases involving serious crimes or repeat offenders. Most defendants were released through publicly-funded pretrial services that granted release on personal recognizance based on a promise to appear at future court dates.

Currently only Illinois, Kentucky, Oregon and Wisconsin prohibit commercial bail bondsmen. Other jurisdictions have laws that allow, and sometimes encourage, the use of bail bond companies. This expansion of the bonding industry has contributed to high jail populations.

The story of Raymond Howard, 34, illustrates the connection. Howard landed in jail in Lubbock County, Texas on a felony check forgery charge; because he had no history of violence and had always showed up for court, he needed only \$500 to make bail. But his inability to post that small amount ended up costing taxpayers over \$5,000 to keep him incarcerated as a pretrial detainee.

The cost, however, did not end there. Howard ended up with a three-year prison sentence. Defense attorneys said that had he been able to make bail he most likely would have received probation, as defendants who are free while awaiting trial are able to pay restitution and show they are making rehabilitative efforts.

"If I can get out and hire an attorney, I can go to rehab. I can get my

job back. And when I get to court, my lawyer has something to work with," said Lubbock County pretrial detainee Doug Currington, who was unable to post \$150 bail for trying to steal a television. "The lawyer can say, 'This guy has been clean. He's voluntarily gone to rehab. He hasn't committed another crime. He has the same job. He's paying child support.' They're not going to want to throw you back in jail."

Another example is Leslie Chew, who was homeless when he was arrested for trying to shoplift four blankets in December 2008 and was booked into the Lubbock County jail. Unable to post \$3,500 bail or pay 10% of that amount to a bondsman, he remained incarcerated for eight months at taxpayer expense.

There are at least 500,000 people accused of crimes who stay in jail each year because they cannot afford to make bail. The bail bond industry vigorously fights to keep them there, in hopes they will eventually come up with the money to pay a bondsman. This epitomizes the socioeconomic disparity that underpins the U.S. criminal justice system: Defendants who can afford to pay a bonding company are released from jail, while poor defendants who cannot remain behind bars—sometimes for months or years while awaiting trial.

Rather than release defendants on their personal recognizance, despite statistics that indicate the vast majority show up for their court dates, jurisdictions such as Lubbock County have gutted their publicly-funded pretrial release programs. The remaining such programs are under attack by bondsmen.

The bail bond business is a cutthroat industry that leaves no room for pretrial release services. As Ken Herzog, the office manager of Lubbock Bail Bond, was working to make bail for a prisoner, he said a clerk advised him that pretrial release was trying to get the same prisoner out of jail.

"I said, 'Oh no, they ain't,'" Herzog told the clerk. "So, I went to the judge that signed the motion for pretrial and told her what was up. They had no business even talking to this person. They pulled their bond, and I got the person out of jail." For a fee, of course.

Herzog told Steve Henderson, who runs Lubbock County's parole and pre-

trial release program, to stay away from his paying clients. "If he gets in my business, I told him, 'I do this for a living,'" Herzog said, referring to Henderson. "I said, 'You don't do that. We set this thing up.' I said, 'I'll work with you any way I can, but you're not going to get in my business.' Well, he backed off."

Lobbying by the bail bond industry has resulted in public officials moving away from pretrial release services in some jurisdictions. Florida's Broward County is one example of such lobbying gone amok. For context, a judge had found in 2007 that overcrowding in the county's jail system was unconstitutional.

Broward County was thus facing the prospect of spending \$70 million to build a new jail. County commissioners, however, voted to double the budget of pretrial release services to let more prisoners out to reduce overcrowding. The program was an amazing success. Defendants were showing up for court, and within a year the sheriff closed an entire wing of the jail due to the decrease in population, saving taxpayers \$20 million annually.

Broward County's bail bondsmen then led a charge to cut the successful pretrial release program. "We're tenacious; we do our job," said bondsman Wayne Spath. "People should not just be released from jail and get a free ride. I mean, this is the way the system's got to work." And the way the system works can be very profitable for bail bond companies.

After all, for every detainee released through a pretrial release program, that's one less potential fee available to bondsmen, who usually collect 10 percent of the full bond amount from their paying customers.

"The bondsmen think pretrial is stealing their business," noted Broward County Judge John Hurley. "But I don't want to get into the mix. I don't want to get into the political aspect of all this."

Bail bond companies in Broward County hired a lobbyist and distributed about \$23,000 in donations among county commissioners in the year before the commission voted on an ordinance that gutted the pretrial release program by limiting defendants who were eligible for the program. The commissioners vigorously denied the contributions had influenced their votes.

Herzog put a nice spin on such political donations by bondsmen. "We take care of the ones who take care of us," he said. "We don't want to pay anybody off, per se. We just want to support the people who are trying to help our business."

Now, thousands of people in Broward County sit in jail because they cannot afford to make bond. The county's public defender, Howard Finkelstein, decried the lobbying by bondsmen that resulted in poor defendants languishing behind bars simply because they can't afford to be paying customers for bail bond companies.

"Don't tell me that you're doing this for the good of the people," Finkelstein said. "You're doing it for your own good, that's fine, but then you shouldn't have a seat at the table when public policy is made."

Bondsmen have pushed legislation in Iowa, North Carolina, Tennessee and Virginia to limit pretrial release services, increase reporting by pretrial release programs and encourage the use of commercial bail bonds. The legislation, known as the Citizen's Right to Know Act, was backed by the American Legislative Exchange Council (ALEC), an influential organization that brings lawmakers and

private-sector companies together to produce model legislation. [See, e.g.: *PLN*, Nov. 2010, p.1; Jan. 2002, p.1]. The Citizen's Right to Know Act passed in Texas in 1995 and Florida in 2009.

"For those who believe in limited government and the supremacy of the free-market, these agencies [pretrial release programs] are frustrating as they replace a well-functioning private-sector model – commercial bail which operates at no cost to the taxpayer – with a less efficient government alternative," an ALEC publication stated.

Not coincidentally, the American Bail Coalition (ABC), a member of ALEC since 1993, has helped push a dozen model bills though ALEC that benefit the bail bond industry, including the Uniform Bail Act. ABC president William Carmichael currently sits on ALEC's Private Enterprise Board, while ABC executive director Dennis Bartlett served on ALEC's Public Safety and Elections Taskforce before that taskforce was eliminated in April 2012.

ABC senior legal counsel Jerry Watson, who chaired ALEC's Private Enterprise Board from 2006 to 2008, received ALEC's Leadership Award. "There is no way to accurately evaluate the benefits

thus far to our industry by our involvement in ALEC," he stated.

A federal version of the Citizen's Right to Know Act was introduced on May 12, 2011 (HB 1885); the legislation would require state and local pretrial release programs that receive federal funding to issue monthly reports to the U.S. Department of Justice. Such reports would include "a list of each charge filed against each individual accepted into a pretrial release program ... a list of all prior criminal convictions of each individual accepted into a pretrial release program ... a list of the court appearances required of each individual accepted into a pretrial release program ... [and] a list of each instance during the reporting period on which an individual accepted into a pretrial release program ... failed to appear at a scheduled court appearance," as well as an annual report on the program's budget. Such burdensome requirements do not apply to bail bond companies. No action has been taken on HB 1885, which was referred to a committee.

During Florida's 2010 legislative session, the bail bond industry pushed a bill that would have allowed a defendant to participate in pretrial release only if a

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## Bail Bond Profit (cont.)

judge found that he or she was indigent, and pretrial release services would have been restricted to defendants charged with the least serious crimes.

Florida sheriffs opposed the bill, contending that it would make it harder for defendants to get out of jail and would cost taxpayers millions to house and feed such pretrial detainees. When it was learned that Accredited, a prominent Florida bail bond insurer, had held a fundraiser that generated \$10,000 for then-state Rep. Sandy Adams only three days before she pushed the legislation through her committee, the House Criminal and Civil Justice Policy Council, sheriffs cried foul.

“This whole thing smells,” said Hillsborough County Sheriff Col. Jim Previtera. The sheriff of Pinellas County, Jim Coats, agreed. “It is very clear to me that when you have special interests with influence, these influences sometimes get preference over taxpayer’s interest.” Ultimately, the bill died in the House.

The business of bail bonds is all about profit, and the industry has been cited as a threat to public safety in Washington state. Just a few days before Thanksgiving in 2009, Maurice Clemmons was bonded out of jail by a bail bond company. That weekend he killed four Lakewood police officers in a coffee shop.

Clemmons was allowed to pay less than five percent of his \$190,000 bond by Jail Sucks Bond Company. While he put up a house worth more than his bail, he had quit paying his mortgage and was facing foreclosure. The bonding company claimed it didn’t know about Clemmons’ mental health issues or prior criminal record.

Bondsmen contend they are held accountable and protect the public. In actuality, they have a sweet deal. They usually charge defendants 10 percent of the bond needed to get them out of jail, which is nonrefundable. But in Lubbock County, Texas they pay the county only five percent of the bond if the defendant fails to appear in court.

Thus, they can make money by doing nothing at all, as most bail jumpers are not caught by bondsmen or bounty hunters. “More often than not, the defendants are rearrested on a warrant that’s issued after they fail to appear,” noted Beni Hemmeline, a Lubbock County prosecutor.

Additionally, even when defendants

on bond flee and the bonding company is required to pay the full bond amount, sometimes they don’t. In Harris County, Texas, for example, bail bond companies were found to owe the county over \$26 million in unpaid bond forfeitures. When the county tried to collect, some bonding companies contested the collection efforts in court while another filed for bankruptcy. [See: *PLN*, Dec. 2010, p.23].

*PLN* has previously reported on other problems and abuses involving bonding companies in California, Connecticut and New Jersey, including unpaid bond forfeitures and illegal solicitations of detainees by bondsmen. [See: *PLN*, Dec. 2007, p.34].

Meanwhile, the bail bond industry has continued to try to expand its influence. In June 2011, over the objections of judges and law enforcement officials, the Wisconsin legislature included a provision in the state’s budget to permit bonding companies. The American Bail Coalition advocated for the change; Wisconsin is one of four states that prohibit bail bond businesses. Governor Scott Walker vetoed the provision, however, saying he supported it but wanted the issue addressed in separate legislation.

“Anytime you place profit-driven organizations in control of an individual’s liberty, corruption must be a major concern,” said Wisconsin state court judge John R. Storck, who chairs the state’s Committee of Chief Judges. “The bail system unfairly penalizes low-income defendants who can’t afford the un-refundable fee. It subverts the justice system, because defendants who can afford to buy their freedom – even those that may pose a relatively greater risk – are free to go at a much lower cost than under the current system.”

The bail bond industry, through ALEC, is also pushing legislation – called the Conditional Early Release Bond Act – that would require some prisoners who are released early to post bonds to ensure their good behavior. If they violate the terms of their release and are not returned to custody within a specified time frame, the bonding company will forfeit the full bond amount to the state.

This creates an additional, potentially huge market for bail bond companies, particularly in states that may be inclined to adopt such “post-conviction bond” programs in order to reduce their expensive and overcrowded prison systems. As with regular bonds, however, they would only be available to prisoners who can afford

them. Versions of the post-conviction bond legislation have been introduced in several states, including South Dakota and South Carolina.

Only the courts and criminal defense organizations seem interested in reining in the bail bond industry. For instance, on March 12, 2012, the Ohio Court of Appeals found that a state law prohibiting the solicitation of bonds at the courthouse and on jail property did not violate the First Amendment. The appellate court held, in part, that “because arraignments are often a source of anxiety and distress for citizens, [the state] has a substantial interest in protecting those who are emotionally vulnerable from the undue influence of bondsmen.” See: *In re Suitability of Debra Henneke*, Court of Appeals, 12<sup>th</sup> Appellate District of Ohio, Case No. CA2011-05-039; 2012 WL 764888.

Also, on July 30, 2012, the National Association of Criminal Defense Lawyers (NACDL) announced the approval of the organization’s “first major bail reform policy proposal in over 25 years.” According to NACDL president Steven Benjamin, “The proposal emphasizes release over detention, with a preference for personal recognizance in most cases. For those persons who do not qualify for release on personal recognizance, NACDL supports standards requiring judicial officers to release the defendant with the least onerous conditions possible.”

NACDL noted that “Financial bail (often known as cash or secured bonds) disproportionately disadvantages indigent and working class defendants who lack the financial resources to secure release, resulting in unnecessarily prolonged periods of pretrial detention, even though they may pose no substantial risk of flight or danger to the community. Pretrial detention not only results in such collateral consequences as loss of employment and eviction from housing, [but] detained individuals are markedly disadvantaged in assisting counsel in preparation for trial.”

No doubt, the bail bond industry will oppose NACDL’s policy proposal. ■

Sources: *National Public Radio*, *Miami Herald*, *KNOW*, [www.aiaSurety.com](http://www.aiaSurety.com), [www.mintpress.net](http://www.mintpress.net), [www.sourcewatch.org](http://www.sourcewatch.org), [www.alec.org](http://www.alec.org), [www.jsonline.com](http://www.jsonline.com), [www.firstamendmentcenter.org](http://www.firstamendmentcenter.org), [www.americanbailcoalition.com](http://www.americanbailcoalition.com), [www.nacdl.org](http://www.nacdl.org), [www.prweb.com](http://www.prweb.com), [www.alecexposed.org](http://www.alecexposed.org)



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# ***Proving Damages to the Jury, 1<sup>st</sup> Ed., by Jim Wren*** **(James Publishing, 2011). 800 pages (with CD), \$70.00**

***Book review by John E. Dannenberg***

**P***roving Damages to the Jury* is a detailed “how-to” manual that takes the reader through the psychology, reasoning, preparation and execution of a civil damages trial. The object lesson is to learn how to select, prime and sell the jury on a maximum damage award for the plaintiff.

The author, Jim Wren, a law professor at Baylor University, has 30 years of trial experience and has been honored as a “Texas Super Lawyer.” *Proving Damages* is an incredibly insightful, pragmatic treatise for both litigants and attorneys who want to “win big.” The book’s 21 chapters are written in a succinct style with numerous helpful subheadings; the detailed table of contents alone is 30 pages.

*Proving Damages* begins with a study of juror motivations, fears and biases – identifying and analyzing 15 types of juror biases. The book explains that biases are shortcuts to decision-making, and occur naturally or can be acquired. Positive motivations are stronger than negative ones, Wren notes, when it comes to damages. Fears generally can be allayed by working to establish credibility through honesty and forthrightness throughout the trial. Indeed, one chapter is devoted to developing such candor and rapport with the jury, which Wren labels “vital” in maximizing damage awards.

Forty pages then address successful language keys for communicating damages. “It’s language, not math,” Wren asserts. A lengthy chapter analyzes interviewing and investigating the plaintiff in preparation for trial. The book distinguishes personal injury, wrongful death, business injury, real property and employment damage claims in this regard, with sample questionnaires for each type of claim. A discussion on the use of expert witnesses warns of potential legal challenges that need to be anticipated and resolved before trial. A chapter is devoted to the use of damages experts; another deals with “test juries” to help predict how much should realistically be requested. Telling the story to the jury using “psychodrama” is touted as an effective method.

The book then goes through the formal stages of trial, beginning with discovery, visual aids and evidentiary issues. Forty pages are devoted to voir dire – a time when Wren suggests pre-

selling jurors during the selection process. Opening statements, direct examination and cross-examination are addressed in separate chapters, in which Wren concentrates on fulfilling the baseline concept of credibility with the jury. Finally, although punitive damages are relatively rare, the book includes guidance on how to maximize results.

To help educate a jury on how to analyze all the variables involved, *Proving Damages* supplies sample damage estimation forms, amortization tables from which to calculate future damages,

and even Power Point slides that can be used during deliberations. If you need to research *Proving Damages* on the fly but can’t tote the 800-page tome around, just examine the included CD of the text on your computer and search by word or phrase.

Wren has promised to publish an updated edition of this book every two years that will include suggestions from readers. *Proving Damages* is available from James Publishing, 2505 Cadillac Ave., Suite H, Costa Mesa, CA 92626 (800) 440-4780; [www.jamespublishing.com](http://www.jamespublishing.com). ■

## **GAO Report on Drug Courts Criticized by Drug Policy Alliance**

***by Joe Watson***

**T**he Drug Policy Alliance (DPA), the nation’s “leading organization promoting alternatives to current drug policy,” often has to wade through murky data to expose the ineffectiveness of the nation’s drug court system. But a recent federal study touting drug court successes only required the DPA to perform some simple math.

A report released by the U.S. Government Accountability Office (GAO) in December 2011 found that 18 of 32 drug courts or prior drug court research reports surveyed – from Sacramento, California and Kalamazoo, Michigan to Queens, New York and Guam – produced “statistically significant” reductions in recidivism. Of course, if just over half of those drug courts produced statistically significant results, it stands to reason that the rest did not.

“The message here is: enter a drug court at your own risk,” said Margaret Dooley-Sammuli, deputy director of the DPA’s Southern California office. “The chance you’ll enter a drug court that might help you avoid getting arrested again is about 50-50, the equivalent of a coin toss. Clearly, the popularity that drug courts enjoy is not supported by the evidence.”

It’s difficult to extract from the GAO report what is considered “statistically significant.” The report’s footnotes assert that its findings are “statistically

significant only if they were significant at the 95%, or greater, level of statistical significance.”

Of the 18 drug courts the GAO report deemed successful, “the percentages of drug court program participants rearrested were lower than for comparison group members by 6 to 26 percentage points.” Despite the fact that the other 14 drug courts or drug court research reports surveyed did not produce such results, drug courts have their proponents.

Actor Martin Sheen appeared before Congress in April 2011, hoping to convince lawmakers to continue funding the nearly 2,500 drug courts operating in the United States. “Drug courts are the very best deal Congress can make to reduce crime and the social consequences related to drug addiction,” said Sheen, who credits court-mandated drug treatment for helping his son, actor Charlie Sheen. From reading the tabloid news media reports on his very public drug use, domestic violence and other issues, it is difficult to ascertain just how much “help” Charlie actually received beyond simply not going to prison.

The advantages of drug courts over traditional courts “are no longer up for debate,” added Dr. Doug Marlowe, chief of science and law for the National Association of Drug Court Professionals. “Drug courts reduce crime by up to 45% and have been found to save up to \$13,000

for every individual they serve,” Marlowe told Congress. “And we now know that 75 percent of those who complete drug court are never arrested again.”

Those numbers, however, simply don’t square with most objective research, including the GAO report and a National Institute of Justice study released in 2011 – the Multi-Site Adult Drug Court Evaluation (MADCE) – a 5-year examination of 1,157 drug court participants nationwide.

MADCE reported a recidivism rate for drug court participants that was 10% lower than a comparison group of offenders (52% vs. 62%), which the NIJ found to be “not statistically significant.” Or, as the DPA noted, “the decrease may be the result of chance.” MADCE also indicated that drug court participants were significantly less likely than the comparison group to commit crimes and engage in drug use, but those results were self-reported by the participants.

“Drug courts have actually helped to increase, not decrease, the criminal justice entanglement of people who struggle with drugs and have failed to provide quality treatment,” argued DPA’s director of legal affairs, Daniel Abrahamson. “Only sentencing reform and expand-

ed investment in health approaches to drug use will stem the flow of drug arrests and incarceration.”

The DPA and the Justice Policy Institute had previously criticized drug courts in reports released by those organizations in March 2011. [See: *PLN*, Dec. 2011, p.38].

Sources: GAO Report, “Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts” (GAO-12-53); [www.gao.gov](http://www.gao.gov); Drug Policy Alliance; TIME Magazine

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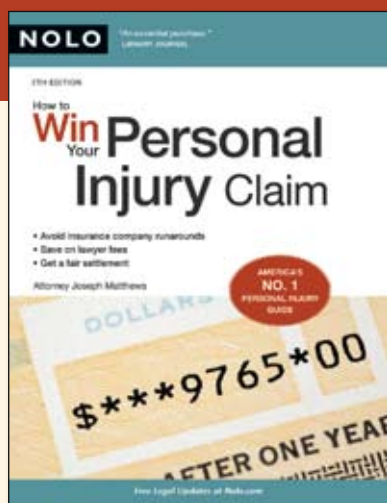
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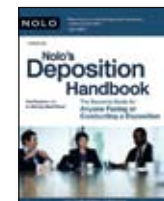
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# Prisoners and Families Connect with Video Visitation, for a Price

Since 2006, family members and friends of Virginia prisoners have been able to use modern videoconferencing equipment to enjoy visits with loved ones held in state prisons hundreds of miles away.

The Video Visitation Program, operated by two Richmond-based nonprofit groups, Assisting Families of Inmates and the New Jubilee Educational and Family Life Center, in cooperation with the Virginia Department of Corrections, is designed to make it easier for prisoners to keep in touch with their families. Staying connected, prison officials and prisoner advocates agree, improves the likelihood that prisoners will achieve long-term success once they are released.

For prison officials, there is the added bonus that participation in the video visitation program gives prisoners an incentive to maintain good behavior. A prisoner who has not remained disciplinary-free for six months is generally not allowed to take part.

For families, the video visiting program is user friendly. A half-hour video chat costs \$15 while an hour-long visit costs \$30; by comparison, an in-person visit – taking into account the cost of gas, food and overnight lodging – can run \$500 or more, according to Fran Bolin, executive director of Assisting Families of Inmates.

The Video Visitation Program is offered at ten Virginia state facilities, and four churches serve as outside video visit sites in Richmond, Norfolk, Alexandria and Roanoke. A number of prisons and jails in other states provide video visitation, too. [See: *PLN*, Nov. 2011, p.37; Jan. 2010, p.22].

In fall 2011, a video visitation program at three Ohio prisons, organized by the Cleveland Eastside Ex-Offender Coalition, shut down after state grant funding ended. The organization was unable to find replacement funding for the video visits, which were made available at the Ohio Reformatory for Women in Marysville, Trumbull Correctional Institution in Leavittsburg and Allen Correctional Institution in Lima. The video visitation was provided at no cost to prisoners and their family members.

“We still kept the program going for our clients as we looked for other sources of revenue, but we became overwhelmed,” said Caroljean Gates, the organization’s director. “Our phones have constantly

been ringing every week because people want to talk with their loved ones [in prison].”

The Ohio Department of Rehabilitation and Correction offers pay video visits at four other facilities though Global Tel\*Link, a company that primarily provides prison phone services. Other for-profit companies, such as JPay, also provide video visitation for a fee at various prisons and jails nationwide.

On July 25, 2012, the District of Columbia’s jail system switched to video visits instead of in-person visits. Video stations were installed in jail housing units

and at an outside Video Visitation Center for freeworld visitors. According to jail officials, video visitation will double the number of visits available each day and visitors will no longer have to wait in long lines or undergo searches.

However, according to Ivy Finkenstatdt, a staff attorney with the Washington Lawyers’ Committee’s DC Prisoners’ Project, “There’s something more tangible about sitting in a room, visiting a loved one” in person. ■

Sources: *Washington Post*, *New York Times*, [www.jpays.com](http://www.jpays.com)

## Onerous Change in Michigan Commutation Procedures Fails to State *Ex Post Facto* Claim

The Sixth Circuit Court of Appeals has held that a change in procedures for commutation of sentence does not constitute an *ex post facto* violation.

The appellate court ruled in a case involving Michigan prisoner Keith Lewis-El, who was serving a non-parolable life sentence for first-degree felony murder. Lewis-El appealed after the federal district court summarily dismissed his 42 U.S.C. § 1983 complaint against members of the Michigan Parole Board (MPB).

Although Lewis-El’s sentence was non-parolable, the MPB has the power to review a prisoner’s sentence and recommend to the governor that the sentence be commuted. Lewis-El claimed that prison officials had advised him upon early admission that the *Guidelines for Commutation Recommendations*, known as “the grid,” were used to determine the earliest date when the MPB could recommend commutation.

With a score of twenty-seven, Lewis-El was told he would have to serve 27 years before such a recommendation.

In 2005, the Michigan Department of Corrections altered its guidelines for determining whether to recommend commutation. The new policy abandoned the grid, which specified a number of years before a recommendation could be made, and adopted a policy that sets an interview after ten years of incarceration with subsequent interviews every five years. A decision is then made whether to make a recommendation to the governor.

Lewis-El received four interviews but

was never recommended for commutation. His next interview was set for 2012, and he alleged that under the grid he would likely be recommended for commutation since he would be past the 27-year date he received upon his admission to the prison system.

He filed suit raising an *ex post facto* claim, and argued that “because the parole board now exercises a ‘life-means-life’ policy, it will never recommend his case for commutation.” The federal district court dismissed his case sua sponte under 28 U.S.C. § 1915(e), finding no *ex post facto* violation.

The Sixth Circuit agreed with the district court’s rationale, holding that Lewis-El had failed to state a claim upon which relief may be granted. A recommendation for commutation is a discretionary act left to the MPB, the appellate court found. Likewise, a decision to commute a prison sentence “is left entirely to the decision of the governor of Michigan.”

The Court of Appeals wrote that Lewis-El failed to show a significant risk of increased punishment by the abandonment of the grid; it would be almost impossible to demonstrate that the changed procedures affected the outcome, because “the decision to commute a prisoner’s sentence is so tied to the personal predilections of the person occupying the governor’s office.”

Even the statistics that Lewis-El presented to show a decreased likelihood of commutation under the new policy were inadequate to prove an *ex post facto*



claim, the Sixth Circuit held. The district court's order of dismissal was accordingly

affirmed. See: *Lewis-El v. Sampson*, 649 F.3d 423 (6<sup>th</sup> Cir. 2011). ■

## Texas Court Orders TDCJ to Provide Hearing Impaired Telecommunications

On April 5, 2011, a Texas state court issued a temporary injunction ordering the Texas Department of Criminal Justice (TDCJ) to provide telecommunications to hearing impaired prisoners using the Texas Relay Service (TRS).

Leslie Arrington, Janet Lock, Kathy Williams and Laura Beeman are Texas state prisoners who, with the assistance of the Texas Civil Rights Project (TCRP), filed a lawsuit in state court challenging the unavailability of telecommunications for hearing impaired prisoners. Aided by TCRP attorneys Abigail Frank and Scott Medlock, they filed a motion for a temporary injunction which the court granted.


The temporary injunction requires the TDCJ to immediately make TRS services available to hearing impaired prisoners so they can communicate with people on their approved lists under conditions similar to those applied to prisoners without

hearing impairments. The only exception is that hearing impaired prisoners must submit a written request to the warden or designee two hours in advance of the requested TRS phone call.

The TDCJ was also ordered to "investigate ways to implement the use of videophone technology to accommodate inmates with disabilities within TDCJ facilities." See: *Arrington v. Securus Technologies, Inc.*, 419th J.D. Court, Travis Co. (TX), Case No. D-1-GN-10-000515.

The TDCJ appealed, but the Court of Appeals refused to stay enforcement of the temporary injunction pending resolution of the appeal. The trial court subsequently entered a permanent injunction; this mooted the TDCJ's interlocutory appeal, which was dismissed on April 25, 2012. See: *Livingston v. Arrington*, Texas Court of Appeals, Third District at Austin, No. 03-11-00266-CV. ■

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# Idaho Appellate Defender: State's Adult Misdemeanor Probation System "Void"

A memo authored by Sara B. Thomas, Chief of the Idaho State Appellate Defender's appellate unit, has concluded that the state's adult misdemeanor probation system is unconstitutional, calling it "null, void and unenforceable."

According to the August 15, 2011 memo, the legislative delegation of authority to the counties to supervise misdemeanor probationers violates Article X, Section 5 of the Idaho Constitution, as amended in 1942, which provides that a "state board of correction ... shall have the control, direction and management of ... adult probation and parole...." Felony probation cases are handled by the Department of Correction.

The memo calls into question the state's delegation to each county of the obligation (and authority) to fund and administer adult misdemeanor probation cases.

Thirty-eight of Idaho's 44 counties operate their own misdemeanor probation programs. Ada, Adams, Boise, Power and Gem counties contract with a private company to provide the services.

Ada County commissioners have expressed concern over the State Appellate Public Defender's Office memo, with Commissioner Sharon Ullman saying, "I just hope we don't have a lot of liability for all of the years that county commissioners all around the state have been running misdemeanor probation programs. I don't think anyone wants this house of cards to come crashing down."

Separately, a federal class-action lawsuit filed in October 2011 is challenging the private probation system in Ada County; the suit alleges that probationers are being charged higher fees than allowed by state law – including for drug testing and GPS monitoring – and are subjected to conditions that were not part of their court-imposed sentences.

The suit, filed by probationers Kenneth Green, Nicholas Hall and Nathaniel Smith against Ada County Misdemeanor Probation Services, Inc. (ACMPS), demonstrates some of the problems that arise when counties conduct their own misdemeanor probation services. See: *Green v. Ada County Misdemeanor Probation Services, Inc.*, District Court for the 4<sup>th</sup> Judicial District for the County of Ada (ID), Case No. CV 0C 1119162.

According to the *Idaho Statesman*,

Commissioner Ullman expressed "grave concerns" over ACMPS's treatment of both probationers and its own employees. "I personally believe there is cause to do an investigation," she stated. ■

Sources: *Idaho Statesman*; *Memorandum, "Constitutional Limits on County Supervision of Adults on Misdemeanor Probation," State Appellate Public Defender (August 15, 2011)*

## Tenth Circuit Holds Due Process Requires Meaningful Segregation Reviews

by Brandon Sample

Prisoners indefinitely confined to administrative segregation are entitled to meaningful, periodic reviews of their segregation status, the U.S. Court of Appeals for the Tenth Circuit held on June 20, 2011, while granting qualified immunity to the prison official defendants. The appellate court issued an amended opinion in April 2012; however, the outcome remained the same.

Colorado state prisoner Janos Toevs filed suit against prison officials in federal court, arguing that he was denied due process while participating in the Colorado DOC's Quality of Life Level Program (QLLP). The QLLP is a behavioral modification program that uses administrative segregation in conjunction with a tiered system of privileges to promote improved behavior among "problem" prisoners.

The QLLP has six levels. Level 1, the most restrictive, offers little to no privileges. As prisoners progressively move through each level, more privileges are afforded. After completing Level 6, QLLP participants are eligible for return to the general prison population. There is no maximum amount of time a prisoner can spend at each level, but there are minimums; it takes at least thirteen months and seven days to complete the QLLP.

Toevs was placed in the QLLP after attempting to escape in 2002. While in Levels 1 to 3, he received regular segregation reviews. During the reviews, though, Toevs was "never informed ... of the reasons why he was recommended for or denied progression [in the QLLP], so that he would have a guide for his future behavior." He received no reviews while in Levels 4 to 6.

Toevs argued that he was denied due process because his segregation reviews in Levels 1 to 3 were not meaningful, and because he was afforded no reviews in Lev-

els 4 through 6. The district court found no due process violations and granted summary judgment to the defendants on the basis of qualified immunity. Toevs appealed.

As with all due process claims in the prison context, the Court of Appeals began by assessing whether Toevs' placement in the QLLP implicated a protected liberty interest. In this case, the appellate court held that it did. The conditions of confinement associated with the QLLP – confinement to a solitary cell for 23 hours a day and limited privileges – when combined with the potentially indefinite nature of the program "established a protected liberty interest."

Because a liberty interest was implicated, the Tenth Circuit held that Toevs was entitled to meaningful reviews of his segregation status, citing *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983). The appellate court then proceeded to define what constituted meaningful.

For one, meaningful review is one that is not a "sham or a pretext." In the context of traditional administrative segregation, where the choice is either to retain prisoners in segregation or release them to the general population, the review must be "capable of releasing the inmate into the general population."

However, with stratified incentive programs like the QLLP, the concept of "meaningful" is different, the Court of Appeals wrote. "Where ... the goal of the placement is behavior modification, the review should provide a guide for future behavior."

In Toevs' case, the appellate court held that he was denied meaningful reviews in Levels 1 to 3 because "the reviews never informed Toevs of the reasons why he was recommended for or denied progression, so that he would have a guide for his future



behavior.” Further, the complete denial of reviews in Levels 4 through 6 was plainly unlawful.

The defendants had argued that reviews were not required for Levels 4 to 6 because prisoners in those levels in the QLLP were in “close custody” rather than administrative segregation. But since the “basic conditions of confinement [are] the same for all QLLP levels,” the Tenth Circuit said it saw “no reason why Levels 4 through 6 would be exempt from *Hewitt*’s prescription of periodic review.”

While the Court of Appeals found that Toeves’ due process rights had been violated, summary judgment for the defendants was upheld because the law regarding what constituted a “meaningful” segregation review in “stratified behavior-modification” programs such as the QLLP was not clearly established at the time of the events described in Toeves’ complaint, from 2005 to 2009. Thus, the appellate court concluded, the defendants were entitled to qualified immunity. See: *Toeves v. Reid*, 646 F.3d 752 (10th Cir. 2011).

The defendants moved for rehearing, which was granted by the appellate court. On April 2, 2012, upon rehearing, the Tenth Circuit issued an amended and superseding opinion that reached the same conclusion as the panel’s original decision.

“Based on the record and the arguments before this court, Mr. Toeves was entitled to meaningful periodic reviews during his placement in administrative segregation in the Colorado prison system’s Quality of Life Level Program (QLLP) because the exclusive justification for keeping Mr. Toeves in administrative segregation was to influence him to modify his future behavior,” the Court of Appeals wrote. “However, the record at this state of the proceeding does not establish that Mr.

Toeves was given meaningful reviews.... On the merits, it was certainly error to grant summary judgment to defendants on this issue. Nevertheless, because at the time it was not clearly established that the review process should apply throughout each level of the QLLP and that the perfunctory reviews given to Mr. Toeves at Levels 1-3 and the failure to provide any reviews whatsoever at Levels 4-6 would not be considered meaningful given the rehabilitative justification for this segregation program, we conclude that defendants are entitled to qualified immunity.”

Toeves litigated the case pro se, including on appeal, and the Tenth Circuit complimented him for “filing appellate briefs that clearly articulate his arguments and ably discuss the applicable precedents,” despite the end result. See: *Toeves v. Reid*, U.S. Court of Appeals for the Tenth Circuit, Case No. 10-1535; 2012 WL 1085802. ■

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# ***Criminal Procedure – Constitutional Limitations in a Nutshell,*** **7<sup>th</sup> Ed., by Jerold H. Israel and Wayne R. LaFave** **(West Group, 2006). 539 pages, \$38.00**

***Book review by John E. Dannenberg***

**C***riminal Procedure – Constitutional Limitations in a Nut Shell* is best understood by first understanding what it is not – it is not a text on the broader subject of *general* criminal procedure. Rather, this text approaches criminal procedures that are more narrowly circumscribed by specific constitutional constraints. With an emphasis on leading case law defining such constraints, *Criminal Procedure* addresses in detail each of the following topics: Arrest, search and seizure; wire-tapping and use of secret agents; police interrogation and confessions; lineups; the exclusionary rule; right to counsel; the privilege against self-incrimination; bail; and appellate review.

Authors Israel and LaFave, seasoned law professors, are careful to point out there is no substitute for reading and discussing on the seminal court decisions that have come to define constitutional limitations in criminal procedure. That being said, it is also true there is no substitute for studying a succinct treatise on constitutional criminal procedures when you are already confined and seek to understand your rights. *Criminal Procedure* offers prisoners just such a self-paced study, written in a refreshing form that is not intimidating to the average layman.

For example, the following summary of the first chapter on arrests is representative of the detailed discussions offered in this book. Beginning with the Fourth Amendment's roots in arrest, the discussion first distinguishes the seizure of a person from the seizure of property. Topics in the chapter include privacy interests, plain view, smell and hearing. Special consideration is given to searches of vehicles and personal effects. Analysis is provided as to "probable cause" and informant issues. Both search warrants and warrantless searches are covered, with and without notice. Searches incidental to arrest and brief jail detentions are addressed, as are border searches, searches incidental to security at airports and searches related to employment. Finally, the chapter discusses searches by consent or with third party consent.

And that is just the first of nine chap-

ters. Throughout the text, the authors denominate each topic of interest based upon its case law origins, e.g., the *Miranda* rule. As a bonus the book includes an additional 38 pages of U.S. Supreme Court citations related to relevant constitutional principles.

In conclusion, *Criminal Procedure* accomplishes what it sets out to do – explain to a budding student of law how constitutional limitations define issues concerning criminal procedure. *Criminal Procedure* is available in PLN's book store – see page 54. ■

## **Arrests of Federal Prison Guards Soar 90% Over Past Decade; Misconduct Cases Double**

***by Derek Gilna***

**A**ccording to a September 2011 report by the U.S. Justice Department's Office of the Inspector General (OIG), arrests of federal Bureau of Prisons (BOP) guards increased almost 90% over the previous ten years, while staffing in the BOP grew only 24% over the same period of time. From fiscal year 2001 to 2010, a total of 272 BOP guards were arrested. The report did not state how many cases originated from privately-operated prisons.

The OIG also noted that misconduct investigations involving BOP guards had doubled from 2,299 in FY 2001 to 4,603 in FY 2010, with more than half of the offenses committed during the guards' first two years on the job, and recommended that the BOP improve its hiring, training and supervision of rookie officers. Also affecting the rise in misconduct cases was an increasing number of female prisoners and young offenders, and an increase in the number of private facilities holding federal prisoners.

The BOP's past hiring practices for guards often resulted in a lower quality of applicants, according to the report. Salaries and benefits for state prison guards have generally tended to be lower than for sworn officers in municipal police departments in the same geographic area. BOP guard salaries are higher than state salaries, but still tend to be lower than police department salaries except where federal prisons are located in rural areas. Thus, more qualified applicants are more

likely to seek employment with police agencies than the BOP.

According to Barry Krisberg, a law professor at the Berkeley Center for Criminal Justice, some guards in both public and private prisons mistakenly think their actions will have no consequences because the disciplinary process is so convoluted.

"Screenings are a good start, but what we need is far better training in terms of what the expectations of the jobs are, better supervision to [find] potential problems and ways to deal with complaints about their behavior," he stated.

Robert Parkinson, author of a book about Texas prisons, noted that as the number of female prisoners increases, so does the rate of sexual harassment and sexual abuse by guards. Further, prisoners are trending younger. "In federal prisons, it used to just be drug kingpins, tax-fraud prisoners, assassins. But now it's become full of more low-level offenders, which ironically makes for more violent prisoners. A middle-aged kingpin is a relatively calm, responsible guy, whereas an 18-year-old ... selling meth ... is going to be a lot more impulsive."

Joe Baumann, a guard at the California State Rehabilitation Center, said that better training and pay vastly improved the quality of guard hires. "The caliber of person just went up. More people had degrees, previous employment, or previous careers when the pay scale went up. We started getting a lot more people from private enterprise. Prior to that, we got a

lot of people who worked fast food [or] manual labor jobs.”

He also criticized privately-operated facilities. “Private prisons aren’t always held to the same standards as public ones,” he noted. “That’s where so much of the stuff I come across is from, the private contractors.”

Although prison guards comprise about 42% of BOP employees, they accounted for 63% of misconduct allegations in FY 2010. Slightly more than half of the misconduct allegations made against guards were substantiated and resulted in discipline of at least a 1-day suspension. The BOP employed 16,009 guards at the end of FY 2010; as noted above, there were 4,603 allegations of guard misconduct during that fiscal year.

The BOP had no comment on the OIG report or the increase in the number of cases involving misconduct by and arrests of federal prison guards. ■

Sources: *Los Angeles Times*; *McClatchy-Tribune*; “Enhanced Screening of BOP Correctional Officer Candidates Could Reduce Likelihood of Misconduct,” *DOJ Office of the Inspector General, Report 1-2011-002 (Sept. 2011)*

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### LEGAL NOTICE

## IF YOU WERE CONFINED IN A HOLDING CELL AT LAKE COUNTY JAIL IN INDIANA FOR A PERIOD OF 24 HOURS OR MORE AT ANY TIME BETWEEN MAY 13, 2006 AND FEBRUARY 1, 2012, YOU MAY BE A MEMBER OF A CLASS ACTION WHO IS ENTITLED TO MONEY.

There is a proposed settlement with defendants (Lake County Sheriff’s Department, Roy Dominguez, Caren Jones and Bennie Freeman) in the class action lawsuit, *Flood, et al. v. Dominguez, et al.*, case no. 2:08-CV-153, pending in the U.S. District Court for the Northern District of Indiana. This notice is provided as a summary of your rights. For more information, visit [www.LakeCountyJailSettlement.com](http://www.LakeCountyJailSettlement.com) or call 800-332-6198.

### What Is This Lawsuit About?

The lawsuit involves the alleged conditions in the holding cells at the Lake County Jail in Indiana. Those alleged conditions include overcrowding, long detentions, and the lack of adequate food, showers, clothing, sanitation, or provisions for sleeping. Defendants deny the allegations. No court has determined that the class is entitled to win or that defendants are entitled to win.

After years of litigation, both sides agreed to the proposed settlement to resolve the case and avoid the risk of loss associated with a trial. The class representatives and lawyers for the class think the proposed settlement is in the best interests of the class members.

### Who Is a Class Member?

You are a class member if you were confined in the Lake County Jail’s holding cells for a period of at least 24 hours at any time from **May 13, 2006 to February 1, 2012.**

### What Does the Proposed Settlement Provide?

Defendants have agreed to pay a total of \$7.2 million. This \$7.2 million will be used to cover payments to class members as well as the attorneys’ fees and costs advanced by the attorneys, incentive awards for the named plaintiffs and certain class members who assisted in the litigation, and the costs of notice and claims administration as the Court will allow.

### Who Represents Me?

The Court has appointed Loevy & Loevy as class counsel to represent the class. The settlement includes money to compensate class counsel for representing the class. Under the proposed settlement, class counsel may petition the Court for the greater of 40% of the fund (\$2.88 million) or the dollar value of the significant amount of professional time they invested in this case increased by a 2-times multiplier to account for the risk of nonpayment class counsel undertook when representing the class. To provide the class certainty on the amount of the fee petition, class counsel decided to limit their fee petition to 40% of the fund.

### What Are My Legal Rights?

- If you do not want to be included in the proposed settlement, you must exclude yourself in writing, postmarked by December 3, 2012, and sent to Lake County Jail Class Action, EXCLUSIONS, Claims Administrator, c/o A.B. Data, Ltd., PO Box 170500, Milwaukee, WI 53217. Your exclusion request must state your name, date of birth, address and telephone number (if any); a statement that you do not want to be part of the Lake County class action settlement; and your signature.
- If you stay in the class and would like to receive payment, you may file a claim. Filing a claim is the only way to be eligible for settlement payment. Your claim must be postmarked by December 3, 2012.
- You may object to any aspect of the proposed settlement. Your written objection must be postmarked by December 3, 2012, and filed and mailed as set out in the notice of class action and proposed settlement referred to below. You also may request in writing to appear at the fairness hearing.
- If you choose to do nothing, you will receive no payment and will give up the right to sue defendants for the same claims in this case.

### Will the Court Approve the Proposed Settlement?

The Court will hold a fairness hearing on **December 14, 2012 at 9:30 a.m.** before the Honorable Philip P. Simon at the United States District Court for the Northern District of Indiana, located at 5400 Federal Plaza, Hammond, IN 46320, to consider whether to approve the proposed settlement and petitions for attorneys’ fees, costs, and named plaintiff and class member incentive awards. Everyone has the right to observe this hearing. You do not have to attend. If you want to speak at the hearing, you must request to do so when you file an objection (see the additional information on objecting in the notice, which is available at [www.LakeCountyJailSettlement.com](http://www.LakeCountyJailSettlement.com) or by calling 800-332-6198). Incarcerated people do not have a right to be brought from a jail or prison to the hearing; however, all written objections will be considered by the Court.

### How Do I Obtain Further Information?

This is only a summary of the proposed settlement. For a more detailed notice of class action and proposed settlement, additional information on the proposed settlement, a copy of the Settlement Agreement, and information about how to file a claim please visit [www.LakeCountyJailSettlement.com](http://www.LakeCountyJailSettlement.com), call toll free 800-332-6198, or write to the claims administrator:

**Lake County Jail Class Action, Claims Administrator,  
c/o A.B. Data, Ltd., PO Box 170500, Milwaukee, WI 53217.**

**Please do not contact the Court or the Court Clerk’s Office for information.**

All inquiries should be directed to the claims administrator at the number and/or address above.

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## Book Review: *A Dictionary of Criminal Law Terms*, by Bryan Garner (Thomson West, 2000). 751 pages, \$29.00

by John E. Dannenberg

PLN readers will recognize this compact 751-page pocketbook as a “junior” version of the venerable 1,920-page *Black’s Law Dictionary*, which is also the work of seasoned legal lexicographer Bryan Garner. The *Dictionary of Criminal Law Terms* gains its compactness not by skimping, but by focusing on criminal law terms – dealing with criminology, criminal procedures and penology. As such, its 3,000 words and phrases are particularly useful to jailhouse lawyers.

Compared to the standard *Black’s* dictionary, this edition is, refreshingly, much more brief and concise in its definitions; one doesn’t need yet another dictionary to translate them. Listings

are conveniently alphabetical even for multiple word phrases. For example, “*in forma pauperis*” is located between “informant” and “information.” Because the definitions are in plain, concise language, they are not intimidating but are rather very easy to use, and, importantly, to learn from. Where a definition has been determined by venerable case law, the legal citation is given. The publisher uses good size print, notwithstanding the book’s compact size, making it readable in dim cell lighting.

The *Dictionary of Criminal Law Terms* has two bonus sections. Appendix A contains the Bill of Rights (first ten amendments to the U.S. Constitution). Appendix

B contains 20 pages of fascinating legal maxims, including their Latin language origins – snippets of legal wisdom chronicled throughout the ages of jurisprudence. A few samples are: *cum confitente sponte mitius est agendum*: one making a voluntary confession is to be dealt with more leniently; *cogitationis poenam nemo patitur*: no one is punished for his thoughts; *delinquens per iram provocatus puniri debet mitius*: a wrongdoer provoked by anger ought to be punished less severely. The *Dictionary of Criminal Law Terms* is thereby both instructive as well as thought-provoking. It is available from PLN for \$29.00 plus shipping on orders under \$50.00. See pages 53-54 for ordering details. ■

## Google Provides Law Enforcement and Courts with User Information, Censors Content

by Joe Watson

Tech giant Google congratulated itself in October 2011 for refusing two “takedown” requests from U.S. law enforcement agencies that claimed videos of police brutality posted on YouTube were defamatory. Google owns YouTube, the Internet’s most popular video-sharing site.

A “local law enforcement agency,” which Google did not identify, was one of the authorities that requested removal of the police brutality videos, “which we did not remove,” Google said.

However, the company’s own data shows that Google often complies when authorities want content removed, and nearly always turns over sensitive user information when requested by courts and law enforcement officials.

Google’s online transparency report, which is updated every six months, indicates that the company complied with around 48 percent of U.S. court orders and executive or law enforcement takedown requests in 2011.

“Police seem to be advising Google on what material might be breaking the law, and then Google decides to censor this material without a court order” in some cases, said Jim Kilock, executive director of the Open Rights Group.

Kilock added that YouTube and other

public media platforms are becoming police tools to gather evidence, and are sometimes co-opted by law enforcement to potentially stifle dissent and criticism. Google’s own transparency report fuels that concern.

U.S. governmental requests for user information rose 38 percent in 2011 compared with the previous year, to 12,271 requests for data related to 23,300 users. Alarming, Google provided authorities with the requested user information, either “fully or partially,” 93 percent of the time.

“So while [Google is] making something of a stand on removing data,” such

as videos of police brutality, tech blogger Devin Coldewey wrote, “they don’t seem to have any trouble giving it out” to courts and law enforcement agencies.

The U.S. topped the list of countries requesting user information from Google, and also had a high number of takedown requests: 172 court orders and 107 executive or law enforcement requests in 2011. Russia, on the other hand, submitted fewer than 30 takedown requests during the same year. ■

Sources: [www.techcrunch.com](http://www.techcrunch.com), [www.rt.com](http://www.rt.com), [www.google.com/transparencyreport](http://www.google.com/transparencyreport)

## Attorney Who Brought Reporter into Prison Cleared of Ethical Violations

A Kansas lawyer who took an investigative reporter into the Topeka Correctional Facility (TCF), a women’s prison, has had the cloud of a pending ethics complaint lifted after two years. The complaint was filed with the Kansas Board for Discipline of Attorneys (Board) by Charles Simmons, then-deputy secretary of the Kansas Department of Corrections.

Attorney Keen A. Umbehr took Tim Carpenter, an investigative reporter with

the *Topeka Capital-Journal*, into TCF to uncover a pattern of sexual abuse. Carpenter interviewed prisoners and the interviews were reported in news stories that detailed illegal sexual relationships and contraband trafficking involving prison employees. Simmons’ ethics complaint, filed in October 2009, charged Umbehr with misrepresenting Carpenter’s occupation when they visited TCF. [See: *PLN*, May 2010, p.18].

On November 9, 2011 the Board issued a letter dismissing the complaint. It said the ethics violation must be proven by "clear and convincing evidence," which was lacking. While Umbehr said he was pleased with the result, he took issue with the Board's statement that he should have researched the issue of members of the media visiting the prison or identified Carpenter as a media representative. Umbehr stated that under the same circumstances he would "absolutely" act in the same

manner, as he did nothing unethical.

He also claimed the ethics complaint was in retaliation for his role in helping to bring illegal activity at TCF to light. The complaint "was a dark cloud over [my] head," he said. Not only did Carpenter's news reporting expose illicit activity at TCF, but the coverage caused state lawmakers to increase the criminal penalties for prison employees who engage in sexual misconduct with prisoners.

On May 23, 2012, Umbehr turned the

tables on the Board by filing a complaint with the Kansas Supreme Court against Stanton Hazlett, the state's disciplinary administrator. Umbehr alleged that Hazlett had engaged in misconduct by falsely saying an ethics panel had found "probable cause" for a full hearing in Simmons' ethics complaint when the panel had in fact made no such finding prior to the dismissal of the complaint. ■

Source: *Topeka Capital-Journal*

## \$375,000 Settlement for Washington Female Juvenile Detainee Raped by Guard

On July 7, 2011, the Washington State Department of Social and Health Services (DSHS) agreed to a \$375,000 settlement in a lawsuit that alleged a guard had raped a female detainee at the Echo Glen Children's Center.

The detainee, Brittney Brown, was 19 at the time she was sexually assaulted in her cell. Robert Heath Fox, 38, a temporary guard at the facility, had exhibited inappropriate conduct prior to the incident, the lawsuit contended. He entered Brown's cell on May 6, 2008, handed her an energy drink, then left; he returned several minutes later, stripped her naked and raped her.

"It was a kind of ugly, brutal, disgusting rape," said Jack Connelly, one of Brown's attorneys. "This case is particularly important because of the incredible imbalance of power between a male guard and a young, teenage female inmate."

Fox pleaded guilty to first-degree custodial sexual misconduct in King County

Superior Court in March 2009, and received an eight-month jail sentence.

"A criminal act was inflicted upon this resident by a depraved individual more than three years ago, and we deeply regret that it took place," said John Clayton, DSHS Juvenile Rehabilitation Administration Assistant Secretary.

Brown's attorneys argued that Fox was not qualified for his position at Echo Glen and that there were other claims of improper conduct involving female detainees. They also said there were inadequate protections for prisoners at the facility. Security cameras have been installed since the incident, the pattern of nighttime staff rounds were changed and staff assessments were increased.

Brown had been in trouble for most of her life. She was exposed to drug use at the age of 11 and was convicted of theft, burglary and forgery. All were related to her drug addiction and caused her to be in

and out of juvenile detention centers. She had started to get her life together at Echo Glen, as demonstrated by earning her GED and getting along with staff – until she was sexually assaulted by Fox.

The rape was a "really traumatic experience for her," said Micah LeBank, another of Brown's lawyers. "Our hope is that [the] money can be used to help her get back to a normal life." See: *B.B. v. Echo Glen Children's Center*, King County Superior Court (WA), Case No. 09-2-28180-7. ■

Sources: *Seattle Times*, *The Stranger*, [www.connelly-law.com](http://www.connelly-law.com)

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## News in Brief

**Indiana:** Lynsey Stangel, 26, formerly employed as a federal prison guard at Terre Haute, pleaded guilty on May 2, 2012 to having sex with a prisoner in a patrol car while on duty. "Unfortunately, there were firearms in the vehicle at the time the tryst occurred, including a 12-gauge shotgun, a 9mm pistol, and I also believe there was an M-16 assault rifle," said U.S. Attorney Joe Hogsett. Stangel received three years' probation and will have to register as a sex offender.

**Kentucky:** Former state prison guard Ted Ray Schlenker, who operates a gun shop called Kentucky Gun Runners, was arrested on April 28, 2012 after sending a threatening letter and a 9mm pistol to an ATF agent who was investigating Schlenker's activities. He was charged in federal court in May 2012 with mailing threatening communications and mailing a firearm.

**Kentucky:** In May 2012, former Greenup County Detention Center guard Causetta Michelle Tackett, 24, received a 10-year prison sentence after pleading guilty to first-degree drug trafficking and first-degree promoting contraband. Tackett and her husband, Charles, were arrested in August 2011 and accused of

selling drugs to prisoners. She had requested probation, which the judge said he could not grant "in good conscience" given the nature of the charges and her prior position as a guard.

**Louisiana:** Former federal prison guard Brandon Ray Willis, 27, was sentenced on May 4, 2012 to 71 months in prison after pleading guilty to attempting to smuggle drugs into USP Pollock. He had met with an undercover agent and agreed to bring heroin and methamphetamine into the facility. In addition to the prison term, Willis was ordered to serve three years on supervised release and pay a \$5,000 fine.

**Massachusetts:** On June 4, 2012, New York City Rikers Island guard Shawn Bryan shot and killed police officer Kevin Ambrose during a domestic disturbance call at the Springfield apartment of Bryan's ex-girlfriend. Bryan also shot his ex-girlfriend, who was hospitalized in critical condition, before committing suicide. A restraining order had been issued against Bryan less than an hour before the incident occurred.

**New Jersey:** Former federal prison guard Joe Brown, 39, pleaded guilty on June 12, 2012 to charges of accepting \$3,600 to smuggle contraband into FCI

Fairton between January and March 2012. He had taken the bribes to deliver tobacco and vitamin supplements to a prisoner, and also took around 900 postage stamps out of the facility for the prisoner's benefit. Brown is scheduled to be sentenced on September 18, 2012.

**Norway:** When government workers went on strike in May 2012, including employees at the Bjoergvin prison outside Bergen, prison officials had to release 52 prisoners. Four were released on probation while the rest received five-day furloughs. "Some of these are prisoners convicted for violence, drugs, economic crime and sex crimes," said prison manager Harald Aasaune. Bjoergvin is an open facility where prisoners can move freely. Norway has one of the most progressive prison systems in the world, with a focus on rehabilitation rather than punitive incarceration.

**Pennsylvania:** Cambria County prisoner Travis Simms, 28, was acquitted at a jury trial on June 1, 2012 of felony charges that he had assaulted a guard who was trying to break up a fight between Simms and another prisoner. According to Simms, he got into a physical altercation when the other prisoner made a sexual remark

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about his young daughter, and pushed the guard when he intervened. The guard, Terry Shean, suffered a bruised arm. Simms spent over 200 days in solitary confinement at the county prison in addition to being prosecuted; he was represented by the public defender's office.

**Russia:** Prison guard Alexander Zainulin, 37, who was drunk on vodka and irritated by other customers at a grocery store in Kamchatka, pulled out a gun, fired several rounds into the ceiling and told people in the store to "stay still and shut up." He then shot three of the customers during the March 7, 2012 incident. Zainulin was arrested and released with a written pledge not to leave town. The charges against him, including attempted murder, were later reduced to simple hooliganism; if convicted he faces up to 8 years in prison.

**South Africa:** Government officials announced in April 2012 that they were

pardoning almost 35,000 offenders to reduce overcrowding in the nation's criminal justice system. The pardons, called special remissions of sentence, commemorated the anniversary of Nelson Mandela winning South Africa's first all-race elections in 1994, and included 14,600 prisoners and 20,000 offenders on parole or probation. Prisoners convicted of sex, weapons and drug-related crimes were not eligible for the pardons.

**Tennessee:** In May 2012, former Knox County criminal court judge Richard Baumgartner was indicted in federal court on seven counts of misprision of a felony. He was accused of being addicted to prescription drugs and not reporting the commission of felony crimes. Baumgartner had resigned from the bench in 2011 and was disbarred after pleading guilty to state charges of official misconduct for having sex and buying drugs during courtroom breaks. He received a suspended two-year

sentence and pretrial diversion in that case. The federal charges are related to Baumgartner interceding in criminal cases involving his mistress, Deena Castleman.

**Tennessee:** Another ex-state court judge was indicted in May 2012. Former Hawkins County general sessions judge James Taylor, 41, was accused of filing false claims with the Administrative Office of the Courts, and was indicted on 41 counts of theft. According to the Tennessee Bureau of Investigation, Taylor had requested payment for legal services he did not perform. He was jailed on \$175,000 bond.

**Texas:** Former federal prison guard Kraig D. Lavan pleaded guilty on April 18, 2012 to one count of sexual abuse of a ward. He was prosecuted for engaging in a "sexual act" with a female prisoner at FMC Carswell, and is scheduled to be sentenced in October 2012. Lavan had

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## News in Brief (cont.)

previously worked for the Hood County Sheriff's Department.

**Texas:** Jorge Luis Sandoval, 31, a guard at the East Hidalgo Detention Center in La Villa operated by LCS Corrections Services, pleaded guilty on July 3, 2012 to federal charges of accepting a bribe while acting under the authority of the U.S. Marshals Service. Sandoval allegedly took the bribe to smuggle a cell phone to a prisoner held at the facility. He faces up to 15 years in prison.

**Virginia:** On March 18, 2012, Mark

Daniel Sharp, 43, was released from the Riverside Regional Jail. He was arrested later that same day for attempted carjacking, after a woman said he approached her in a parking lot, claimed to have a weapon and told her to give him her car keys. Sharp was quickly apprehended, booked back into the jail and held without bond.

**Washington:** A vacant state prison camp where prisoners were once trained to fight forest fires will be burned down as part of a training exercise, according to a June 2012 news report. The 180-bed Indian Ridge Correctional Facility near Arlington has been abandoned since 2005. Snohomish County Fire District 21 is

working with state officials to schedule a timeline for demolishing the camp, which will be replanted with trees and turned over to Washington's Department of Natural Resources.

**Wisconsin:** On March 22, 2012, a Milwaukee County Sheriff's Department transport bus clipped an 18-wheeler near Interstate 43 and Holt Avenue. The bus, which was transporting 22 prisoners from the County Correctional Facility-South to attend court hearings, was changing lanes to avoid a disabled vehicle at the time of the accident. Four prisoners were taken to a hospital for evaluation of neck and back pain. ■

## Criminal Justice Resources

### *ACLU National Prison Project*

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### *Amnesty International*

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### *Center for Health Justice*

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### *Critical Resistance*

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### *Family & Corrections Network*

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### *FAMM*

FAMM (Families Against Mandatory Minimums) publishes the FAMMgram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### *The Fortune Society*

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### *Innocence Project*

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### *Just Detention International*

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### *Justice Denied*

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### *National CURE*

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### *November Coalition*

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### *Prison Activist Resource Center*

PARC is a prison abolitionist group committed to exposing and challenging all forms of institutionalized racism, sexism, ableism, heterosexism and classism, specifically within the Prison Industrial Complex. PARC produces a free resource directory for prisoners, and supports activists working to expose and end the abuses of the Prison Industrial Complex and mass incarceration. Contact: PARC, P.O. Box 70447, Oakland, CA 94612 (510) 893-4648. [www.prisonactivist.org](http://www.prisonactivist.org)

### *The Sentencing Project*

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)

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**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

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# PRISON

## Legal News

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VOL. 23 No. 10

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

October 2012

## Solitary Confinement Subject of Unprecedented Congressional Hearing

*by Alex Friedmann<sup>1</sup>*

*It's an awful thing, solitary. It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.*

— U.S. Senator John McCain, on his treatment as a P.O.W.<sup>2</sup>

On June 19, 2012, the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, held a hearing concerning issues related to solitary confinement – the first time that topic has been addressed by a Congressional committee. Over 250 audience members attended.<sup>3</sup>

The hearing, titled “Reassessing Soli-

tary Confinement: The Human Rights, Fiscal and Public Safety Consequences,” was chaired by Illinois Senator Richard J. Durbin and included testimony from federal Bureau of Prisons Director Charles E. Samuels, Jr.; Mississippi DOC Commissioner Christopher B. Epps; attorney Stuart M. Andrews, Jr.; exonerated former death row prisoner Anthony Graves; Pat Nolan, president of Justice Fellowship; and University of California psychology professor Craig Haney.<sup>4</sup> Prof. Haney was one of the researchers in the Stanford Prison Experiment, an infamous 1971 study that revealed the psychological effects of incarceration on both prisoners and prison staff.<sup>5</sup>

“In the face of mounting evidence that the use of solitary confinement may in fact be counterproductive, this hearing is an excellent opportunity for the Committee to get a better understanding of this practice,” observed Vermont Senator Patrick Leahy.

An impressive 90 organizations and individuals submitted written statements or comments in advance of the hearing – including the Vera Institute of Justice; American Friends Service Committee; American Bar Association; Just Detention International; several prisoners currently held in solitary confinement, including two on death row; the Center for Constitutional Rights; mothers of prisoners held in solitary and family members of prisoners who died while in segregation; Human Rights Watch; the Innocence Project; former prisoners who had been held in solitary; the National Alliance on Mental Illness; the ACLU and several ACLU chapters; Solitary Watch; the An-

gola 3;<sup>6</sup> the National Immigrant Justice Center; a prison chaplain and several former corrections officials; Physicians for Human Rights; the National Center for Transgender Equality; the Youth Law Center; and the Human Rights Defense Center (HRDC – the parent organization of Prison Legal News).<sup>7</sup>

The Subcommittee hearing, which included a full-size mock-up of a segregation cell,<sup>8</sup> provided an opportunity to examine the origins, scope and conditions of solitary confinement in U.S. prisons, and to consider the social, financial and human costs of keeping prisoners confined in small cells with little meaningful interaction with other people for extended periods of time.

### Solitary Confinement: The Past

Solitary confinement in the U.S. prison system has a lengthy history, dating back to the nation's first prison, the Walnut Street Jail, established in Philadelphia. In 1790, legislation authorized the construction of 16 small, individual cells at the Walnut Street Jail where prisoners were kept in isolation.<sup>9</sup> Under what became known as the Pennsylvania System, prisoners were held in solitary confinement and segregated from each other almost all of the time, including during meals. The Pennsylvania System was intended to induce penitence and reformation by providing prisoners with time alone to contemplate their sins.<sup>10</sup>

However, problems were noted even during the early years when solitary confinement was used as a form of correctional management, and the Pennsylvania System eventually fell out of favor. When

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## **Solitary Confinement Hearing (cont.)**

Charles Dickens toured the United States in 1842, he visited the Eastern State Penitentiary in Pennsylvania and commented on conditions at that facility, including the use of segregation. He wrote:

*The system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers.... I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.<sup>11</sup>*

A more detailed account of the history of solitary confinement in the U.S. prison system, from its inception to its modern usage, is presented in "The Resistable Rise and Predictable Fall of the U.S. Supermax," by Stephen F. Eisenman, writing for *Monthly Review*.<sup>12</sup>

### **Solitary Confinement: The Present**

According to a March 2006 study by the Urban Institute, an estimated 25,000 prisoners were held in solitary confinement in U.S. prisons, jails and detention facilities as of 2005.<sup>13</sup> Solitary confinement takes several forms, including isolation units that are often called Special or Security Housing Units or Special Management Units, but more commonly known in prison vernacular as "the hole" or "seg."

Prisoners may be placed in solitary for a myriad of reasons, including their security custody level, administrative segregation (ad seg), disciplinary segregation and even protective custody.<sup>14</sup> Thus, the actual number of prisoners held in solitary confinement is much higher than the number cited by the Urban Institute, and was estimated at more than 81,600

according to a 2005 census by the Bureau of Justice Statistics.<sup>15</sup>

Professor Chris Haney, in his testimony before the Subcommittee, stated, "...I believe the renewed use of long-term solitary confinement is the result of the confluence of three unfortunate trends – the era of "mass imprisonment" that began in the mid-1970s and produced widespread prison overcrowding, the shift in responsibility for housing the mentally ill to the nation's prison systems, and the abandonment of the rehabilitative ideal and its corresponding mandate to provide prison programming and treatment."<sup>16</sup>

According to a spokesman for the Bureau of Prisons (BOP), the federal prison system does not use solitary confinement.<sup>17</sup> However, the BOP does keep prisoners in segregation in Special Housing Units (SHUs), Special Management Units (SMUs) and an Administrative Maximum (ADX) unit, which serve the same purpose.

BOP Director Charles Samuels testified at the Subcommittee hearing that approximately 7 percent of federal prisoners are housed in segregation units – which, based on the BOP's current population, equates to around 15,000 prisoners.<sup>18</sup>

Samuels defended the BOP's use of segregation, calling it "a critical management tool that helps us maintain safety, security, and effective reentry programming for the vast majority of federal inmates housed in general population."<sup>19</sup> Only upon close questioning did he acknowledge that placement in solitary was not "the preferred option," and that "there would be some concerns with prolonged confinement."<sup>20</sup>

Supermax facilities, a relatively new addition to the U.S. prison system, are literally built around the concept of solitary confinement. The BOP operates the 490-bed supermax ADX unit in Florence, Colorado, and as of 2004 at least 44 states had supermax facilities or units, including Pelican Bay State Prison in California and Red Onion State Prison in Virginia.<sup>21</sup> Some jails (including Rikers Island in New York City), as well as women's prisons and juvenile facilities, also maintain solitary confinement units.<sup>22</sup>

According to Human Rights Watch, "the proliferation of super-maximum security facilities is the most troubling development in U.S. corrections in recent decades."<sup>23</sup>

Solitary confinement and supermax



## Solitary Confinement Hearing (cont.)

prisons are uniquely American in terms of the scope of and reliance on long-term segregation in our nation's prison system. Other industrialized countries, such as England, do not rely on solitary as a means of controlling or punishing their prisoners.<sup>24</sup>

### Conditions in Solitary Confinement

Solitary confinement is generally defined as isolating prisoners in individual cells for a majority of the time, usually 22-24 hours a day, with minimal contact with other people.<sup>25</sup> Prisoners eat, sleep, use the toilet and live in such conditions for extended periods that last up to decades.<sup>26</sup> When they leave their cells they are usually handcuffed, shackled and escorted by prison staff.

Access to work and education programs, phones, visitation, showers and even reading material is often restricted (in the latter case, with the approval of the U.S. Supreme Court<sup>27</sup>). According to a 2008 American Friends Service Committee report, "Buried Alive: Long-Term Isolation in California's Youth and Adult Prisons," the lights in segregation cells may be left on 24 hours a day, some solitary confinement cells have no windows, and out-of-cell exercise (30-60 minutes per day) is usually provided in an enclosed "dog-run" or outdoor cage.<sup>28</sup>

While it is far removed from the

reality, one way to experience solitary confinement firsthand is to lock oneself in a bathroom – which is the approximate size of an 8x10' cell and contains the same amenities of a toilet and sink – and remain there for a period of several years, with meals being delivered through a slot in the door.

Solitary confinement was described by one U.S. District Court as follows:

*Inmates on Level One at the State of Wisconsin's Supermax Correctional Institution in Boscobel, Wisconsin spend all but four hours a week confined to a cell. The "boxcar" style door on the cell is solid except for a shutter and a trap door that opens into the dead space of a vestibule through which a guard may transfer items to the inmate without interacting with him. The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted: one religious text, one box of legal materials and 25 personal letters. They are permitted no clocks, radios, watches, cassette players or televisions. The temperature fluctuates wildly, reaching extremely high and low temperatures depending on the season. A video camera rather than a human eye monitors the inmate's movements. Visits other than with lawyers are conducted through video screens.*<sup>29</sup>

Anthony Graves, who spent over 18 years in Texas prisons – including 12 on death row – before being exonerated in 2010, testified at the Subcommittee hearing about the conditions he experienced.

"Like all death row inmates, I was kept in solitary confinement. I lived under some of the worst conditions imaginable with the filth, the food, the total disrespect of human dignity. I lived under the rules of a system that is literally driving men out of their minds," he stated.<sup>30</sup>

"Solitary confinement does one thing, it breaks a man's will to live and he ends up deteriorating.... I have been free for almost two years and I still cry at night, because no one out here can relate to what I have gone through. I battle with feelings of loneliness. I've tried therapy but it didn't work. The therapist was crying more than me. She couldn't believe that our system was putting men through this sort of inhumane treatment."<sup>31</sup>

Robert Hillary King, one of the Angola 3 who spent 29 years in segregation prior to his release in 2001, wrote in his autobiography, "Solitary confinement is terrifying, especially if you are innocent of the charges that put you there. It evokes a lot of emotion. It was a nightmare. My soul still cries from all I witnessed and endured.... There's no describing the day to day assault on your body and your mind and the feelings of hopelessness and despair."<sup>32</sup>

### Who is Placed in Solitary?

Corrections officials often claim that the "worst of the worst" prisoners are held in solitary confinement – those who pose a threat to prison staff, security or other prisoners. While that is certainly true in some cases, other prisoners are placed in segregation because they are perceived as being "troublemakers" due to their religious or political beliefs, or because they violate minor prison rules or exercise their rights by filing grievances and lawsuits.<sup>33</sup>

Few prison systems have clear, objective standards for placing prisoners in

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solitary confinement based on the severity of their actual conduct, particularly when they do not pose a threat to staff or other prisoners. Corrections officials have almost unfettered discretion in deciding whether a prisoner should be held in segregation, which leads to arbitrary results.

"These supermaxes, just like the crack cocaine sentencing laws, were part of a tough-on-crime policy that many of us thought made sense at the time," Senator Durbin stated at the Subcommittee hearing. "But we now know that solitary confinement isn't just used for the worst of the worst. Instead, we're seeing an alarming increase in isolation for those who don't really need to be there, and for many, many vulnerable groups like immigrants, children, LGBT inmates, supposedly there for their own protection."<sup>34</sup>

After spending tens of millions of dollars to build and staff supermax prisons, corrections officials apparently feel the need to keep them full to justify their existence. If there is an insufficient number of violent or dangerous prisoners to fill empty supermax beds, then the criteria for placement in segregation are relaxed so that other prisoners can occupy the solitary confinement cells. Thus, it is not surprising that prisoners are sometimes placed in segregation "for petty annoyances like refusing to get out of the shower quickly enough."<sup>35</sup>

According to Senator Patrick Leahy, "Although solitary confinement was developed as a method for handling highly dangerous prisoners, it is increasingly being used with inmates who do not pose a threat to staff or other inmates. Far too often, prisoners today are placed in solitary confinement for minor violations that are disruptive but not violent."<sup>36</sup>

Consider that the California Code of Regulations, Title 15, Section 3315, outlines dozens of "Serious Rule Violations" that may result in "segregation from the general population." Such infractions include "possession of five dollars or more without authorization," "tattooing or possession of tattoo paraphernalia," "refusal to perform work or participate in a program as ordered or assigned," "participation in gambling" and "self mutilation or attempted suicide for the purpose of manipulation."<sup>37</sup>

In Virginia, a number of prisoners who practice the Rastafarian religion have been held in segregation for over a decade. They were not placed in solitary

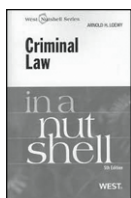
because they were violent, tried to escape, incited a riot or similar reasons. Rather, they refused – based on their religious beliefs – to cut their hair. Rastafarians let their hair grow in dreadlocks and do not trim their beards, which conflicts with the grooming policy of the Virginia Department of Corrections.<sup>38</sup>

Consequently, Rastafarian prisoners who refused to cut their hair or shave were kept in solitary. According to a June 2010 *Associated Press* article, 48 Virginia prisoners were placed in segregation because they would not follow the prison system's grooming policy.<sup>39</sup> In November 2010, 31

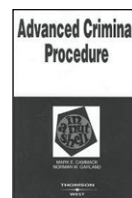
Rastafarian prisoners were released from segregation and transferred to another facility; however, some were returned to solitary confinement several months later after they declined to participate in a program that required them to cut their hair and shave their beards.<sup>40</sup> The use of long-term segregation to punish Rastafarian prisoners who do not comply with prison grooming requirements has been upheld by the federal courts.<sup>41</sup>

Also, in Louisiana, two of the Angola 3, Herman Wallace and Albert Woodfox, have been held in solitary confinement or segregation units for 40 years – not

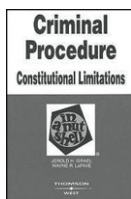
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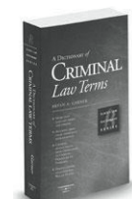
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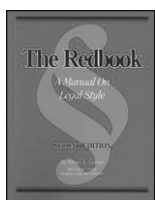
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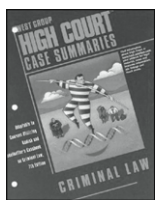
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## Solitary Confinement Hearing (cont.)

because they continue to be violent but because they were involved with forming a Black Panther chapter while incarcerated in the 1970s.<sup>42</sup> Prison warden Burl Cain said of one of the Angola 3 prisoners in a deposition, "He wants to organize. He wants to be defiant.... [H]e is still trying to practice Black Pantherism, and I still would not want him walking around my prison because he would organize the young new inmates."<sup>43</sup> When asked whether the Angola 3 were political prisoners, Warden Cain responded, "Well, yes. Well, no, I don't like the word political."<sup>44</sup>

It is clear that in some cases, prisoners are held in solitary confinement in U.S. prisons due to their religious and political beliefs, not because they are violent or dangerous. In other cases – particularly in California – prisoners are placed in segregation because they are deemed to be "validated" gang members or are suspected of having ties to prison gangs. "There is no other state in the country that keeps so many inmates in solitary confinement for so long," said Alexis Agathocleous, a staff attorney with the Center for Constitutional Rights.<sup>45</sup>

However, the determination by prison officials that a prisoner is a gang member may be incorrect, as was the case with California state prisoner Ernesto Lira, who was "validated" as a gang member and placed in an isolation unit for 8 years. On September 20, 2009, following a four-week trial, a U.S. District Court held that Lira's gang validation was not supported

by accurate or reliable evidence and his due process rights had been violated. The court found that as a result of his lengthy stint in solitary, Lira suffered clinical depression and PTSD. His record was expunged and he was awarded over \$1 million in attorney fees.<sup>46</sup>

But far exceeding the above examples, one type of offender is "vastly overrepresented" in segregation and supermax units: prisoners with mental illnesses.<sup>47</sup>

### Solitary Confinement and Mental Health

The negative impact of long-term isolation on prisoners' mental health is well established. A large body of research has found that solitary confinement results in a plethora of mental health problems;<sup>48</sup> that prisoners placed in segregation are more likely to commit suicide than those not held in such conditions;<sup>49</sup> and that solitary confinement is particularly damaging for people who have pre-existing mental health issues or are otherwise vulnerable, such as juveniles.

As Judge Richard Posner with the U.S. Court of Appeals for the Seventh Circuit wrote, "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant)."<sup>50</sup> And a federal judge in California stated that long-term segregation in a supermax facility "may press the outer bounds of what most humans can psychologically tolerate."<sup>51</sup>

Nor is this a new development. In 1890, the U.S. Supreme Court noted problems with solitary confinement in relation

to prisoners' mental health:

*The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction.... But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.*<sup>52</sup>

Solitary confinement can be accurately described as an effective means of driving the sane insane, while making the insane even more mentally ill. As noted by a U.S. District Court, "[Solitary confinement] units are virtual incubators of psychoses – seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities."<sup>53</sup>

One psychiatrist at a California state prison said, bluntly, "It's a standard psychiatric concept, if you put people in isolation, they will go insane."<sup>54</sup> This is in no small part because people are social by nature and need social interaction to maintain a healthy mental state.<sup>55</sup>

It is hard to appreciate the scope and seriousness of mental health problems that result from solitary confinement without reading accounts of prisoners

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who cut their “arms and legs with chips of paint and concrete,” smear themselves and their cells with feces, strangle themselves with their clothes, swallow glass, and cut out their own testicles.<sup>56</sup> Or the Texas prisoner, held in segregation on death row, who gouged out and ate his one remaining eye.<sup>57</sup>

According to Professor Haney’s testimony at the Subcommittee hearing, “I recall a prisoner in New Mexico who was floridly psychotic and used a makeshift needle and thread from his pillowcase to sew his mouth completely shut. Prison authorities dutifully unstitched him, treated the wounds to his mouth, and then not only immediately returned him to the same isolation unit that had caused him such anguish but gave him a disciplinary infraction for destroying state property (i.e., the pillowcase), thus ensuring that his stay in the unit would be prolonged.”<sup>58</sup>

Anthony Graves testified at the hearing about the effects of solitary confinement on other prisoners that he had witnessed during his lengthy incarceration: “I would watch guys come to prison totally sane and in three years they don’t live in the real world anymore,” he said. “I know a guy who would sit in the middle of

the floor, rip his sheet up, wrap it around himself and light it on fire.”<sup>59</sup>

Attorney Stuart Andrews, whose law firm represents mentally ill prisoners in South Carolina’s prison system in a class-action lawsuit, testified at the Subcommittee hearing that prisoners with mental health problems are more likely to be placed in segregation than those without such disabilities.

“In South Carolina mentally ill inmates are twice as likely to be in solitary confinement as inmates without mental illness (15.81% v. 7.85%); two and a half times as likely to receive a sentence in solitary that exceeds their release date from prison (4.65% v. 1.86%); and over three times as likely to be assigned to an indefinite period of time in solitary (8.66% v. 2.78%),” he said.<sup>60</sup>

The American Bar Association’s revised *Standards for Criminal Justice, Treatment of Prisoners*, approved in February 2010, state that “No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing,” and that the mental health of prisoners held in segregation should be carefully monitored.<sup>61</sup> Unfortunately, the ABA standards carry little weight with

corrections officials and do not create legally-enforceable rights.

## Release from Solitary Confinement

Significantly, many prisoners are in segregation because they have pre-existing mental health problems that make it difficult for them to follow prison rules.<sup>62</sup> Once in segregation they decompensate, which makes it almost impossible for them to “earn” their way out of solitary through good behavior, because that requires following additional rules and regulations. This creates a Catch-22 that keeps mentally ill prisoners in solitary for extended periods of time, although they could be better managed with mental health treatment.<sup>63</sup>

Also, in some states, prisoners are not removed from segregation unless they become informants for prison officials or complete their sentences and are released – typically known as “snitch, parole or die” policies,<sup>64</sup> as those are the only ways out of solitary confinement. With respect to “validated” gang members, however, prisoners who are erroneously validated and are not in fact gang members cannot snitch (“debrief”), since they are not members of a gang; thus, they cannot “earn”

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## Solitary Confinement Hearing (cont.)

their way out of segregation. Such was the case with Ernesto Lira.<sup>65</sup>

Don Specter, director of the Prison Law Office in California, noted that although prisoners “identified as gang members are granted periodic hearings, under the current policy they are not allowed to confront their accusers – or even to know who their accusers are. Nor can they cross-examine witnesses, present their own evidence or argue their case before a neutral decision maker, all basic rights afforded to defendants in the outside judicial system.”<sup>66</sup>

In short, in many cases there are no specific criteria governing release from segregation. While most prison systems have a formalized review process, in which a prisoner’s placement in solitary is examined on a regular basis to determine whether they should be released (typically every 30-90 days), the review process is usually *pro forma*, with prison staff rubber-stamping decisions to continuously renew terms of solitary confinement.

Although the reviews constitute minimal due process for prisoners placed and held in segregation, in practice very little process is due and there is no meaningful, independent review of decisions to keep prisoners in solitary for years or even decades. When such decisions are challenged, courts typically defer to the “informed discretion of corrections officials.”<sup>67</sup>

As Justice Fellowship director Pat Nolan testified at the Subcommittee hearing, “It is troubling that so many inmates are held in the harsh circumstances of solitary confinement for such long periods of time without recourse and without a systematic review of their cases. The harm that such

prolonged periods of isolation cause are well documented, and these policies put the public at great risk after the inmates held in isolation are released.”<sup>68</sup>

### Solitary Confinement and Public Safety

The vast majority of prisoners, including those in segregation, will one day be released. When they return to the community, prisoners held in prolonged solitary confinement with little social interaction or ability to participate in education, treatment or other rehabilitative programs will have a much more difficult time assimilating into society. This translates to higher recidivism rates, which in turn implicate public safety concerns.

“The longer you leave someone in there without rehabilitation, there is a possibility they will come out more dangerous,” said Texas state Senator John Whitmire, on the use of administrative segregation in the Texas Department of Criminal Justice (TDCJ). Around 8,144 Texas prisoners are held in TDCJ ad seg units, down from 9,752 in 2005.<sup>69</sup>

According to recidivism data released by the California Department of Corrections in November 2011, the one-year recidivism rate for prisoners held in SHUs was 52.2%, compared with 47.6% for prisoners not assigned to SHUs. After two years, the recidivism rate was 64.9% for prisoners held in SHUs compared with 60.2% for non-SHU prisoners; at three years the rates were 69.8% and 64.8%, respectively.<sup>70</sup>

In a 2006 report, the Commission on Safety and Abuse in America’s Prisons warned that “the misuse of segregation works against the process of rehabilitating people, thereby threatening public safety.”<sup>71</sup>

This is particularly true for prisoners

released directly from segregation units to the community with no transition period or post-release supervision. The Commission on Safety and Abuse in America’s Prisons stated, “Prisoners often are released directly from solitary confinement and other high-security units directly to the streets, despite the clear dangers of doing so.”<sup>72</sup>

The Commission cited “a large study of former prisoners in Washington” that “tracked rearrest rates among people released from prison in 1997 and 1998, a total of 8,000 former prisoners.”<sup>73</sup> The study found that prisoners who had spent at least three continuous months in segregation, and often much longer, “were somewhat more likely than the others to commit new felonies. And among the repeat offenders, formerly segregated prisoners were much more likely to commit violent crimes.” Further, prisoners “who were released directly from segregation had a much higher rate of recidivism than individuals who spent some time in the normal prison setting before returning to the community: 64 percent compared with 41 percent.”<sup>74</sup>

Additionally, in Illinois, the average recidivism rate for adult prisoners for the two years prior to the 1998 opening of the supermax unit at the Tamms Correctional Center was 42.5 percent. In the two years after the supermax opened, the recidivism rate averaged 46.2 percent. In the following two years (fiscal years 2000-2001), the average recidivism rate was 54.5 percent. Thus, recidivism rates in Illinois increased by more than 28 percent from 1996 to 2001, despite – or potentially due to – the opening of a supermax in which hundreds of prisoners were placed in segregation prior to their release.<sup>75</sup>

Policymakers, however, often don’t make the connection between oppressive conditions in solitary confinement

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and the effects those conditions have on prisoners in terms of recidivism rates. "I ain't worried about their comfort level, to be honest," said Senator Whitmire, counterintuitively, referring to prisoners held in segregation.<sup>76</sup>

### Financial Costs of Solitary Confinement

Beyond the documented problems with solitary confinement, including adverse effects on prisoners' mental health and increased recidivism rates that endanger public safety, solitary is much more expensive than the cost of housing prisoners in general population units.<sup>77</sup>

For example, according to the 2006 study by the Urban Institute, the average cost of housing a prisoner in the supermax unit at the Ohio State Penitentiary (OSP) was more than twice as high (\$149 per day) than the cost of incarcerating a prisoner in general population (\$63 per day).<sup>78</sup> Also, as noted by the ACLU in its written statement for the Subcommittee hearing:

*[A] 2007 estimate from Arizona put the annual cost of holding a prisoner in solitary confinement at approximately \$50,000 compared to only about \$20,000 for the average prisoner. In Maryland, the aver-*

*age cost of housing a prisoner in the state's segregation units is three times greater than in a general population facility; in Ohio it is twice as high; and in Texas the costs are 45% greater. In Connecticut the cost of solitary is nearly twice as much as the average daily expenditure per prisoner; and in Illinois it is three times the statewide average. [internal footnotes omitted]*<sup>79</sup>

According to Senator Durbin, based on FY 2010 data it cost \$61,522 annually to house a prisoner in Illinois' supermax unit at Tamms Correctional Center – almost triple the \$22,043 average cost of incarceration at other state prisons.<sup>80</sup>

The costs are higher because solitary confinement units typically have higher staff-to-prisoner ratios. According to the Urban Institute study, "[The] increased cost of the OSP is due, in part, to the fact that it has a staff-to-prisoner ratio 50 percent higher than that of the state's maximum-security prison."<sup>81</sup>

In California, according to 2010-2011 data, the average annual cost for housing prisoners in Administrative Segregation Units (ASUs) at Pelican Bay State Prison was \$77,740, which was 33% higher than the average general population per-prisoner cost of \$58,324.<sup>82</sup> Further, a

2009 report by California's Office of the Inspector General estimated "the annual correctional staff cost of a standard ASU bed to be at least \$14,600 more than the equivalent general population bed. For the 8,878 ASU beds statewide, this additional cost equates to nearly \$130 million a year. While ASUs are an important part of prison population management, unnecessary ASU housing is a waste of taxpayer dollars."<sup>83</sup>

Further, supermax facilities and other prisons with solitary confinement units are more expensive to build. According to Solitary Watch, the BOP's ADX Florence facility was constructed at a cost of \$60 million, or more than \$122,000 per bed; the supermax Pelican Bay State Prison in California cost \$230 million to build, or over \$217,000 per bed; and the Tamms Correctional Center was built at a cost of \$73 million, or around \$146,000 per bed.<sup>84</sup> These costs are significantly higher than the typical cost of constructing medium-security prisons, which is around \$65,000 per bed.<sup>85</sup>

Thus, not surprisingly, closing supermax or solitary confinement units can result in substantial savings. According to Mississippi DOC Commissioner Christopher Epps, the 2010 closure of Unit 32

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## Solitary Confinement Hearing (cont.)

at the Mississippi State Penitentiary at Parchman, a segregation unit, resulted in annual savings of approximately \$5.6 million.<sup>86</sup> And when Illinois Governor Pat Quinn ordered the closure of the Tamms supermax facility in June 2012, he cited an estimated savings of \$21.6 million during the current fiscal year and \$26.6 million in 2014.<sup>87</sup> However, unionized prison employees filed a lawsuit to keep the facility open, and on September 4, 2012 a state court entered a temporary restraining order preventing Tamms from closing.<sup>88</sup>

Despite the high costs of maintaining supermax prisons and keeping prisoners in solitary confinement for lengthy periods of time, most states apparently are willing to pay such expenses due to lack of political will and capitulation to corrections officials who contend that the widespread use of segregation is necessary to maintain safety and security.

### Constitutionality of Solitary Confinement

While solitary confinement *per se* is considered to be a constitutional form of

punishment, so long as it is accompanied by very minimal due process requirements, extended periods of time in solitary that result in physical or mental suffering may be impermissible. For example, the U.S. Court of Appeals for the Third Circuit stated:

*Courts, though, have universally condemned conditions of segregation inimicable to the inmate-occupants' physical health, and, in some instances, have also considered conditions that jeopardize the mental health or stability of the inmates so confined. The touchstone is the health of the inmate. While the prison administration may punish, it may not do so in a manner that threatens the physical and mental health of prisoners.*

*There is a fundamental difference between depriving a prisoner of privileges he may enjoy and depriving him of the basic necessities of human existence. Isolation may differ from normal confinement only in the loss of freedom and privileges permitted to other prisoners. The duration and conditions of confinement cannot be ignored in deciding whether such confinement meets constitutional standards.*<sup>89</sup>

A U.S. District Court in Louisiana is currently considering an Eighth Amendment challenge to prolonged solitary confinement in a lawsuit filed by Herman Wallace, 70, and Albert Woodfox, 65, two of the Angola 3 prisoners who have spent 40 years in segregation, primarily at the Louisiana State Penitentiary (LSP) at Angola.<sup>90</sup> In 2007 the district court adopted a Report and Recommendation that stated, in part:

*Taking the plaintiffs' evidence as true, and resolving all inferences in the plaintiffs' favor, as the court must do for purposes of this motion, the court finds that the plaintiffs have introduced sufficient evidence for a reasonable fact finder to determine that the cumulative effect of over 28 years of confinement in lock-down at LSP constitutes a sufficiently serious deprivation of at least one basic human need, including but not limited to sleep, exercise, social contact and environmental stimulation. It is obvious that being housed in isolation in a tiny cell for 23 hours a day for over three decades results in serious deprivations of basic human needs.*

*It is also a matter of common sense that three decades of extreme social isolation and enforced inactivity in a space smaller than a typical walk-in closet present the antithesis of what is necessary to meet basic human needs. That such isolation and*

*inactivity may be justified in a prison setting under some situations and for some period of time, does not mean that the experience itself is somehow minimized or made less onerous or painful by its necessity. The emphasis on duration in all these cases is in direct response to the acknowledged severity of the deprivation. It becomes a balancing act between the severity of the deprivation and the legitimate necessity for its imposition. With each passing day its effects are exponentially increased, just as surely as a single drop of water repeated endlessly will eventually bore through the hardest of stones.*<sup>91</sup>

Other recent lawsuits challenging solitary confinement are also pending. For example, two prisoners at Pelican Bay State Prison in California, Todd Ashker and Danny Troxell, filed suit in 2009 challenging their lengthy stays in solitary.<sup>92</sup> Both had spent over 20 years in 8x10' windowless segregation cells. On May 31, 2012, the Center for Constitutional Rights took over representation in their lawsuit and amended it to include numerous other prisoners held in solitary confinement.<sup>93</sup> According to statistics released by California prison officials in 2011, 513 prisoners at Pelican Bay have been kept in segregation for 10 years or more; of those, 78 have been held in solitary 20 years or more.<sup>94</sup>

And on June 18, 2012, five prisoners filed a class-action suit against the Bureau of Prisons regarding conditions at the ADX Florence facility, alleging that federal prison officials "have violated BOP policy and the United States Constitution by failing to properly diagnose and treat prisoners at ADX with serious mental illness."<sup>95</sup> The plaintiffs are represented by the law firm of Arnold & Porter and the DC Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

According to the complaint, "the BOP turns a blind eye to the needs of the mentally ill at ADX and to deplorable conditions of confinement that are inhumane to these prisoners. No civilized society treats its mentally ill citizens with such deliberate indifference to their plight." The lawsuit describes ADX prisoners who are delusional, have engaged in self-mutilation, have tried to commit suicide and who "spread feces and other human waste and body fluids throughout their cells..."<sup>96</sup>

Despite such conditions, some courts have upheld lengthy stints in solitary

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confinement. BOP prisoner Thomas "Tommy" Silverstein, 58, has spent the longest time in solitary in the federal prison system; he has been held in segregation units under a "no human contact" order since 1983 after he murdered BOP guard Merle Clutts at USP Marion. Silverstein is currently housed at the ADX Florence facility, and has described his almost three decades in solitary as "a slow, constant peeling of the skin."<sup>97</sup> Prison officials claim he is a former gang leader and still dangerous.

Silverstein filed a lawsuit in 2007 challenging his lengthy, indefinite stay in segregation, but the case was dismissed in September 2011 after a federal court held that conditions at the ADX were not "atypically extreme."<sup>98</sup> Given that the ADX is the BOP's most secure and restrictive housing unit, one must wonder what the courts consider "extreme."

Several international authorities, including the United Nations' Human Rights Committee, Committee Against Torture and Special Rapporteur on Torture, have criticized the practice of holding prisoners in long-term solitary confinement in supermax facilities.<sup>99</sup> In October 2011, the UN Special Rapporteur

on Torture, Juan E. Méndez, called for a ban on solitary confinement, saying it "is a harsh measure which is contrary to rehabilitation, the aim of the penitentiary system."<sup>100</sup>

However, the United States largely ignores international law with which it disagrees, including treaties to which it is a signatory; further, it does not submit to the jurisdiction of the International Court of Justice at the Hague, commonly known as the World Court.<sup>101</sup>

### Solitary Confinement: Recent Reforms

According to the 2006 report by the Commission on Safety and Abuse in America's Prisons:

*There is growing consensus that correctional systems should rely less on segregation, using it only when absolutely necessary to protect prisoners and staff – and that further reforms are needed. Keeping people locked down for hours on end is counter-productive in the long run. To the extent that safety allows, prisoners in segregation should have opportunities to better themselves through treatment, work, and study, and to feel part of a community, even if it is a highly controlled*

*community.*<sup>102</sup>

Several state prison systems have taken steps to reduce their use of solitary confinement and have not experienced adverse effects as a result. Unfortunately, in many cases such changes have occurred due to lawsuits and not because prison officials have recognized and voluntarily intervened to remediate the many problems associated with long-term segregation.

In June 2010, as a result of protracted and adversarial litigation, Mississippi agreed to close Unit 32 at Parchman. Prisoners held in Unit 32 were described as the "worst of the worst," and "were permanently locked down in solitary confinement with no possibility of earning their way to a less restrictive environment through good behavior."<sup>103</sup>

Following a consent decree entered in 2006, programs were developed whereby prisoners in Unit 32 could earn their way out of solitary confinement. They were allowed out of their cells, were permitted to eat meals together, and recreational activities and rehabilitative programs were provided.<sup>104</sup>


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## Solitary Confinement Hearing (cont.)

conditions at Unit 32 during the course of the litigation. “If you treat people like animals, that’s exactly the way they’ll behave,” he said. Epps, who is also president-elect of the American Correctional Association, noted that transitioning prisoners in Unit 32 out of solitary confinement “...worked out just fine. We didn’t have a single incident.”<sup>105</sup>

He testified at the Subcommittee hearing that “The Mississippi Department of Corrections administrative segregation reforms resulted in a 75.6% reduction in the administrative segregation population from over 1,300 in 2007 to 316 by June 2012. Because Mississippi’s total adult inmate population is 21,982 right now, that means that 1.4% are currently in administrative segregation. The administrative segregation population reduction has not resulted in an increase in serious incidents. The administrative segregation reduction along with the implementation of faith-based and other programs has actually led to 50% fewer violent incidents at the penitentiary.”<sup>106</sup>

In April 2007, the State of New York agreed to settle a lawsuit challenging the placement of mentally ill prisoners in segregation.<sup>107</sup> The settlement requires the state to create “new mental health treatment programs for prisoners with serious mental illness who have SHU and keeplock sentences, and requires the state to provide at least two hours a day of out of cell treatment and programming to all prisoners with serious mental illness remaining in SHU. It requires reviews of disciplinary sentences for inmates with serious mental illness to reduce their sentences and divert them from SHU.”<sup>108</sup>

New York subsequently enacted legislation that established safeguards for mentally ill prisoners, including mental health and suicide prevention screening for prisoners placed in segregation; diverting prisoners with serious mental illnesses “from segregated confinement, where such confinement could potentially be for a period in excess of thirty days, to a residential mental health treatment unit”; reviews every 14 days for mentally ill prisoners not diverted from segregation; and staff training on how to deal with mentally ill prisoners.<sup>109</sup>

In Maine, as a result of voluntary action by DOC Commissioner Joseph Ponte, the number of prisoners held in

the Maine State Prison’s solitary confinement unit has been reduced by more than half. Ponte, who was appointed in 2011, ordered that prisoners not be placed in solitary for more than 72 hours without his approval. He also asked prison staff to impose informal sanctions rather than segregation when prisoners commit rule infractions, removed prisoners from the supermax unit who did not belong there, stopped violent “cell extractions” of uncooperative or unruly prisoners, and instituted other reforms recommended by a panel of corrections officials who had studied solitary confinement-related issues.<sup>110</sup>

“We didn’t do the change [in segregation practices] for budget reasons,” said Ponte. “We did it because we thought it was a more effective way to manage these inmates, and the proof’s in the data. The data says that it’s working.”<sup>111</sup>

In 2007, Indiana agreed to remove seriously mentally ill prisoners from segregation units as part of a settlement agreement in a class-action lawsuit. The court had found that solitary confinement inflicted extreme social isolation and sensory deprivation on mentally ill prisoners; the settlement specified that such prisoners would receive mental health evaluations and treatment, among other provisions.<sup>112</sup>

Beyond litigation – which has served as the driving force behind changes in solitary confinement practices, given the indifference and inaction by most state lawmakers and prison administrators – prisoners themselves are playing a role in effecting change.

As previously reported in *Prison Legal News*, a series of peaceful hunger strikes by thousands of California prisoners, including those held in solitary confinement, took place in 2011 and early 2012. Central to the demands of the protesters were improved conditions for prisoners held in segregation, including at the state’s supermax Pelican Bay facility. The hunger striking prisoners’ demands included compliance with the recommendations of the Commission on Safety and Abuse in America’s Prisons relative to ending long-term solitary confinement, plus providing constructive programming and privileges for prisoners in SHU units.<sup>113</sup>

Largely due to strong outside support, media coverage, and the unity and resolve of the prisoners involved in the protest, California prison officials agreed to make various reforms with respect to SHU

conditions and the process for releasing prisoners from segregation units.<sup>114</sup>

As stated by one California prisoner, “When we are trying to come together for the betterment of our conditions, none of this can be done without mutual respect being established. This is not always an easy job, due to prisoners having different ideologies, religions, political beliefs; and these differences sometimes get in the way. But collective unity and understanding amongst targeted prisoners is growing day by day. We must move with this momentum when it exists, and build unshakable foundations of solidarity.”<sup>115</sup>

## Conclusion

Solitary confinement presents a host of problems, especially for prisoners who are mentally ill – although all prisoners placed in long-term segregation, whether mentally ill or not, are at risk of damaging effects. There are few objective standards and little meaningful due process when placing and holding prisoners in solitary confinement. Conditions in solitary, including the inherent lack of social interaction, can result in physical and mental harm. In some cases, prisoners are placed in segregation not because they are violent or dangerous but rather due to their religious or political beliefs, or because they file complaints or commit minor rule violations. Studies indicate that prisoners held in solitary confinement have higher rates of recidivism following their release from prison, thereby endangering public safety.

Prolonged placement in segregation is constitutionally questionable, and lawsuits have increasingly challenged such practices. As a result of litigation – and voluntarily in some cases – several states have taken steps to reduce the use of solitary confinement in their prison systems without negatively impacting institutional security.

For these reasons, solitary confinement should be curtailed and used only in cases where it is essential to ensure the safety of prison staff or other prisoners, and then only for periods of time necessary to accomplish that goal. There must be regular, meaningful reviews of continued placement in solitary and clear standards for release from segregation units. Further, whenever possible, mentally ill prisoners should not be placed in isolation.

A number of advocacy organizations are working to address issues related to solitary confinement, including Solitary



Watch,<sup>116</sup> the Segregation Reduction Project of the Vera Institute of Justice,<sup>117</sup> the American Friends Service Committee's STOPMAX campaign,<sup>118</sup> the National Religious Campaign Against Torture<sup>119</sup> and the Stop Solitary project of the American Civil Liberties Union.<sup>120</sup>

Through the dedicated work of these organizations, and the efforts of prisoners and their supporters, including those who submitted comments to the Subcommittee hearing, as well as concerned lawmakers such as Senator Durbin, the focus on solitary confinement will hopefully result in much-needed improvements.

As noted by Human Rights Watch, "This Committee's hearing marks the end of an era of uncritical acceptance of or indifference to the use of solitary confinement in U.S. prisons. It is particularly welcome because of the Committee's recognition that solitary confinement raises serious human rights concerns."<sup>121</sup>

Senator Durbin, who called for the hearing after visiting the Tamms supermax unit in his home state of Illinois, has indicated he will introduce legislation to reform solitary confinement practices. "We can no longer slam the cell door and turn our backs on the impact our policies

have on the incarcerated and the safety of our nation," he stated.<sup>122</sup>

That, at least, is a promising start. ■

## ENDNOTES

1 PLN associate editor Alex Friedmann drafted the Human Rights Defense Center's statement for the Subcommittee hearing on solitary confinement, and the issues addressed in HRDC's statement are incorporated into this article

2 Richard Kozar, *John McCain (Overcoming Adversity)* (Chelsea House Pub. 2001)

3 [www.nytimes.com/2012/06/20/us/senators-start-a-review-of-solitary-confinement.html?\\_r=1&emc=tnt&tntemail=y](http://www.nytimes.com/2012/06/20/us/senators-start-a-review-of-solitary-confinement.html?_r=1&emc=tnt&tntemail=y)

4 For the witness testimony and member statements presented at the hearing, see: [www.hsdl.org/?view&did=713592](http://www.hsdl.org/?view&did=713592)

5 [www.prisonexp.org](http://www.prisonexp.org)

6 Three Louisiana prisoners—Robert King, Albert Woodfox and Herman Wallace—who have collectively served 109 years in solitary confinement or segregation units; Woodfox and Wallace remain incarcerated

7 For the written statements submitted to the Subcommittee, see: [www.solitarywatch.com/resources/testimony](http://www.solitarywatch.com/resources/testimony)

8 [www.npr.org/2012/06/19/155369432/senators-get-time-in-solitary-confinement](http://www.npr.org/2012/06/19/155369432/senators-get-time-in-solitary-confinement)

9 [www.prisonersociety.org/about/history.shtml](http://www.prisonersociety.org/about/history.shtml)

10 As stated by Alexis de Tocqueville after visit-

ing the Eastern State Penitentiary in Philadelphia in 1831: "Thrown into solitude he reflects. Placed alone in view of his crime, [the prisoner] learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for anything better, it is in solitude, where remorse will come to assail him." Gustave Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and its Applicability to France* (Edwardsville: Southern Illinois University, 1964) (originally published 1833)

11 Charles Dickens, *American Notes for General Circulation* (Chapman & Hall, 1842)

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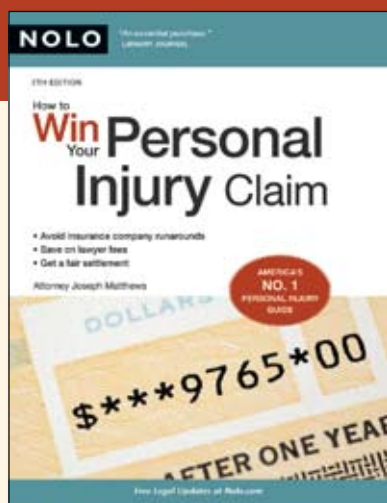
16 [www.judiciary.senate.gov/pdf/12-6-19HaneyTestimony.pdf](http://www.judiciary.senate.gov/pdf/12-6-19HaneyTestimony.pdf)

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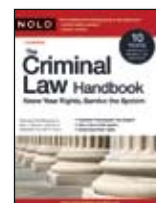
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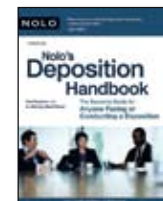
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21 [www.solitarywatch.com/fa](http://www.solitarywatch.com/fa)

22 *Id.*

23 [www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement](http://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement)

24 [www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande); see also, [www.bostonreview.net/BR35.6/tapley.php](http://www.bostonreview.net/BR35.6/tapley.php)

25 [www.solitarywatch.com/fa](http://www.solitarywatch.com/fa)

26 Federal prisoner Tommy Silverstein, for example, has been held in solitary confinement since 1983. Louisiana prisoners Herman Wallace and Albert Woodfox, two of the Angola 3, have served 40 years in solitary confinement or segregation units. As of 2011, 78 prisoners at California's Pelican Bay State Prison had spent over 20 years in segregation (see Endnote no. 94)

27 [www.law.cornell.edu/supct/html/04-1739.ZS.html](http://www.law.cornell.edu/supct/html/04-1739.ZS.html)

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29 *Jones' El v. Berge*, 164 F.Supp.2d 1096, 1098 (W.D. Wis. 2001)

30 [www.judiciary.senate.gov/pdf/12-6-19GravesTestimony.pdf](http://www.judiciary.senate.gov/pdf/12-6-19GravesTestimony.pdf)

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32 [www.solitarywatch.com/wp-content/uploads/2012/06/angola-3-robert-king-herman-wallace-albert-woodfox-prisoners-in-solitary-in-louisiana.pdf](http://www.solitarywatch.com/wp-content/uploads/2012/06/angola-3-robert-king-herman-wallace-albert-woodfox-prisoners-in-solitary-in-louisiana.pdf)

33 Previously, the website for the Tamms supermax prison in Illinois said the facility housed "some of the most litigious inmates in the department's custody"; see: [www.alternet.org/story/94257/stopmax%3A\\_the\\_fight\\_against\\_supermax\\_prisons\\_heats\\_up](http://www.alternet.org/story/94257/stopmax%3A_the_fight_against_supermax_prisons_heats_up)

34 [www.judiciary.senate.gov/pdf/12-6-19DurbinStatement.pdf](http://www.judiciary.senate.gov/pdf/12-6-19DurbinStatement.pdf)

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39 [www.firstamendmentcenter.org/va-officials-rastafarian-inmates-no-longer-isolated-because-of-hair](http://www.firstamendmentcenter.org/va-officials-rastafarian-inmates-no-longer-isolated-because-of-hair)

40 *Prison Legal News*, Dec. 2011, p.28, available at: [www.prisonlegalnews.org/24080\\_displayArticle.aspx](http://www.prisonlegalnews.org/24080_displayArticle.aspx)

41 *McRae v. Johnson*, 261 Fed.Appx. 554 (4th

Cir. 2008); *Smith v. Ozmint*, 396 Fed.Appx. 944 (4th Cir. 2010)

42 Woodfox and Wallace were convicted of killing a prison guard; they have served 40 years in segregation units, mainly in solitary confinement at the Louisiana State Penitentiary in Angola, and remain incarcerated. King was convicted of murdering another prisoner; his conviction was later overturned, and he pleaded guilty to conspiracy to commit murder and was released in 2001

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44 *Wilkerson v. Stalder*, U.S.D.C. (M.D. La.), Case No. 3:00-cv-00304-RET-DLD (Docket No. 233), available at: [www.angola3.org/uploads/Angola\\_8th\\_A\\_Summary\\_Judgment\\_Decision.pdf](http://www.angola3.org/uploads/Angola_8th_A_Summary_Judgment_Decision.pdf)

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46 *Prison Legal News*, May 2010, p.24, available at [www.prisonlegalnews.org/22316\\_displayArticle.aspx](http://www.prisonlegalnews.org/22316_displayArticle.aspx); [www.nytimes.com/2012/03/31/us/battles-to-change-prison-policy-of-solitary-confinement.html?pagewanted=all](http://www.nytimes.com/2012/03/31/us/battles-to-change-prison-policy-of-solitary-confinement.html?pagewanted=all)

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50 *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988)

51 *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). Also from the *Madrid* ruling, at 1230: "Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances"

52 *In re Medley*, 134 U.S. 160, 168 (1890)

53 *Ruiz v Johnson*, 154 F.Supp.2d 975 (S.D. Tex. 2001)

54 [www.hrw.org/sites/default/files/reports/usa1003.pdf](http://www.hrw.org/sites/default/files/reports/usa1003.pdf)

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65 See Endnote no. 46

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67 *Turner v. Safley*, 490 U.S. 78, 90 (1987); see also, Sharon Dolovich, "Forms of Deference in Prison Law," *Federal Sentencing Reporter*, Vol. 24, No. 4, p.245 (April 2012)

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89 *Young v. Quinn*, 960 F.2d 351 (3d Cir. 1992), *reversed on other grounds*

90 Wallace and Woodfox were transferred from Angola in 2008 after serving 36 years in solitary and moved to other maximum-security prisons, where they remain in segregation. *See*: [www.solitarywatch.com/2011/05/17/angola-3-mark-39-years-in-solitary-confinement](http://www.solitarywatch.com/2011/05/17/angola-3-mark-39-years-in-solitary-confinement)

91 *Wilkerson v. Stalder*, U.S.D.C. (M.D. La.), Case No. 3:00-cv-00304-RET-DLD (Docket No. 233), *available at*: [www.angola3.org/uploads/Angola\\_8th\\_A\\_Summary\\_Judgment\\_Decision.pdf](http://www.angola3.org/uploads/Angola_8th_A_Summary_Judgment_Decision.pdf). The suit, filed in 2000, remains pending as of September 2012

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# Solitary Confinement: Bad for Chimps, Okay for Humans?

by Lance Tapley

Maine Republican Senator Susan Collins is a key cosponsor of legislation that, among other provisions, would outlaw psychologically damaging solitary confinement for more than 500 chimpanzees caged for research in federally supported laboratories. In July 2012 the bill bipartisanly passed the Senate's Environment and Public Works Committee on its way to a floor vote.

But the legislation, which also protects gorillas and other ape species if they are used for research, doesn't protect the dominant primate species, *Homo sapiens*. Experts say at least 80,000 prisoners are in solitary confinement in tiny cells in this country.

Some prisoner-rights advocates think it's ironic when laws give rights to animals that aren't extended to humans. *Prison Legal News* editor Paul Wright noted that, for example, "there are existing laws saying how much living space primates should have in captivity. By contrast, no such laws apply to humans in captivity."

He concluded: "Sadly, I don't think most people, at least not in this country, see any connection between animal and human rights."

Laurie Jo Reynolds, an anti-solitary-confinement activist in Illinois who also is a strong supporter of animal rights, said, "Acknowledging that we must stop inflicting solitary confinement on chimpanzees

is also a recognition that we must stop the practice for humans."

S. 810, the Great Ape Protection Act, "corrects the pain and psychological damage that apes often experience as a result of needless experiments and solitary confinement," Senator Collins said in a recent statement. Repeated requests to her office for her views on human solitary confinement did not get a response.

But Maine's First District Democratic Representative Chellie Pingree, who is a cosponsor of a parallel bill in the House, H.R. 1513, agreed that the damaging effects of solitary confinement extend to humans: "A growing number of experts describe it as cruel and unusual punishment, and I agree with them."

Michael Michaud, Maine's Second District congressman, is also a H.R. 1513 cosponsor. In repeated attempts, he could not be reached on the question of whether human solitary confinement should also be banned.

A ban or restrictions on prisoner isolation, however, may soon be debated in Congress. In June, Senator Richard Durbin, the Illinois Democrat and chairman of the Senate's Subcommittee on the Constitution, Civil Rights and Human Rights, presided over the first-ever congressional hearing on solitary confinement. He's preparing legislation to reform its use.

Wayne Pacelle, president of the Humane Society of the United States, said he refers to the damaging effects of solitary confinement on humans in his speeches in support of S. 810, but banning isolation of chimpanzees was "really not the impetus" for the legislation.

He said forbidding the invasive experiments chimps are subject to is a more important motivation behind the bill. These include, as the bill's language states, experiments that cause injury, trauma or death in drug testing, "intentional exposure" to harmful substances, and removing body parts.

But S. 810 would also ban "isolation" and "social deprivation" that "may be detrimental to the health or psychological well-being of a great ape." The legislation notes that apes are "highly intelligent and social animals."

Kathleen Conlee, vice president of the Humane Society, pointed to research appearing in the *Journal of Trauma & Dis-*

*sociation* that shows how chimps subject to laboratory conditions express Post Traumatic Stress Disorder-like symptoms. Isolation is listed as a common stress.

Chimpanzee PTSD symptoms include violence, self-injury, screaming and "highly anxious states" – symptoms humans often show after long-term solitary confinement.

"Great apes" is a term encompassing gorillas, bonobos, orangutans, gibbons and chimpanzees, but only chimpanzees are currently kept for research, according to the Humane Society. The federal Institute of Medicine has concluded that most chimp research is unnecessary. Violations of the Great Ape Protection Act could result in a fine of \$10,000 a day for each animal mistreated.

S. 810's full title is the Great Ape Protection and Cost Saving Act of 2011. Proponents claim it would save the government \$25 million a year by relocating chimpanzees from laboratories to wildlife sanctuaries, which have freer living conditions.

Proponents of ending human solitary confinement also say there are cost-saving reasons to stop that practice. The cage-like cells of "supermax" prisons and prison units are so labor-intensive for guards that they cost two times as much as regular imprisonment, experts say.

Independent Senator Bernard Sanders of Vermont, like Collins another S. 810 lead cosponsor, was quoted in a recent Humane Society press release: "We remain the only country besides Gabon to continue holding these animals in laboratories as possible subjects for invasive research."

Similarly, the U.S. is the only nation that practices human solitary confinement in large numbers.

Pingree said it's time to take a careful look at how prisons use solitary confinement: "Perhaps there are some times when it is important to temporarily isolate a prisoner for his safety or the safety of other inmates, but using solitary confinement as a routine punishment technique is too harsh."

She added, "If one of the goals of putting people in prison is to rehabilitate, long-term solitary confinement doesn't advance that goal." ■

*This article was originally published in the Portland Phoenix on August 22, 2012, and is reprinted with permission.*



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# California Female Prisoners Eligible for Early Release, but Disqualified Due to Lack of Local Rehabilitative Services

In the wake of the U.S. Supreme Court's ruling in *Plata v. Brown*, mandating that California take immediate steps to reduce prison overcrowding, state officials have proposed innovative ideas to help accomplish that goal.

One such idea, put forth by state Senator Carol Liu, was subsequently passed by the California legislature. Liu's bill (SB 1266) created a program that allows for the early release of female prisoners, pregnant prisoners and prisoners "who were primary caregivers of dependent children immediately prior to incarceration" if they were convicted of offenses that are deemed non-violent, non-serious and non-sexual under California law, and have less than two years remaining on their sentences and no history of escapes.

Under the initiative, called the Alternative Custody Program, qualifying prisoners would be required to live in either a sober living treatment facility, a transitional home or at their own legal residence (effectively under house arrest). They would be electronically monitored and, like other parolees, would report to parole officers. Full requirements for the program are set forth at California Penal Code § 1170.05.

Of the more than 9,500 women incarcerated in California's prison system, state

officials estimate that roughly half are eligible for the program but only around 500 will be approved for early release. Why the much lower number? Insufficient rehabilitative services in the communities to which the prisoners will return.

Dana Toyama, a spokesperson for the California Department of Corrections and Rehabilitation, explained. "They [eligible prisoners] have to be released to their county of last legal residence, and they have to have some sort of rehabilitative program to go to." She added, "We do have inmates that want to do this, just nothing available in their community."

According to Barry Krisberg, Director of Research and Policy at the U.C. Berkeley School of Law, only a few of California's 58 counties have devoted sufficient resources to providing community-based rehabilitative programs.

"The statistics would argue that recidivism rates are going to be low if we can give [parolees] some treatment services," Krisberg said. "This will work in some places because you have a critical mass of people that want to innovate: prison less, community more. But there's just a dozen of them at best."

Thus, despite the state legislature's best intentions, many female prisoners, although otherwise eligible, will not be

able to obtain early release. In fact, by January 2012 only 10 prisoners had been released under the program. And while the law was written in a way that does not exclude male prisoners who were the primary caregivers of dependent children prior to their incarceration, the Alternative Custody Program has only been extended to female offenders. State officials said male prisoners might be eligible in the future.

"Right now, we are not offering it to them, but they can't be statutorily excluded. We just don't have the resources to offer it to male inmates," said Toyama.

Nor is everyone happy about providing the early release program to female prisoners. "If they were such great mothers to begin with, they never would have committed the heinous crime that got them sent to state prison," remarked Harriet Salarno, founder of Crime Victims United. ■

Sources: [www.healthycal.org](http://www.healthycal.org), *Los Angeles Times*, [www.kalw.org](http://www.kalw.org), [www.kcra.com](http://www.kcra.com)



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# From the Editor

*by Paul Wright*

Over the past 22 years Prison Legal News has been represented by dozens of lawyers around the country in a variety of cases, mostly dealing with censorship and public records requests. We have met many if not most of our attorneys because they subscribed to PLN, based on their interest in criminal justice issues and the fact that they are generally litigating prison and jail cases. That was how we happened to meet Brian Barnard.

Brian was one of the very few civil rights lawyers in Utah. When jails in Utah and the Utah Department of Corrections censored PLN in the mid 1990s, Brian was the person we turned to for advice and then legal representation. He represented PLN in five separate censorship suits over the years – four against jails and one against the Utah DOC. Brian had successfully represented prisoners in various cases since the mid 1970s; he was often the attorney of last resort for citizens in Utah whose rights were violated by government officials.

I am saddened to report that Brian died in his sleep on September 4, 2012. While in many jurisdictions there are dozens if not hundreds of lawyers who are capable and willing to represent plaintiffs in civil and constitutional rights cases, in others, like Utah, there are very few who can do so. Brian represented PLN for 8 or 9 years before I actually met him in person in 2005. He was especially fond of the First Amendment, and represented clients on issues ranging from the right to protest to establishment clause claims, and, of course, prison and jail censorship cases. It is fair to say that without Brian's tenacious and successful advocacy, the free speech rights of Utah's citizens, in and out of prison, would be greatly diminished. This issue of PLN is dedicated to Brian Barnard and his memory as a defender of free speech and the downtrodden.

This month's cover story reports on efforts to stem the use of solitary confinement in the U.S. Since PLN first started publishing in 1990, control units and sensory deprivation have been high on the list of evils we have targeted for exposure and elimination. The trend towards widespread and massive use of solitary confinement, including the construction of specialized prisons for that purpose, started in the mid 1980s and accelerated in the 1990s. Interestingly, the use of solitary

confinement began to increase around the time federal courts held that prison officials could not arbitrarily beat, whip, flog or physically abuse prisoners.

Despite knowing for centuries that prolonged segregation drives people insane, federal and state prison officials duly embarked upon the mass implementation of solitary confinement for their prison populations, which in no uncertain terms has the goal of destroying people who are held in isolation cells for extended periods of time.

The luster is finally fading from the supermax experiment, but as the cover story notes, having invested billions in their construction it is not an easy habit to give up, and it remains to be seen what will actually happen given the limited utility of supermax facilities for other purposes. Exposing solitary confinement as the human rights abuse it is has been long overdue, and PLN's steady coverage of this topic over the past 22 years has contributed to the increase in awareness of this issue. The Human Rights Defense Center submitted formal comments, which are available on our website, to the U.S. Senate subcommittee that held the hearing on solitary confinement last June.

While we are on the topic of long-standing abuses, the Prison Phone Justice Campaign continues to pick up steam. Members of the coalition to end exorbitant charges for prison phone calls have met with the chairperson and several members of the Federal Communications Commission to act on the pending Wright petition, which would cap interstate prison phone rates. We have also met with several members of Congress to express our concerns, and they in turn have urged the FCC to act on the Wright petition.

Since PLN began publicizing the campaign in June 2012, over 200 prisoners and their family members have contacted the FCC about the cost of prison phone calls. These letters are available online on the FCC's public docket. If you or your family are negatively affected by high prison phone rates, please write to the FCC as described in the ad on page 25 of this issue of PLN, and urge them to act on the Wright petition to cap the rates for interstate prison phone calls (the FCC only has jurisdiction over interstate rates).

PLN/HRDC, along with our allies at

Working Narratives and the Center for Media Justice, are spearheading the struggle to end exorbitant prison phone rates. We are gathering updated prison phone contract and commission data for all 50 states and making this information publicly available on the campaign's website, [www.prison-phonejustice.org](http://www.prison-phonejustice.org). We are also working to educate the FCC and state utility commissions, and are urging them to cap prison phone rates. Plus we are networking with the media and other organizations to take action on this issue. Unfortunately this requires staff time – a lot of it – plus expenses for things like travel, website design and maintenance, mailings, etc.

We need to raise \$60,000 within the next four months to be able to sustain (and hopefully increase) this level of activity. By now, PLN readers should have received our annual fundraiser letter. Given the importance of the prison phone justice issue, we are dedicating this year's annual fundraiser solely to funding our share of the Prison Phone Justice Campaign. Donations will primarily go towards hiring a full-time coordinator and covering campaign expenses.

The injustices associated with the kickbacks and high costs of prison phone calls are well-documented, and PLN has been instrumental in exposing abuses in the prison phone industry for the past two decades (see the article on page 20 for a review and update on this issue). There is finally a critical mass of people and organizations working to end excessive prison phone rates, and we now need additional resources to follow through.

We obtained small grants from the Proteus Fund and the Funding Exchange to cover the start-up costs for the Prison Phone Justice Campaign, but need more if we are going to sustain it. We are confronting both the prison industrial complex and telecom companies, and the prison phone industry alone is worth billions of dollars to those who exploit prisoners and their families by gouging them on the cost of prison phone calls.

If you think the time has come to end this abuse, you can do two things right now. First, if you have not already done so, write a letter to the FCC and tell them how high prison phone rates have negatively affected you, your family and/or your friends, and why action is needed



to cap the rates for interstate prison phone calls. Second, if you are able, send a donation to PLN to help fund the Prison Phone Justice Campaign. No amount is too small. If each of PLN's 7,000 subscribers donated only \$10, we would surpass our

funding goal of \$60,000. This is your chance to stand up and take action to end one of the more egregious abuses within the U.S. criminal justice system – one that affects all prisoners and their families.

Lastly, as the holiday season ap-

proaches, please consider giving gift subscriptions of PLN or purchasing some of the books we distribute, which make great holiday gifts. Enjoy this issue of PLN and please encourage others to subscribe. 📧

## Ninth Circuit Judge Who Co-Authorred “Torture Memos” Discloses Receipt of \$3.4 Million in Legal and Consulting Help

In October 2011, the *National Law Journal* reported that Jay Bybee, a conservative federal judge on the Ninth Circuit Court of Appeals, had accepted \$3.4 million in legal and consulting help from 2007 to 2010 as he defended himself against allegations that he violated ethics rules when, as head of the Office of Legal Counsel for the U.S. Department of Justice (DOJ) under the Bush administration, he co-authored memos that justified the use of waterboarding and other torture techniques against suspected terrorists.

To critics, the so-called “torture memos” contravened the Geneva Conventions as well as long-standing U.S. policy regarding the treatment of prisoners of war. They became a lightning rod for opponents of the war in Iraq, who argued

that the memos not only lowered the moral standing of the U.S. among other nations, but acted as a powerful recruiting tool for the very terrorists the United States was fighting.

Bybee's financial disclosures indicated that he received more than \$3.25 million in assistance from the Los Angeles-based powerhouse law firm of Latham & Watkins. Several other law firms contributed about \$150,000 worth of services. When lawyers from the DOJ's Office of Professional Responsibility argued that Bybee and former DOJ attorney John Yoo – now a professor at the University of California Berkeley School of Law – had acted improperly in authoring the torture memos, Latham lawyers Maureen Mahoney and Everett Johnson, Jr. responded with a

spirited 157-page rebuttal. They also accompanied Bybee when he appeared for an interview before House Judiciary Committee investigators. A call for Bybee's impeachment was successfully rebuffed.

There is nothing wrong with Bybee accepting pro bono legal services, according to Charles Geyh, an Indiana University professor who specializes in legal ethics, so long as he does not trade on his judicial position. By publicly disclosing the value of the services he received, Geyh said, “Bybee is trying to do the right thing.” Bybee is also avoiding the appearance of a conflict of interest by disqualifying himself from cases involving attorneys from Latham & Watkins. 📧

Source: *National Law Journal*



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# The Price to Call Home: State-Sanctioned Monopolization in the Prison Phone Industry

by Drew Kukorowski

*Ed. Note: In April 2011, Prison Legal News published a comprehensive cover story on the prison telephone industry based on two years of research into prison phone contracts, rates and kickbacks nationwide. This article provides a summary and update of issues related to the prison phone industry, including the Wright Petition, which remains pending before the FCC. See the Prison Phone Justice Campaign ad on page 25 for additional information.*

Exorbitant phone rates make the prison telephone industry one of the most lucrative businesses in the United States today. The industry is so profitable because prison phone companies have state-sanctioned monopolistic control over the state prison markets,<sup>1</sup> and the sole federal agency with authority to rein in prison phone rates nationwide has thus far failed to provide meaningful relief.

Prison phone companies are awarded monopolies through bidding processes in which they submit contract proposals to the state prison systems; in all but eight states, these contracts include provisions to pay “commissions”—in effect, kickbacks—in either the form of a percentage of revenue, a fixed up-front payment or a combination of the two.<sup>2</sup> Thus, state prison systems have no incentive to select the telephone company that offers the lowest rates; rather, they have an incentive to reap the most profit by selecting the company that provides the highest commission.<sup>3</sup>

This market oddity—that the government entity has an incentive to select the highest bidder and that the actual consumers have no input in the bidding process—makes the prison telephone industry susceptible to prices that are well above the phone rates for non-incarcerated persons. This fact, coupled with what economists would call the “relative inelastic demand”<sup>4</sup> that incarcerated persons and their families have to speak with one another, leads to exorbitant rates. The prison telephone market is structured to be exploitative because it grants monopolies to the producers (prison phone companies), and because the consumers—the incarcerated persons and their families who are actually footing the bills—have no comparable alternative means of communicating.<sup>5</sup>

Exorbitant telephone rates are not only bad for incarcerated persons and their families, but also are bad for society at large. High phone rates reduce the ability of incarcerated persons to communicate with their family members, and family contact has been consistently shown to lower recidivism.<sup>6</sup> Currently, there is public debate about reducing the costs of mass incarceration by focusing on ways to lower the likelihood that incarcerated persons will re-offend after their release.<sup>7</sup> For example, the Republican Party Platform for 2012 endorses “the institution of family-friendly policies ... [to] reduce the rate of recidivism, thus reducing the enormous fiscal and social costs of incarceration.”<sup>8</sup> And the Democratic Party Platform for 2012 notes that the party “support[s] ... initiatives to reduce recidivism.”<sup>9</sup> Lowering prison telephone rates would serve the uncontroversial goal of reducing the likelihood that incarcerated persons will re-offend after their release, as family contact is linked to lower recidivism.

Fortunately, government regulation can help achieve this goal. The Federal Communications Commission is considering a modest regulation to impose price caps on long-distance prison telephone rates. Such regulation, when considered against the backdrop of the corporate monopolization of the prison telephone market, would both reduce the price-gouging that incarcerated persons and their families suffer, and simultaneously contribute to the social good by reducing recidivism.

## The Prison Telephone Market is Broken

Markets for goods and services work best when consumers have the freedom to select the best option. In the prison phone market, though, consumers have no choice as to which telephone company they use. That choice is made for them by the state prison system. But state prison systems cannot be expected to advocate for lower phone rates because they don’t have consumer interests in mind. And prison telephone companies have little incentive to provide reasonable rates to their customers because they do not answer to those customers.

These state-sanctioned monopolies prey upon people who are least able to select alternative methods of communication and who are least able to sustain additional expenses. Incarcerated persons have below-average literacy rates that make it less practical for them to communicate in writing.<sup>10</sup> Further, it is difficult for families of incarcerated persons to pay for phone calls because people in prison tend to come from low-income households.<sup>11</sup> A study of recently-released people from Illinois prisons found that the high cost of prison phone calls was one of the two most significant barriers to family contact during incarceration.<sup>12</sup> Therefore, prison phone companies not only have monopolies, but their customers have no comparable alternatives to telephone communication.

In addition to these structural problems within the prison telephone industry, corporate agglomeration has exacerbated already exorbitant prison phone rates. Over the past few years, three companies have emerged to dominate the market: 90% of incarcerated persons live in states with prison phone service that is controlled by Global Tel\*Link, Securus Technologies or CenturyLink.<sup>13</sup> The largest of these corporations, Global Tel\*Link, currently has contracts for 27 state correctional departments following its acquisition of four smaller prison phone companies between 2009 and 2011.<sup>14</sup> Global Tel\*Link-controlled states contain approximately 57% of the total state prison population in the United States.<sup>15</sup> Government regulation was designed to address this kind of corporate domination over a captive market.

## Exorbitant Rates Result from the Monopolistic Market

The combination of corporate consolidation in the prison phone industry, state-granted monopolies and inelastic demand for prison telephone service has led to exorbitant pricing. In many states, people behind bars must pay about \$15 for a fifteen-minute phone call.<sup>16</sup> For families trying to stay in touch on a regular basis, such costs are often backbreaking.

Because phone rates vary widely between states—even between states that use the same prison phone company—nationwide regulation is appropriate. For

example, a fifteen-minute long-distance call from Global Tel\*Link costs \$2.36 in Massachusetts, but the same call costs more than \$17 in Georgia.<sup>17</sup> This significant difference in rates originates in large part from the wide range—anywhere from 15% to 60%—in the size of kickbacks that prison phone companies pay to state governments.<sup>18</sup>

Prison phone companies and state prison officials use different arguments to defend the high rates. The companies argue that rates must be high in order to cover costs associated with providing secure telephone service, such as call monitoring.<sup>19</sup> But this argument is refuted by the phone rates charged in New York's prison system. New York law bans kickbacks and requires that "the lowest possible cost to the user shall be emphasized."<sup>20</sup> Currently, Global Tel\*Link charges incarcerated persons and their families about \$0.05 per minute for local and long-distance calls from New York prisons. Thus, low rates in the prison phone market are entirely consistent with call monitoring and other security measures.

Corrections officials argue that phone kickback revenue pays for prison amenities that otherwise would go unfunded by state legislatures.<sup>21</sup> This argument fails to stand up to scrutiny when considering that the federal prison system charges comparatively low rates, \$0.06/minute for local calls and \$0.23/minute for long-distance, yet still generates enormous revenue. As a recent Government Accountability Office report points out, the federal prison phone rates were sufficient to cover costs plus generate \$34 million in profit in 2010.<sup>22</sup> Thus, substantial profits can still be realized when prices are set at relatively low levels, and both prison telephone companies and state prison systems would be able to cover their costs and generate revenue even with rate caps in place.

### High Prison Phone Rates Harm Society

The link between family contact during incarceration and reduced recidivism is well-documented.<sup>23</sup> Indeed, the federal Bureau of Prisons states that "telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development."<sup>24</sup> Congress itself has found, in the context of enacting the Second Chance Act of 2007, that "there is evidence to suggest that inmates who are connected to their children and families are more

likely to avoid negative incidents and have reduced sentences."<sup>25</sup> The American Correctional Association, the world's largest professional corrections organization and an accreditation agency for correctional facilities, has repeatedly resolved that "sound correctional management" requires that "adult/juvenile offenders should have access to a range of reasonably priced telecommunications services," and that rates for such services should be "commensurate with those charged to the general public for like services."<sup>26</sup> Thus, a variety of stakeholders and policy-making bodies agree that high prison telephone rates are harmful, yet such high rates persist.

In addition to reducing recidivism, lower phone rates that lead to increased contact between incarcerated people and their children increase incarcerated persons' involvement with their children after release.<sup>27</sup> As of 2007, 52% of people held in state prisons and 63% of people held in the federal prison system were parents of minor children.<sup>28</sup> Lowering the cost of telephone communication for these incarcerated persons would improve parent-child relationships by permitting more frequent calls.

The economic consequences of high

prison phone rates are harmful as well. The revenues generated by prison telephone rates are offset by the costs of larger prison populations caused by increased rates of re-offending. Forgoing revenue from exorbitant phone rates now will decrease correctional departments' costs in the future, because fewer people will find themselves back in prison. If state governments are serious about cutting costs by reducing their prison populations, then lowering prison phone rates provides a simple, straightforward and evidence-based way to achieve that goal.

High prison phone rates also function as a regressive tax on communities that experience higher incarceration rates.<sup>29</sup> This is the opposite of our generally progressive tax structure where tax burdens increase as income rises. In this context, low-income families pay exorbitant phone rates that fund state revenues. But taxpayers are already paying for prisons. It is unfair that taxpayers whose family members are incarcerated should be subject to an additional tax in the form of high prison phones rates, especially considering that this concurrently enriches prison phone companies and negatively impacts recidivism.

Finally, lower prison telephone rates



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## Prison Phone Industry (cont.)

would also lessen the growing problem of contraband cell phones.<sup>30</sup> The connection between prison phone rates and contraband cell phones spurred Congress to order a government study into the effect of high phone rates on the demand for contraband cell phones.<sup>31</sup> And even *TIME Magazine* notes that the “notoriously expensive” cost of using prison telephones contributes to the demand for cell phones in prison.<sup>32</sup> Thus, lowering high prison telephone rates would improve safety by providing less incentive for incarcerated people to acquire and use contraband cell phones.

### Government Regulation in the Prison Phone Industry

Currently, prison phone companies are subject to minimal governmental regulation. Pressuring state utility agencies—which regulate in-state phone services—to lower prison phone rates has been successful in a few cases, but is unlikely to succeed everywhere. The kickback commissions that most states receive from prison phone companies give them little incentive to enact affordable rates. At the federal level, the Federal Communications Commission (FCC) currently limits its regulation of the prison phone industry to disclosure requirements mandating that prison phone companies inform collect call

recipients of rate prices before they accept calls from incarcerated persons.<sup>33</sup>

In 2000, a group of plaintiffs brought a class-action lawsuit against Corrections Corporation of America and several prison phone companies, alleging that the prison phone agreements between the parties violated federal anti-trust law, among other claims. The federal district court referred the case to the FCC, stating that the FCC was better suited to address the concerns raised in the lawsuit. The plaintiffs then petitioned the FCC to enact regulations that would introduce competition to the prison telephone market, in the hopes of lowering prison phone rates by breaking up the monopolistic prison phone industry. After several years with little movement by the FCC, the plaintiffs shifted their request and petitioned the FCC to impose price caps or benchmark rates of \$0.20 to \$0.25 per minute for interstate (long distance) prison phone calls.<sup>34</sup> This petition—known as the Wright Petition, after original plaintiff Martha Wright—is still pending before the FCC.

The rates requested by the Wright Petition would be more affordable and would still permit phone companies to generate profit. As demonstrated by the example of New York’s prison system discussed above, prison telephone rates as low as \$0.05 per minute can still generate sufficient revenue. Despite widespread consensus that prison phone rates should be lower, the FCC has

failed to impose price caps in this market due to obstructionism by prison phone companies. This is corporate greed and disregard for public welfare at its worst.

### Why Federal Regulation Would Ameliorate the Problem

The Federal Communications Commission’s statutory purpose, stated in the law that created the agency in 1934, is to regulate telecommunications so that service is available nationwide at “reasonable charges.”<sup>35</sup> Under no circumstances can the rates charged in the current prison phone market be deemed reasonable.

The FCC is ideally situated to regulate this broken industry. The FCC already has consumer protection capabilities such that it can field consumer complaints and resolve disputes with phone companies without the time and costs associated with litigation.

Federal regulation of interstate prison phone rates would bring much-needed relief to incarcerated persons and their families, and would increase public safety by reducing recidivism through increased family communications. While such regulation would not necessarily affect prison phone rates within a state (for local and intrastate calls),<sup>36</sup> the highest prison phone rates currently apply to interstate calls.<sup>37</sup> Setting price caps for interstate prison phone rates would bring them more in line with rates in the non-prison market while still allowing prison phone companies to generate profit.<sup>38</sup> In sum, federal regulation of this industry is imperative.

### Summary and Recommendations

State-sanctioned monopolies for prison telephone companies encourage exorbitant phone rates for incarcerated persons and their families. High prison phone rates—effectively regressive taxes—reduce communication between incarcerated persons and their family members. Research undeniably demonstrates that increased communication with family during incarceration reduces the risk that incarcerated persons will re-offend following their release. But neither prison phone companies nor state prison systems have an incentive to lower prison telephone rates. As a result, incarcerated persons, their families and the public suffer while prison phone companies, and the government agencies they contract with, profit.

Government regulation of this predatory industry is the best solution. The FCC

## Who Owns Global Tel\*Link? American Securities

*American Securities LLC is a New York-based private equity firm that finalized its purchase of prison telephone industry leader Global Tel\*Link in December 2011.*

**How did American Securities acquire Global Tel\*Link?**

*By buying the company from two other New York private equity firms, Veritas Capital and Goldman Sachs Direct, for \$1 billion. Veritas and Goldman Sachs, in turn, had purchased Global Tel\*Link in 2009 for \$345 million from Gores Equity LLC. That’s a \$655 million return on their investment within two years.*

**What kinds of companies does American Securities invest in?**

*According to its website, American Securities specializes in “stable demand industries.” And it doesn’t get much more stable than a monopoly over the prison telephone industry, which has a captive consumer market – literally.*

**Never heard of American Securities before?**

*Aside from Global Tel\*Link, their investments include a wide variety of companies, including Oreck Vacuums and Potbelly Sandwich Works, a restaurant chain.*

Sources: [www.thedeal.com](http://www.thedeal.com), [www.american-securities.com](http://www.american-securities.com)

should set price caps on interstate prison phone rates by approving the Wright Petition. State governments should refuse to engage in the collusive and pernicious practice of accepting kickbacks from prison phone companies. And the public should exercise its political power to ensure that justice is brought to the prison phone industry by participating in advocacy campaigns that address this issue, including those organized by Citizens United for the Rehabilitation of Errants (CURE), the Center for Media Justice and the Prison Phone Justice Campaign.<sup>39</sup> ■

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**Acknowledgements:** Many thanks to the following people for kindly giving their time to speak with me about prison telephone justice: Barbara Fair, Alex Friedmann, Steven Healy, Aleks Kajstura, Kelsey Kauffman, Taren Kauffman, Leah Sakala, Nick Szuberla, Peter Wagner and Paul Wright.

## ENDNOTES

1 Paul R. Zimmerman & Susan M.V. Flaherty, "Location Monopolies and Prison Phone Rates," 47 *Quarterly Review of Economics and Finance* 261, 262 (2007). Specifically, Zimmerman & Flaherty identify prison telephone companies as having "location monopolies," i.e., the telephone service provider is the exclusive provider for all of the prisons within a state

2 See John E. Dannenberg, "Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks," 22 *Prison Legal News* 1, 4-5 (April 2011); see also Steven J. Jackson, "Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry," 22 *Critical Studies in Media Communication* 263, 269 (2005). Dannenberg's article is a *tour de force* that is required reading for this issue

3 See Jackson, *supra* note 2, at 269

4 Roughly, demand for a specific product is inelastic when changes in the product's price do not have a corresponding effect on the demand for that good or service

5 See Zimmerman & Flaherty, *supra* note 1, at 262 (arguing that mail and email are not close substitutes of telephone communication because of the high rate of illiteracy among incarcerated persons)

6 See Nancy G. La Vigne, Rebecca L. Naser, Lisa E. Brooks & Jennifer L. Castro, "Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships," 21 *Journal*

*of Contemporary Criminal Justice* 314, 316 (2005)

7 There is also significant action by states to consider new ways to reduce recidivism. See Christian Henrichson & Ruth Delaney, Vera Institute of Justice, *The Price of Prisons: What Incarceration Costs Taxpayers* 12 (2012) (noting that several states have increased efforts to reduce recidivism through improved reentry programs), available at [www.vera.org/download?file=3542/Price%2520of%2520Prisons\\_updated%2520version\\_072512.pdf](http://www.vera.org/download?file=3542/Price%2520of%2520Prisons_updated%2520version_072512.pdf) (last visited Sept. 5, 2012)

8 Republican Party Platform 38 (2012), available at [www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf](http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf) (last visited Sept. 4, 2012)

9 Democratic National Platform (2012), available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> (last visited Sept. 7, 2012)

10 See Elizabeth Greenberg, Eric Dunleavy, Mark Kutner & Sheida White, U.S. Dept. of Education, National Center for Education Statistics, *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey* 29 (2007), available at <http://nces.ed.gov/pubs2007/2007473.pdf> (last visited Sept. 5, 2012)

11 See generally Bruce Western, *Punishment and Inequality in America* 85-107 (2006) (Ch.4)

12 See La Vigne, et al., *supra* note 6, at 323 (2005)

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## Prison Phone Industry (cont.)

13 Note that this data only reflects state prison contracts, not local jail contracts or contracts with private prisons. Thus, it is likely that these companies control phone service for even more incarcerated persons. Percentage was calculated by consulting Dannenberg (2011) and U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2010* 14 (2012), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2230> (last visited Sept. 5, 2012)

14 See Dannenberg, *supra* note 2, at 16, and Global Tel\*Link website, available at [www.gtl.net](http://www.gtl.net) (noting that Global Tel\*Link owns the contracts for Conversant Technologies, Value-Added Communications, Public Communications Services and Inmate Telephone Inc.) (last visited Sept. 10, 2012)

15 See note 13, *supra*

16 In Mississippi, for example, someone behind bars in the state Department of Corrections pays \$14.55 for a 15-minute phone call. See U.S. Government Accountability Office, *Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection* 14 (2011), available at [www.gao.gov/assets/330/322805.pdf](http://www.gao.gov/assets/330/322805.pdf) (last visited Sept. 5, 2012). In Georgia, that price rises to more than \$17. See Georgia Department of Corrections, *Inmate Telephone System: Global Tel Link Customer User Guide* 4, available at [www.dcor.state.ga.us/pdf/GDC\\_GTL\\_user\\_manual.pdf](http://www.dcor.state.ga.us/pdf/GDC_GTL_user_manual.pdf) (last visited on Sept. 3, 2012)

17 See Dannenberg, *supra* note 2, at 16

18 See *id.* at 2

19 See Zimmerman & Flaherty, *supra* note 1, at 263

20 N.Y. CORR. LAW § 623

21 See Zimmerman & Flaherty, *supra* note 1, at 263; see also Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 Fed. Comm. L.J. 391, 400 (2002)

22 See U.S. GAO, *supra* note 16, at 15

23 See La Vigne, et al., *supra* note 6, at 316; see also Rebecca L. Naser & Christy A. Visher, "Family Members' Experiences with Incarceration and Reentry," 7 *Western Criminology Review* 20, 21 (2006) (noting that "a remarkably consistent association has been found between family contact during incarceration and lower recidivism rates")

24 28 C.F.R. § 540.100(a)

25 42 U.S.C. § 17501(b)(6)

26 American Correctional Association, Public Correctional Policies, *Public Correctional Policy on Adult/Juvenile Offender Access to Telephones* 2001-1 (amended 2011), available at [www.aca.org/government/policyresolution/PDFs/Public\\_Correctional\\_Policies.pdf](http://www.aca.org/government/policyresolution/PDFs/Public_Correctional_Policies.pdf) (last visited Sept. 8, 2012). This Policy Statement was unanimously adopted in 2001, and amended and endorsed in 2006 and 2011

27 See La Vigne, et al., *supra* note 6, at 328

28 Lauren E. Glaze & Laura M. Mar-

uschak, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children* 1 (2008; revised 2010), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=823> (last visited Sept. 6, 2012)

29 See Carver, *supra* note 21, at 400 (2002)

30 See, e.g., Todd W. Burke & Stephen S. Owen, FBI Law Enforcement Bulletin, *Cell Phones as Prison Contraband* (2010), available at [www.fbi.gov/stats-services/publications/law-enforcement-bulletin/july-2010/cell-phones-as-prison-contraband](http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/july-2010/cell-phones-as-prison-contraband) (last visited Sept. 6, 2012). This FBI bulletin also acknowledges that part of correctional administrators' objection to cell phones lies in the fact that cell phone use reduces revenue from prison-approved phones. See also David R. Shaw, California Office of the Inspector General, *Special Report: Inmate Cell Phone Use Endangers Prison Security and Public Safety* 6 (2009) (noting that a correctional officer in the California prison system earned \$150,000 in a single year smuggling cell phones)

31 Cell Phone Contraband Act of 2010, Pub. L. No. 111-225, 124 Stat. 2387 (2010)

32 Tom McNichol, "Prison Cell Phone Use

a Growing Problem," *TIME Magazine* (May 26, 2009), available at [www.time.com/time/nation/article/0,8599,1900859,00.html](http://www.time.com/time/nation/article/0,8599,1900859,00.html) (last visited Sept. 3, 2012)

33 47 C.F.R. § 64.710

34 Federal Communications Commission, *Implementation of Pay Telephone Reclassification and Compensation Provisions of Telecommunications Act of 1996*. Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (Feb. 28, 2007). Given that this request was submitted in 2007, and considering the low long-distance rates that prevail today outside the prison context, the requested rates would already seem too high

35 47 U.S.C. § 151

36 FCC jurisdiction only extends to interstate telecommunications

37 See Dannenberg, *supra* note 2, at 16

38 See Zimmerman & Flaherty, *supra* note 1, at 277

39 See [www.etcampaign.com](http://www.etcampaign.com); [www.centerformediajustice.org/tag/prison-phone-justice](http://www.centerformediajustice.org/tag/prison-phone-justice); [www.prisonphonejustice.org](http://www.prisonphonejustice.org); [www.kitescampaigns.org/campaign/prison-phone-justice](http://www.kitescampaigns.org/campaign/prison-phone-justice)

## Ninth Circuit Holds CAFRA Attorney Fees Should be Paid to Claimant, not Attorney

In a case brought under the Civil Asset Forfeiture Reform Act (CAFRA), the Ninth Circuit Court of Appeals held on April 26, 2011 that "attorneys fees awarded under CAFRA are payable to the claimant, not the attorney," but left the total amount of the fees to be decided by the Appellate Commissioner utilizing the "lodestar" method.

The claimant, UMC Clinic (UMCC), had prevailed in a civil forfeiture proceeding initiated by the U.S. government, and thereafter invoked the fee provisions of CAFRA. The appellate court noted that it had not yet decided the method of determining a fee award under CAFRA. UMCC had proposed "that its fees be determined [using the lodestar method], but the government argues that the lodestar approach should not be used and that the fee should primarily be based on the actual agreement between UMCC and its attorney."

The Ninth Circuit held that the lodestar method "is the method customarily used to determine attorney fees under fee-shifting statutes," and "should be used in calculating fees in this case." However, as UMCC's attorney agreement may be relevant, UMCC was "required to disclose its agreement with its attorney."

Further, the Court of Appeals followed *Astrue v. Ratliff*, 130 S.Ct. 2521 (2010) [*PLN*, Sept. 2010, p.33] in holding that CAFRA fees should go directly to the prevailing litigant instead of the attorney, and thus "attorney fees and litigation costs awarded in this case are payable to UMCC as the successful claimant." The Court noted that its ruling was contrary to an amicus brief filed by the National Association of Criminal Defense Lawyers, which argued that "if fee awards are paid to the claimant ... attorneys may not be paid for their work, thus reducing the likelihood of competent representation and defeating congressional intent."

The dissent noted that *Ratliff* did not necessarily dictate that fees must go to the successful litigant since CAFRA contains no such language, and argued that the statute's stated purpose "is best interpreted by leaving that question up to district courts on a case-by-case basis," largely due to the varying tax consequences of such a decision.

A petition for writ of certiorari to the U.S. Supreme Court was filed on May 3, 2012 and remains pending. See: *United States v. \$186,416.00 in U.S. Currency*, 642 F.3d 753 (9<sup>th</sup> Cir. 2011), *petition for certiorari filed*. ■



## CAMPAIGN FOR PRISON PHONE JUSTICE



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### JOIN THE CAMPAIGN FOR PRISON PHONE JUSTICE!

A national coalition of media and criminal justice activists, led by the Human Rights Defense Center, Working Narratives and the Center for Media Justice, invite you to join a campaign to fight the high cost of prison phone calls.

We need those inside our nation's jails, prisons and detention centers to speak up about the impact of the cost of prison phone calls on you and your family. With your support we will advance a state-by-state legislative challenge, while also pushing the Federal Communications Commission (FCC) to take action.

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Send a brief letter to the Federal Communications Commission explaining the impact the high costs of prison phone calls have had on you and your family. Address the letter "Dear Chairman Genachowski," and please speak from your own personal experience. You must state the following at the top of the letter: "This is a public comment for the Wright Petition (CC Docket #96-128)." Your letters will be made part of the public docket in the case.

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Our goal is to gather thousands of powerful stories. The prison facility which registers the most letters will be highlighted on the campaign website and will get a co-producer credit on our national radio program addressing the high cost of prison phone calls.

We also need your help organizing on the outside. Ask your family members to sign up for the campaign at [www.phonejustice.org](http://www.phonejustice.org) and invite them to share their story about the high costs of prison phone calls. They can also register their comments online, directly with the FCC, at: <http://apps.fcc.gov/ecfs/upload/display.action?z=whn8> (enter docket #96-128).

Only with your support will we end the abusive cost of prison phone calls. Encourage others to join us in this struggle!

**For more information: [www.prisonphonejustice.org](http://www.prisonphonejustice.org) and [www.phonejustice.org](http://www.phonejustice.org)**

## Fifth Circuit Holds Louisiana Prisons Can't Ban Nation of Islam Newspaper

In 2005, Louisiana prison officials instituted a statewide ban on *The Final Call*, a newspaper published by the Nation of Islam. The ban was based solely on the content of a statement of beliefs called "The Muslim Program," located on the last page of each issue of the paper. However, the Fifth Circuit Court of Appeals has held that objectionable language in "The Muslim Program" does not justify a blanket ban on *The Final Call*.

With the assistance of the American Civil Liberties Union of Louisiana, Henry Leonard, a Louisiana state prisoner, filed a federal civil rights action under 42 U.S.C. § 1983 challenging the ban at the David Wade Correctional Center. The district court found that the ban was an exaggerated response to security concerns, since prison officials were unable to show

that any violent acts had been linked to *The Final Call*. Therefore, the court held the prison could not restrict or censor Leonard's access to the newspaper. [See: *PLN*, Sept. 2010, p.11].

Prison officials appealed.

On November 10, 2011, the Fifth Circuit issued an unpublished ruling agreeing with the district court's reasoning. "While we do not agree that 'The Muslim Program' is free of racially inflammatory language, the record here does not justify [banning the newspaper] under circumstances where an objectionable page could be deleted and where this page has been included in all prior issues of the newspaper and is and always has been available to [Leonard]."

The district court's judgment was affirmed. See: *Leonard v. State of Louisiana*,

449 Fed.Appx. 386 (5th Cir. 2011). The defendants filed a petition for writ of certiorari to the U.S. Supreme Court on May 17, 2012, which remains pending.

The ACLU of Louisiana is currently pursuing a similar lawsuit concerning the ban on *The Final Call* at the Louisiana State Penitentiary at Angola, on behalf of state prisoner Shawn Anderson. That case, which was held in abeyance pending the Fifth Circuit's decision in Leonard's suit, remains pending as of the end of Sept. 2012. See: *Anderson v. State of Louisiana*, U.S.D.C. (M.D. La.), Case No. 3-09-cv-00075-JJB-DLD.

Another lawsuit related to censorship of *The Final Call* was settled by Virginia prison officials in November 2010. [See: *PLN*, June 2011, p.46].

## New York Court Upholds Law Requiring Census Count to Use Prisoners' Pre-Incarceration Address

On December 1, 2011, a New York Supreme Court dismissed a lawsuit that sought a judicial declaration that a state statute requiring prisoners to be counted for reapportionment purposes in their last known residence prior to their incarceration, rather than in their currently assigned prison, violated the state's constitution.

The plaintiffs, mostly Republican state senators, were challenging Part XX of Chapter 57 of the Laws of 2010, which requires the New York State Department of Corrections and Community Supervision (DOCCS) to report to the New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR) prisoners' residential addresses prior to incarceration, if available, instead of their prison addresses for use in drawing new legislative districts. [See: *PLN*, Oct. 2010, p.18]. Similar laws against prison-based gerrymandering have been passed in Delaware, Maryland and California.

The lead plaintiff in the challenge to the New York statute, state Senator Elizabeth Little, had 12,000 prisoners in her district. The suit alleged that Part XX violates Article III, § 4 of the New York Constitution because its method of counting prisoners deviates from that

recommended by the U.S. Census Bureau. The Census Bureau, however, allows states to create their own methodology for counting prisoners for apportionment purposes, the court held.

"Though inmates may be physically found in the locations of their respective correctional facilities at the time the census is conducted, there is nothing in the record to indicate that such inmates have any actual permanency in these locations or have an intent to remain," the court wrote. "In fact, it is undisputed that inmates are transferred among the state's correctional facilities at the discretion of DOCCS and plaintiffs have not proffered evidence prisoners have substantial ties to the communities in which they are involuntarily and temporarily located."

After finding the statute did not violate the state constitution, the court determined there was no equal protection violation. The law's sponsor wrote a memorandum supporting the legislation, explaining that prisoners do not use local "schools, hospitals, or other public facilities," unlike college students and military personnel who are considered part of "group quarters," and to count them as inhabitants of communities where prisons are located tends to dilute minority voting

strength in those communities, in violation of the federal Voting Rights Act of 1965 and the one-person, one-vote rule. Part XX was enacted to rectify the "electoral inequities" created by counting prisoners as inhabitants in the districts where they are incarcerated.

The court found the plaintiffs lacked standing to bring other claims, or that their claims were conclusory. It also held there was no constitutional violation in the allegation that "Part XX is the product of a power play by Democratic lawmakers to usurp the strength of the 'Republican Party, its voters, and elected representatives.'"

The defendants' motion for summary judgment was granted and the case dismissed. The plaintiffs appealed, but on February 14, 2012 their appeal was transferred to the Appellate Division, Third Department, "upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved." The appeal was later dropped in March 2012. See: *Little v. LATFOR*, Supreme Court for Albany County (NY), Case No. 3210-2011.

Fifteen New York voters represented by a number of organizations – including the Prison Policy Initiative, the Brennan

Center for Justice, the Center for Law and Social Justice, Demos, LatinoJustice PRLDEF, the NAACP Legal Defense and Educational Fund, and the New York Civil Liberties Union – had intervened in the case in support of the statute. The Prison Policy Initiative is the driving force behind nationwide efforts to reform the method by which prisoners are counted in census reports.

“Prison-based gerrymandering in New York unjustly diluted the voice of voters and gave undue political influence to districts with large prisons. By dropping

[their] challenge, opponents acknowledged they were fighting a losing battle,” stated attorneys for the organizations that represented the intervening parties. “As the redistricting process continues, we are pleased that incarcerated persons will be allocated where they belong – the communities from which they came and to which they overwhelmingly return. This victory helps ensure that all New Yorkers have an equal voice in our democracy.”

Additional sources: [www.prisonpolicy.org](http://www.prisonpolicy.org),  
[www.prisonersofthecensus.org](http://www.prisonersofthecensus.org)

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# Texas Abolishes Last Meals for Death Row Prisoners, Reduces Weekend Meals

by Matt Clarke

Texas served its final last meal to condemned prisoner Lawrence Russell Brewer, who, on September 21, 2011, was executed for the infamous racially-motivated 1998 dragging death of James Byrd, Jr. Brewer requested an extensive last meal and then didn't eat any of it, which prompted state Senator John Whitmire, chairman of the Senate's Criminal Justice Committee, to call for ending the practice of special last meals for death row prisoners.

"It is extremely inappropriate to give a person sentenced to death such a privilege," Whitmire wrote in a letter to Texas Department of Criminal Justice (TDCJ) executive director Brad Livingston.

Livingston agreed and quickly ended the tradition of last meals. "Effective immediately, no such accommodations will be made," he stated. "They [condemned prisoners] will receive the same meal served to other offenders on the unit."

"It's long overdue," said Senator Whitmire. "This old boy last night, enough is enough. We're fixing to execute the guy and maybe it makes the system feel good about what they're fixing to do. Kind of hypocritical, you reckon?"

Calling the traditional last meal "ridiculous," Whitmire noted that "Mr. Byrd didn't get to choose his last meal. The whole idea is so illogical."

But Senator Whitmire had his facts wrong. The tradition did not begin because the "system" was trying to make itself feel good about an execution. Rather, the tradition of a last meal existed in ancient Greece, Rome and

China. The original purpose was an offering to ward off possible haunting by the spirit of the person who was executed. This tradition has continued into modern times.

Likewise, most people are misinformed about how last meal requests work. The media published Brewer's lavish final meal request of two chicken-fried steaks, a triple-meat bacon cheeseburger, fried okra, a pound of barbecue, three fajitas, a meat lover's pizza, a pint of ice cream, three root beers and a slab of peanut butter fudge with crushed peanuts, then groused that he didn't eat anything. But did he really get all that he asked for, and is it really surprising that a man who knows he will die in a few hours might lose his appetite?

The truth about last meals in Texas is more complicated than the list of food that a condemned prisoner requests. According to Brian D. Price, 60, who prepared last meals for about 220 Texas prisoners while serving a 14-year sentence and who has written a book titled *Meals to Die For* about his experiences, death row prisoners could ask for whatever they wanted, but what they got were reasonable portions of foods already available in the prison's kitchen. Thus, the last meal that Brewer received did not contain all of the items he requested, and what was provided was in smaller portions.

Price gave an example of the type of substitutions he made when preparing last meals by describing what he did if a prisoner asked for lobster, an item not available in the kitchen food inventory. The condemned prisoner would "get a piece of frozen pollock. Just like they would normally get on a Friday, but what I'd do is wash the breeding off, cut it diagonally and dip it in a batter so that it looked something like at Long John Silver's – something from the free world, something they thought they were getting, but it wasn't."

"They quit serving steaks in 1994, so whenever anyone would request a steak, I would do a hamburger steak with brown gravy and grilled onions, you know, stuff like that. The press would get [the last meal request] as they requested it, but I would get the handwritten last meal re-

quest about three days ahead of time and I'd take it to my captain and say, 'Well, what do you want me to do?' And she'd lay it out for me. I tried to do the best I could with what I had."

After Price was released from prison, he opened a restaurant. When he heard about the elimination of last meals for death row prisoners, he offered to deliver them to the prison for free. The TDCJ declined his offer.

"We should not get rid of the last meal," Price said. "Texas has always been coldhearted about these types of things. Not to minimize these crimes, the majority of [death row prisoners] have earned their place at that dinner table. But with my offer it would not cost Texas taxpayers anything."

He also opined that the decision to end the last meals was politically motivated. "They waited for a heinous crime – the most heinous one in years in Texas, first off – and then someone who ordered a lot of food, which they do that quite often anyhow. And they decided to stop the last meal request and give them what was on the line for that day. What raised the fur on my back was – how can one person do this? The State of Texas sends these people to the death chamber. It's up to the folks of Texas if they want to stop a tradition, an age-old tradition. One or two men shouldn't have the stroke of power to do that."

In fact the public has a morbid fascination with last meals, and an online blog, "Dead Man Eating," is devoted to that topic. In August 2012 researchers at Cornell University released a study of 193 last meal requests, which found they tended to include fried foods, desserts, soft drinks and high calorie counts. Some condemned prisoners did not want a last meal; one asked for a single pitted olive, while another in Tennessee, Philip Workman, asked for a vegetarian pizza to be delivered to a homeless person (his request was denied, but members of the public responded by ordering hundreds of pizzas for local homeless shelters).

Last meals for death row prisoners aren't the only meals being cut in Texas prisons. In October 2011, 36 TDCJ facili-

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ties stopped serving lunch on weekends. Instead, "brunch is served between 5 a.m. and 7 a.m. and dinner is served between 4 p.m. and 6:30 p.m." The only exceptions are for prisoners on work details.

Prison officials justified the change as a necessary component of efforts to reduce prison food expenditures by \$2.8 million, to help close a large state budget gap. Other changes, which affect all Texas prisoners, include the replacement of carton milk with powdered milk and the replacement of hamburger and hot dog buns with sliced bread. Previous budget cuts had resulted in the elimination of desserts except for one meal a week.

Such meal reductions appear to violate the food-service standards set by the American Correctional Association (ACA), which recommend three meals a day but allow variation for weekend and holiday demands provided the meals still meet basic nutritional guidelines.

"I've never read the standard to mean that you can do it every weekend," said Davidson County, Tennessee Sheriff Daron Hall, who serves as the ACA's president.

Prisoners' rights advocates agree that

providing only two meals per day falls into a legal gray area. Texas has a statute mandating that prisoners receive three meals a day, but the law only applies to jails, not state prisons. Plus the ACA standards do not constitute "rights."

TDCJ officials have argued that prisoners can supplement the weekend meals with snacks purchased from the prison commissary. However, the commissaries sell mostly unhealthy food items such as candy and chips, and the 60% of state prisoners who are indigent have no access to even those less-than-nutritional snacks.

"Going from 7 a.m. to 4 p.m. without an authorized meal is too long," said Keith Ayoob, director of the nutritional clinic at the Albert Einstein College of Medicine in New York City. "With fewer meals, it's difficult to get enough nutrients. It's likely to negatively affect mood in people who are used to having regular meals."

And a prison system full of hungry prisoners in a bad mood is a recipe for trouble. ■

Sources: *New York Times*, *ABC News*, <http://deadmaneating.blogspot.com>, [www.foxnews.com](http://www.foxnews.com), *CNN*, *Associated Press*

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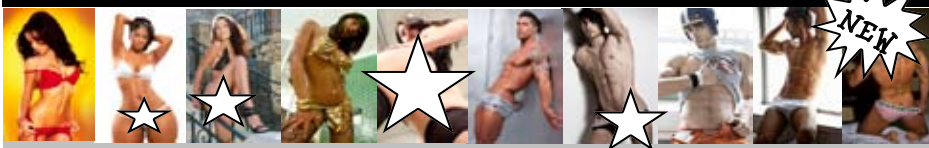
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# Manhattan Prosecutor Who Moonlights as Dominatrix Suspended, Resigns

by Matt Clarke

In 2008, then-New York Attorney General Andrew Cuomo heaped lavish praise on Alisha Smith, a prosecutor in Manhattan who helped secure a \$5 billion settlement in a securities fraud case involving Bank of America and other financial firms. The demurely-dressed Assistant State Attorney General spent her workdays pouring over fiscal statements. Her nights, though, were anything but boring.

When away from her day job, Smith, 36, reportedly metamorphosed into a dominatrix with the alias of “Alisha Spark.”

“They pay her to go to the events. She dominates people, restrains them and whips them,” said a source within the sado-masochistic (S&M) community.

Smith was also known to pose for photos with others involved in the S&M scene. One picture showed her wearing a skintight latex dress with heart-shaped pasties. Another displayed her in sexy attire, sandwiched between another dominatrix, “Jade Vixen,” and Vixen’s boyfriend. The source said that Smith and Vixen were close friends and frequently attended S&M parties where they “work[ed] together” on one submissive – a masochistic person who voluntarily submits to sadistic abuse.

Vixen, whose non-S&M name is Edythe Maa, has an interesting history for a close friend of a prosecutor: Three of her male associates have died due to unnatural causes.

In December 2008, Vixen’s then-boyfriend, New York lawyer Anthony Ottaviano, was shot and killed by former Vixen S&M client David Krieg. Krieg then committed suicide after briefly holding Vixen hostage.

On August 8, 2011, Vixen’s boyfriend, Peter Stelzenmuller, 49, was found dead in the attic of their home in Pennsylvania, wearing a scuba suit. Although the obituary said his death resulted from an accident while trying on scuba gear, Stelzenmuller, who reportedly had a rubber and latex fetish, is believed to have died due to autoerotic asphyxiation.

Apparently Stelzenmuller’s death didn’t upset Vixen very much; the day after she found his body, she tweeted, “Ladies night with Mistress Tyler, Alisha Spark and Lydia Mischief.”

According to a spokesman for New

York Attorney General Eric Schneiderman, Smith was suspended without pay in September 2011 “pending an internal investigation.” However, her suspension was not due to her sexual proclivities; rather, it related to her being paid for her appearances at fetish parties. An executive order in the Attorney General’s Office requires employees to “obtain prior approval from the [Employment Conduct Committee] before engaging in any outside pursuit ... from which more than \$1,000 will be received or is anticipated to be received.”

Still, one has to wonder whether the Attorney General’s Office would have suspended Smith had she been accused of profiting from something more innocent than her S&M activities, such as writing children’s books without permission, for example.

Smith voluntarily resigned in October 2011. According to her attorney, well-known women’s rights lawyer Gloria Allred, “Employers do not have the right to go on fishing expeditions into an employee’s private sexual activities and an employee should not have to sacrifice their privacy about their sex life in order to keep a job.”

When that employee is an Assistant State Attorney General and her private sexual activities allegedly involve work as a paid dominatrix, however, an investigation may well be warranted, given that the state routinely polices the sex lives of its other citizens. ■

Sources: *New York Post*, [www.truecrimereport.com](http://www.truecrimereport.com), [www.dailymail.co.uk](http://www.dailymail.co.uk), [www.gothamist.com](http://www.gothamist.com)

## Report Cites Rising Violence, Other Problems at Illinois Maximum-Security Prison

by David M. Reutter

A report by the John Howard Association of Illinois (JHA) found that overcrowding and understaffing at the Menard Correctional Center (Menard) has resulted in an “alarming” increase in staff and prisoner assaults.

Opened in 1878, Menard is the second-oldest prison in Illinois. When JHA visited the facility on June 21, 2011, it housed 3,618 prisoners – a population roughly 17% above its rated design capacity of 3,098. Menard is the state’s largest maximum-security prison.

“On first entering Menard’s visitor’s center, JHA was struck by the unusually strained and tense atmosphere of the facility, even compared to other maximum-security prisons,” the report stated. “The demeanor of the security staff was remarkably hostile and aggressive towards inmates’ family members and to JHA’s own monitoring group members.”

One prisoner summed up the environment at Menard as “walking on egg shells.” JHA said that was not surprising, considering the number of violent assaults at the prison. In the first six months of 2011 there were 14 staff assaults, plus an “unusually

large number” of prisoners in segregation, protective custody and the facility’s general population had reported cases of guards using excessive force or physically abusing prisoners. For the year preceding the visit, JHA had received a “substantial number of letters and calls” from prisoners and their family members regarding physical and verbal abuse by prison staff.

Further, lockdowns occur at Menard with greater frequency than at comparable prisons. Over the 18 months preceding JHA’s visit, Menard was on full or partial lockdown roughly half the time. On average, prisoners spend 21 to 22 hours per day in their cells.

“Ultimately, repeated use of lockdowns can undermine security of a facility by upsetting predictability and normal operations, and increasing inmates’ stress and aggression through increased isolation, idleness, and inactivity,” the report noted. “This can generate greater incidents of aggression and violence, leading to greater lockdowns, creating a vicious cycle.”

The 130-year-old facility has ever-present plumbing problems yet lacks an

in-house plumber. This is not the fault of Menard's administration, which the report praised in several areas for doing what it could and being creative with solutions; rather, the blame lies "with Illinois elected officials who expect the DOC to somehow maintain century-old correctional facilities without adequate funding for maintenance and repair."

There were also issues related to excessive heat and lack of circulation in cells, especially in segregation cells that lack windows. "In the past seven years, two inmates have died due to extreme body temperatures caused in part by cell conditions," the JHA report stated.

In terms of staffing levels at the facility, JHA wrote that "Menard has the worst inmate-to-staff ratio of all Illinois' maximum-security facilities."

Medical and mental health care at Menard is provided by a mix of state employees and private contract employees through Wexford Health Sources. "Like many Illinois facilities, Menard suffers from chronic understaffing of nurses." While the prison has authorized staffing for 43 nurses for a total of 1,720 hours per week, at the time of JHA's visit it was staffed with only 35 nurses working 1,400 hours a week.

Staffing for physicians was also "extremely low." Although Menard was considered "fully staffed" with five physician positions, the ratio of one doctor to every 723 prisoners "lacks sufficient healthcare staff to meet the needs of this sized population," JHA stated. The report also cited a lack of dentists, as the two assigned to Menard were responsible for the care of

over 1,800 prisoners each. Finally, the report noted insufficient mental health care staff.

JHA also concluded that "Menard has almost no educational programming." There was no teacher for the 305 prisoners on a waiting list for Adult Basic Education. The facility had GED classes with 43 prisoners enrolled, but another 167 remained on a wait list. There was one construction class with only 13 prisoners enrolled, and just 16 prisoners were assigned to a job preparedness class.

Menard does, however, have "several small but successful industries" that employ 98 prisoners. Another 568 prisoners had non-industry work assignments. Menard also suffers from severe understaffing in terms of clerical and administrative positions. This negatively affects its ability to deliver essential services, such as mail delivery, which "was behind or backlogged for several weeks up to a month."

"Overcrowding and warehousing inmates without jobs, rehabilitative programming or education, and without adequate access to health care and basic services causes immense human suffering and undermines a facility's security and stability. It also has a profoundly debilitating impact on morale, health, safety, and wellbeing of staff," the JHA report's executive summary concluded. "Ultimately, releasing these inmates back into the community without treatment or rehabilitative services will dangerously compromise the public's welfare and safety."

The report is available on PLN's website, or at [www.thejha.org](http://www.thejha.org).

Source: "Monitoring Visit to Menard Correctional Center," John Howard Association of Illinois (June 21, 2011)

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# Private Prison Monopolies

by Christopher Petrella

As the late business historian Alfred Chandler, Jr. once said, the visible hand of the corporation has been of far greater importance to capitalism than has Adam Smith's so-called invisible hand of the market.

Although modern forms of capitalism are justified, and often sanitized, by rhetorical appeals to competition, competition contradictorily tends toward monopoly by eliminating "weaker" firms in any given market. Competition is integral to the rationalizing logic of capitalism writ large, but anathema to individual capitalist firms. The essential inconsistencies of modern capitalism, however, often serve as the fault lines from which social movements can emerge.

And what better place to begin than with the Tennessee-based private prison firm, Corrections Corporation of America (CCA). CCA, in its own words, "is the nation's largest owner and operator of partnership correction and detention facilities and one of the largest prison operators in the United States, behind only the federal government and three states. [The company] currently operate[s] 67 facilities, including 47 company-owned facilities, with a total design capacity of approximately 92,000 beds in 20 states and the District of Columbia."

Very few corporations are more notoriously devoted to Chandler's "visible hand" theory than Corrections Corporation of America. With less than one month remaining in FY 2012, CCA has thus far been "awarded" \$373,355,264 in contracts with the federal government. Eighty-eight percent of federal contracts "won" by CCA this year have originated with the U.S. Department of Justice. The Department of Homeland Security accounts for the remaining 12 percent of allotments. During FY 2012, CCA competed for only 45 percent of its total federal procurement dollars. The remaining 55 percent of CCA's FY 2012 federal contracts – worth close to \$205 million – were provisioned on a non-compete basis. So much for free-market competition....

Fundamentally, non-compete contracts are forms of monopoly. In recent years the subject has gained considerable public attention, in part because of the burgeoning rates of federal noncompetitive contracts awarded during the George W. Bush years.

But doesn't Congress have some law on the books to prevent the abuse of non-competitive procurements? Well, sort of.

Passed in 1984, the Competition in Contracting Act (CICA) governs competition in federal procurement contracting. CICA requires that contracts be entered into after "full and open competition through the use of competitive procedures" unless certain circumstances exist that would permit agencies to use noncompetitive procedures. So what happened in the case of CCA?

Well, to begin, CCA spent \$1.6 million lobbying appropriations officials over the last year and a half. And secondly, CCA, along with the Department of Defense (DOD), is exploiting a yawning loophole in CICA. Not all contracts – or even all procurement contracts – that agencies lawfully enter into are the result of full and open competition under CICA. Some contracting agencies may circumvent CICA regulations by assuming an "other transaction authority" status (OTA) not subject to the ordinary rules of full and open competition. Only a few agencies, most notably the Departments of Defense, Transportation, Homeland Security, Health and Human Services, and Energy, "have been granted OTA on a permanent or temporary basis so that they can contract for research and development (R&D) or prototypes of promising new technologies without full and open competition."

Although the permanent OTA exemption enjoyed by the Departments of Defense and Homeland Security,

among others, is intended to encourage promising new technologies and innovations that may be compromised vis-à-vis competition, CCA is in no position to benefit from such an exception. Corrections Corporation of America is not in the business of research and development or prototype creation. They are in the business of incarcerating people for the sake of turning a profit.

CCA also fails to meet any other criteria for exemption. Corrections Corporation of America, for example, is not a "single source for goods or services" in that there are many other private corrections companies as well as state departments of corrections up to the task. Additionally, CCA does not reflect a "necessary public interest." Why? Well, the U.S. incarceration rate was far, far lower before the introduction of private prisons in 1983 [when the company was founded].

In many ways there is an ever-widening chasm between the ideological underpinnings of competitive capitalism and the reality of its monopoly composition. In an industry wherein three companies – Corrections Corporation of America, the GEO Group and MTC – control nearly 90 percent of the private corrections market the word "competition" is no more than a courtesy, an imaginary resolution to a very real capital contradiction. ■

*This article was originally published by Nation of Change ([www.nationofchange.org](http://www.nationofchange.org)) on August 31, 2012, and is reprinted with permission.*

## 46 California Prisoners Injured in Disturbance at CCA-run Oklahoma Facility

Widespread fighting among black and Hispanic California prisoners at the privately-operated North Fork Correctional Facility in Sayre, Oklahoma last year left dozens of prisoners injured.

The disturbance began shortly before noon on October 11, 2011 and was described by some news reports as a riot and by others as a series of random, uncoordinated brawls. Six local police units responded, and order was restored after police and prison employees used chemical irritants and pepperball rounds to quell the fighting. The facility is managed

by Corrections Corporation of America (CCA).

At least 46 prisoners suffered injuries – 57 according to one news report; of those, 8 were removed by helicopter, four were hospitalized for weeks and one lapsed into a coma. There were no fatalities, and no staff members or law enforcement officers were hurt.

The *Associated Press* reported that some Hispanic prisoners had barricaded themselves in a dining hall; another news source put the number of prisoners who participated in the riot at 600. Although



some of the prisoners involved were affiliated with the Surenos prison gang, it was unknown whether the fighting was gang-related.

"My considered opinion is that it looks like they had way too many inmates out of their cells way too early so that when the situation kicked off they couldn't control it," stated retired California Dept. of Corrections and Rehabilitation (CDCR) Lt. Bob Walsh. "Also, it seems that their physical security was not so great. They should have been able to lock down the dining rooms and the gym. They either did not do so or could not do so."

Opened in 1999, over the past decade North Fork has housed prisoners from Colorado, Idaho, Washington, Wisconsin, Wyoming and Vermont. It currently holds over 2,000 California prisoners.

The CDCR houses about 9,300 of its prisoners in out-of-state facilities. In addition to those in North Fork, about 4,600 are held in two Arizona prisons and another 2,600 in Mississippi. All of the out-of-state facilities are operated by CCA.

The CDCR began transferring prisoners to other states in 2007 in an effort to alleviate severe overcrowding in California's prison system. At that time, California housed around 172,000 prisoners in in-state facilities in a space designed for approximately half that number.

In December 2010, the California Inspector General's office raised concerns about security deficiencies and other problems at the CCA prisons housing California prisoners, including North

Fork. [See: *PLN*, Oct. 2011, p.24].

Under a recent "realignment" program by California officials following the U.S. Supreme Court's ruling in the *Plata v. Brown* litigation, the state plans to return all of its prisoners held in out-of-state facilities by 2016. [See: *PLN*, July 2012, p.28]. That depends on several factors, however, including obtaining permission from the three-judge federal court overseeing the *Plata* case for the state to miss its deadline to reduce California's prison population to 137.5% of its capacity.

Regardless, CDCR officials have already started returning prisoners held in out-of-state facilities, including North Fork. In July 2012, California announced that it was removing some of its prisoners from the CCA-run Oklahoma prison. Officials in Sayre were not pleased.

"It'll be a [loss of a] couple hundred thousand easy in utilities. It doesn't help your budget any," stated City Manager Guy Hylton. "It would hurt us here, in Sayre, to be sure," added Mayor Eddie Tom Lakey.

Meanwhile, at least one California prisoner has filed a federal lawsuit related to the October 11, 2011 disturbance at North Fork. Melvin Fisher wrote in his complaint that he was badly injured when CCA staff failed to protect him from other prisoners; he alleges that a CCA guard held a door to the gym shut when he was trying to get "out of harms way into safety." See: *Fisher v. Figueroa*, U.S.D.C. (W.D. Okla.), Case No. 5:12-cv-00231.

So who will have to pay the long-term costs associated with the violent

disturbance at North Fork, including the prosecution of prisoners involved in the incident, who face charges ranging from assault to attempted murder? Local Oklahoma taxpayers.

"Now, this riot will create substantial costs to us," said Beckham County district attorney Dennis Smith. "A lot of that is going to depend on how many cases we actually file. It's already added a strain. So, for me to be able to expound exactly how much it costs – there are so many factors that go into that. How many people are prosecuted? How many are convicted? How many are actually going to serve time."

Following the May 2012 release of a 2,700-page report concerning the North Fork riot, Smith stated that California prisoners convicted of crimes related to the disturbance would have to serve time in Oklahoma's prison system.

"When we prosecute someone, say it's for assaulting a guard or assaulting a fellow inmate, and we assign them some length of sentence, they're not going to serve it in CCA. They've suddenly become the property of the Oklahoma Department of Corrections when it's time to serve their sentence. That's an additional cost to the citizens, taxpayers of Oklahoma," he noted.

Which is one of the undisclosed, oft-overlooked costs of prison privatization. ■

Sources: *World Capitol Bureau*, *Associated Press*, *Oklahoman*, *San Francisco Chronicle*, *CNN*, *KFOR-TV*, [www.sdcitybeat.com](http://www.sdcitybeat.com), [www.stateimpact.npr.org](http://www.stateimpact.npr.org)



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# Washington State Post-Judgment Interest Award Required when Judgment Increased by Appellate Court in Records Case

The Division One Court of Appeals for the State of Washington held on August 15, 2011 that where an appellate court “merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate,” post-judgment interest retroactive to the date of the original judgment is mandatory.

More than a decade ago, Armen Yousoufian submitted a public records request to King County. When the county failed to comply, Yousoufian obtained a judgment under the state’s Public Records Act (PRA), which penalizes state agencies that do not comply by awarding the requester “an amount not less than five dollars and not to exceed one hundred dollars for each day” of non-compliance, in the discretion of the court.

Multiple appeals were filed in this case, but most relevant was a decision by the Washington Supreme Court affirming the appellate court’s reversal of the trial court’s \$15-a-day award. See: *Yousoufian v. Office of Ron Sims, County Executive*, 168 Wn.2d 444, 229 P.3d 735 (Wash. 2010).

Rather than remanding, the Court increased the per-day award to \$45. This increased the total award to Yousoufian to \$371,340. King County had already paid \$123,780, and following the Supreme Court’s decision it paid the balance of \$247,560 plus \$4,639.21 in post-judgment interest from the date of the Court’s ruling.

Yousoufian then filed a motion in the trial court seeking post-judgment interest on the additional amount awarded by the Supreme Court, retroactive to the date of the original judgment. The trial court denied the motion and Yousoufian appealed.

King County argued that it was entitled to sovereign immunity. The appellate court noted that under RCW 4.56.110, post-judgment interest is mandatory and retroactive where a judgment is wholly or partially affirmed on review. It also found that even if sovereign immunity would ordinarily apply in this circumstance, it was not applicable because it had been waived when the legislature enacted the PRA to hold the government accountable to the people. “To that end, the PRA provides for a cause of action against a government agency that violates its provisions, as well

as monetary penalties, costs and attorney fees to the aggrieved member of the public,” the Court of Appeals wrote.

In rejecting King County’s position that an appellate court’s act of increasing a judgment amount on appeal does not mean the government agency is obligated to pay interest retroactively on the increased amount of the award, the Court of Appeals noted that the Washington Supreme Court had made no such

distinction. In fact, case law provides for post-judgment interest to be awarded in such cases.

Finally, the appellate court held that Yousoufian was entitled to attorney fees and costs on appeal, and in the trial court for pursuing the motion for post-judgment interest. See: *Yousoufian v. The Office of Ron Sims, County Executive*, 163 Wash. App. 1008 (Wash.App. Div.1, 2011); 2011 WL 3568904. ■

## Violence in Tennessee Prisons up 20 Percent Under New Commissioner

by Alex Friedmann

On September 18, 2012 the Human Rights Defense Center (HRDC), the parent organization of Prison Legal News, released data indicating that levels of violence in Tennessee state prisons had increased approximately 20 percent since Tennessee Department of Correction (TDOC) Commissioner Derrick D. Schofield was appointed by Governor Bill Haslam in January 2011.

According to statistical data obtained from the TDOC pursuant to public records requests, the number of violent incidents in three categories – prisoner-on-prisoner assaults, prisoner-on-staff assaults and institutional disturbances – increased significantly during the first 18 months of Commissioner Schofield’s tenure.

Based on TDOC data from January 2010 through June 2012, the average number of assaults on prison staff systemwide increased from 55 per month in 2010, the year before Commissioner Schofield was appointed, to 67.67 per month for the first six months of 2012 – an increase of 23%.

The average rate of violent incidents per 1,000 prisoners increased from 15.57 per month in 2010 to 18.56 per month as of June 2012, or an 18% increase. And the average number of violent incidents per facility per month increased from 22.17 in 2010 to 26.24 for the first half of 2012 – an 18.3 percent increase.

“The numbers speak for themselves,” said HRDC associate director Alex Friedmann, who served time in Tennessee prisons in the 1990s prior to his

release in 1999. “If you look at it from a business perspective, if the commissioner were running a company, and while he was running that company things got 20 percent worse across the board, he would be out of a job.”

The escalating amount of violence in Tennessee state prisons coincides with a number of new policies implemented by Commissioner Schofield, many of which are perceived as punitive and unwarranted by prisoners and even some prison staff. The policy changes include:

- Prisoners are required to walk in a single-file line under staff escort on the prison compound, a specified distance apart, and are not allowed to talk.

- Prisoners are not allowed to have their hands in their pockets while under escort, even during cold weather, and the TDOC has not issued gloves to all prisoners.

- Daily cell inspections are held in which prisoners have to stand by their cells without talking, reading or doing anything else until all cells in a unit have been inspected.

- Property rules have been repeatedly changed, and property items that prisoners were previously allowed to own have been prohibited.

- When prisoners are called to meals they are required to line up and wait outside until it is their turn to go to the dining hall; if it is raining they must stand in the rain.

- Most recently, prisoners are required to be standing by their bunks in their cells during morning count, which is held at

5:00 a.m. to 6:00 a.m.; this was not done previously.

"Questions that need to be answered include why levels of violence are increasing, whether that increase is a result of the new policies implemented by Commissioner Schofield, and if not, what is behind the escalating violence. Also, most importantly, why the Commissioner apparently has been unable to curb violence in state prisons, particularly against staff," Friedmann said.

He added there is concern that the new policies will lead to even more violence, including riots like the ones that swept through Tennessee prisons in 1985, and that the TDOC appears to be anticipating this by training a large number of guards as tactical officers and equipping them with riot gear.

"Rather than preparing for riots that may occur, the TDOC should be seeking solutions to the increasing levels of violence in an effort to prevent any riots from happening in the first place," noted HRDC director Paul Wright.

Since the Tennessee legislature dissolved the Select Oversight Committee on Corrections in June 2011 there has been no direct oversight over the state prison

system, except through the Governor's office and the standing legislative Judiciary Committees.

"Both Governor Haslam and the chairpersons of the House and Senate Judiciary Committees were notified of rising levels of violence in Tennessee state prisons in March 2012, including increased violence against staff; they received copies of a letter that was sent to Commissioner Schofield to that effect. However, they expressed no interest," said Friedmann.

The letter sent to Commissioner Schofield on March 8, 2012 was signed by four organizations: the Human Rights Defense Center, Reconciliation, TN CURE and the Tennessee Alliance for Reform. [See: *PLN*, April 2012, p.20]. While the Commissioner responded to the letter, according to Friedmann he "did not address or respond to the gravamen of our concerns," i.e., whether his new policies "are resulting in increased levels of violence in Tennessee's prison system."

The TDOC is well aware of the rise in violence; for example, in a June 2011 internal report state prison officials noted, "The June 2011 violent incident rate is greater (17.7%) than the May 2011 rate

and is also greater (19.2%) than the June 2010 rate." And in a November 2011 internal report the TDOC indicated that the "violent incident rate is higher (8.7%) than the October 2011 rate and is higher (25.0%) than the November 2010 rate."

Despite the TDOC's own reports and data related to violent incidents, state prison officials denied there has been an increase in violence, citing outdated statistics that cover only the first six months after Schofield was appointed.

At least some prison employees are reacting to the policy changes and violence by retiring or resigning; four wardens have retired or quit since January 2011. According to former TDOC associate warden Penny Tucker, who retired after serving 27 years in the state's prison system, Commissioner Schofield's "lack of listening to and getting rid of his most experienced people has a lot to do with violence going up." ■

Sources: HRDC press release, [www.wsmv.com](http://www.wsmv.com)

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# Mug Shot Websites Based on Extortion Business Model

by David M. Reutter

One of the most insidious businesses to grow out of the prison industrial complex revolves around mug shots. Natural curiosity compels many people to view jail booking photos taken by law enforcement agencies when someone is arrested, which are usually considered public records. Profiteers are now using publicly-available mug shots to generate profit.

Booking photos catch people at one of the worst moments of their lives; many have blank stares following the shock of being arrested. Some, like the infamous mug shot of Nick Nolte with frazzled hair while wearing a Hawaiian shirt, can be entertaining. That entertainment value, and a desire to see whether someone they know has been busted, drives the public's interest in jail booking photos. The result is that mug shots have become very popular – particularly on websites devoted to that topic.

And when something is popular, someone will find a way to make money off it. With respect to mug shot-related sites, profit can be generated in two ways. The first is from advertising revenue by providing ad space on the websites, which are attractive to advertisers because they tend to generate high Internet traffic. The other is by posting people's mug shots online and then charging them to remove their photos.

In the latter regard, “[t]he business model seems to be to generate embarrassment and then remove the source of embarrassment for a fee,” explained Steven Aftergood, director of the Project on Government Secrecy for the Federation of American Scientists. “So the whole practice is designed to exploit human weakness.”

The website *Busted in Acadiana* (BIA), which posted local mug shots from Lafayette, Louisiana, exemplified that practice with its Facebook tagline: “When you get arrested, your business becomes our business.” BIA not only posted mug shots but also comments from its tens of thousands of Facebook followers, who often poked fun at or made humiliating remarks about the people whose photos were featured on the site.

BIA's tactics were “downright despicable” according to one University of Louisiana at Lafayette student, who did

not want to be identified.

“One day I saw BIA had posted a kid's information and his girlfriend's picture just for the sake of harassment,” the student stated. “The kid simply said he thought *Busted in Acadiana* was distasteful and that he disagreed with it. The BIA admin started posting information off the kid's Facebook page, such as his address and work info, and then encouraged people to call and harass him. Then, the BIA admin went to the kid's girlfriend's page and took her profile picture and posted it on BIA. That is when I was determined to be very outspoken against BIA. My goal was originally to expose the identity of the admin of BIA if at all possible.”

Even the innocent were not immune from harassment by BIA. For example, a man was arrested for unauthorized use of an access card in July 2011. After his arrest it was determined there was a misunderstanding, and he was released within minutes of being taken to jail. Yet, like many others, his mug shot was posted on BIA's website.

When the man's wife emailed BIA to explain what happened and to request the removal of her husband's photo, BIA began flooding her inbox with messages. It then proceeded to publish her email in its entirety, including her name, place of employment, email address and work phone number. BIA contacted her company's IT department and she ended up losing her job. The man's mug shot was eventually removed, though.

The student who set out to unmask the operator behind BIA was successful. By tracking down the registration information for domain names associated with the website, he learned the operator was Lafayette resident Christopher Hebert, 37. Ironically, Hebert has a criminal record himself; he was arrested in December 2001 on charges of public intimidation, disturbing the peace by appearing intoxicated and remaining where forbidden. He pleaded guilty to one of the misdemeanor charges, paid \$316.50 in fines and was placed on probation for six months. Hebert's identity and connection with BIA was revealed in a September 21, 2011 cover story in *The Independent Weekly*, a Lafayette-based publication.

“We found out everything we needed to know by finding every mistake Chris

made when trying to remain anonymous,” said the student. “It was very easy to do. All information obtained was done so through public record. Public record is what Chris Hebert clung to in order to justify why what he was doing was okay. It was because he was ‘simply using public record’ to extort people [by posting their mug shots], that's why I wanted to show him how public record can be used effectively against someone.”

Interestingly, it turned out that Hebert also has ties to law enforcement. His wife, Amanda, is employed by the Lafayette Police Department. Police officials said they were investigating whether she accessed law enforcement computers on behalf of BIA. Circumstantial evidence indicates special access, as BIA often posted the arrest records of negative commenters on the site within minutes.

Shortly before Hebert was outed as BIA's operator, the website was shut down. That same day Hebert posted a message on his personal Facebook page thanking his friends and family for their support. “I am sorry if I have disappointed any of you by pursuing my dreams,” he wrote. “Unfortunately, when my family becomes threatened, I must set aside my dreams.”

He did not explain why his dreams included humiliating and harassing people, posting their embarrassing mug shots online, and then charging to remove them. The BIA site was taken down in September 2011 but later reinstated; it now focuses on local crime reports, does not include mug shot galleries and does not have an associated Facebook page with public comments. It is unclear whether Hebert is still affiliated with BIA.

Except for the harassment, however, BIA was largely doing the same thing as most other mug shot sites, such as [www.mugshotrow.com](http://www.mugshotrow.com), [www.jailbase.com](http://www.jailbase.com), [www.mugshots.com](http://www.mugshots.com), [www.gotbusted.net](http://www.gotbusted.net), [www.whosarrested.com](http://www.whosarrested.com), [www.bustedmugshots.com](http://www.bustedmugshots.com) and [www.dailymugshot.com](http://www.dailymugshot.com), among many others, as well as geographic-specific websites like [www.portlandcriminals.com](http://www.portlandcriminals.com) and [www.cincy-mugshots.com](http://www.cincy-mugshots.com).

Such sites post thousands of jail booking photos obtained from law enforcement agencies, and use them to generate website traffic and ad revenue. It's a potentially huge market; according



to FBI statistics there were over 13 million arrests in 2010, most of which resulted in booking photos. Further, many mug shot websites offer to remove the embarrassing pictures for a fee or are affiliated with removal services, which provides an additional revenue stream.

For example, BIA's removal service, [www.deletemymug.com](http://www.deletemymug.com), which is no longer active, charged \$99. Two unrelated services, [www.removemymug.com](http://www.removemymug.com) and [www.removeslander.com](http://www.removeslander.com), charge \$99 and \$399 respectively; the latter also claims to remove mug shot photos from Google searches. Another, [www.removearrest.com](http://www.removearrest.com), charges a variable fee depending on the number of sites where a person's photo is posted. Removal services provided by [www.unpublisharrest.com](http://www.unpublisharrest.com) and [www.unpublishmugshots.com](http://www.unpublishmugshots.com) start at \$399.

Some people are willing to pay in order to have their mug shots deleted, as the photos are humiliating and can interfere with personal relationships and even finding employment. "It completely screwed with my life," said Janet LaBarba, whose mug shot for a 2009 DUI arrest was posted online. "People Googled me and it was very embarrassing."

Unlike the photos they post publicly, remaining anonymous is extremely important to operators of most mug shot websites, as indicated by the demise of BIA after Hebert's identity was revealed.

KA Marketing's Kyle Ritter, who owns 35 mug shot sites and is also known as Mug Shot Barry, kept his identity a secret until he was exposed by Portland, Oregon's *Willamette Week* in August 2011. "I don't really conceal my identity for my

sake," he said. "I didn't want friends, family, and other folks who have no affiliation with the company to be harassed."

He indicated that his websites do not allow the posting of public comments. "We tried allowing commenting on our sites for a few days and it was an utter disaster," he noted. "People were posting pictures of inmate's children, phone numbers, home addresses, spouses names, all kinds of terrible things. Racist comments were rampant. It was awful." One of the biggest players in the mug shot website business is <http://florida.arrests.org>, which has over four million booking photos. Like the original BIA site, [florida.arrests.org](http://florida.arrests.org) is operated by someone who has had his own mug shot taken.

Florida ex-con Rob Wigen, 32, served three years in prison for participating in a small-time credit card skimming scheme. "Of course, I'm not going to have my mug on my site," he stated, when questioned about his online endeavors.

Wigen said his website has earned him enemies, and that he receives about 100 angry emails and a few letters via snail mail a day from people whose photos are posted on his site. "Obviously, they're really nasty," he said. "I never thought I'd get this backlash from individuals. I just never imagined it." His website generates revenue from Google Ad-Sense banners and by advertising for defense lawyers and bail bondsmen. He

also receives income from having mug shots removed.

The founder of [www.bustedmugshots.com](http://www.bustedmugshots.com), Kyle Prall, located in Travis County, Texas, defended his business. "We are publishing public records with an interest in informing the community," he stated. "We have never approached anybody attempting to generate revenue from them to remove a record from our database."

Which is true – rather, mug shot websites wait until people contact them to have their photos deleted, then charge them to do so or refer them to a removal service. Some sites will remove mug shots for free if the charges that resulted in the booking photo were dismissed or the defendant prevails at trial. Otherwise, people must pay to have their pictures removed.

Like Wigen and Hebert, Prall has also had empirical experience with the criminal justice system; he was found guilty of illegal consumption of alcohol as a minor, delivering/manufacturing marijuana, trespassing into a car and drunk driving, and served jail time. He has not put his own mug shots on his website.

To avoid having his clients' booking photos posted on mug shot sites, Florida


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## Mug Shot Websites (cont.)

criminal defense lawyer Daniel Haenel advises them to turn themselves in to small town sheriff's offices. "I have them go to a county I know they are not scraping [online] data from," he remarked. If a client does end up on a mug shot website, he directs them to his own removal service, [www.hidemymugshot.com](http://www.hidemymugshot.com), which will have the offending photo taken down for \$1,250. At least 25 clients have used his removal service, he said. Haenel indicated he was only involved in mug shot removal for his clients, not the general public.

Those who get caught up in the profiteering-from-mug-shot-website in-

dustry feel abused. "You know, I did make a mistake back then," said Philip Cabibi, whose 2007 booking photo for a DUI arrest landed on Wiggen's site. "There's a difference between having it available on the county jail website ... then to have it return on the first page of Google when you google your name. It seems like ... extortion to me."

Perhaps because that's basically the business model of mug shot sites and their affiliated removal services. Not surprisingly, there is sometimes collusion between websites that post booking photos and the online services that remove them for a fee. Wiggen, for example, said he had provided [www.removeslander.com](http://www.removeslander.com) and other removal services with

a method to delete mug shots from his website within minutes, after they send him a small payment.

Meanwhile, on October 5, 2011, former BIA operator Christopher Hebert was arrested and charged with stalking and cyberstalking. According to a police report, he is accused of harassing and threatening a woman by phone and over the Internet since November 2010. The charges are reportedly not related to BIA. Hebert was jailed under a \$50,000 bond and later released; his mug shot is currently posted on a number of websites. ■

Sources: [www.theind.com](http://www.theind.com), [www.wired.com](http://www.wired.com), [www.in.reuters.com](http://www.in.reuters.com), [www.katc.com](http://www.katc.com), [www.week.com](http://www.week.com)

## ***Advanced Criminal Procedure in a Nutshell, 2<sup>nd</sup> Ed.,*** **by Mark E. Cammack and Norman M. Garland** **(Thomson West, 2006). 505 pages, \$38.00**

*Book review by John E. Dannenberg*

*Advanced Criminal Procedure in a Nutshell* is an informative book that covers procedural aspects of a criminal case after an investigation by the police has resulted in a decision to prosecute. A less accurate but more colorful title would be "Criminal Procedure from Bail to Jail."

Differing substantially from the similar-sounding *Criminal Procedure in a Nutshell – Constitutional Limitations* [see: *PLN*, Sept. 2012, p.46], this text tackles the legal doctrines from a prosecutor's decision to file charges all the way through appeal and collateral attack of a conviction. The book's 15 chapters address in detail each of the following topics: the decision to prosecute, pretrial detention and release, preliminary hearing, grand jury, discovery, time limitations, venue, joinder and severance, double jeopardy, plea bargaining, assistance of counsel, trial rights, sentencing and appeals.

Authors Cammack and Garland are seasoned law professors who offer this book as a concise summary of the courses they teach in criminal procedure. Noting that each state has its own specific procedures, the authors chose as their "typical" model the federal law system, so as to give readers the broadest background. That having been said, they advise readers to consult carefully with their individual state rules, including rules of court, in or-

der to be fully informed on local criminal procedures. Overall, *Advanced Criminal Procedure* offers a very useful, self-paced study written in a refreshing fashion that is not intimidating to a layman.

The first chapter's 30 pages cover all aspects of the decision to prosecute, including discretion, challenges to a decision to prosecute, vindictive prosecution and problems of proof. Chapter 2 guides you through the right to a probable cause determination and pre- and post-conviction bail. Your rights at the preliminary hearing, as well as procedures to protect them, are covered in Chapter 3. If prosecution results from a grand jury indictment, read Chapter 4 to learn about secrecy, bills of particulars and challenges to a grand jury. The next chapter, on discovery, includes preservation of evidence, use of your prior record, expert witnesses, and alibi and insanity defenses.

Twenty pages are devoted to the important topic of statutes of limitations and speedy trial rights. A lengthy chapter follows on double jeopardy; it distinguishes the doctrines of collateral estoppel and dual sovereignty exposure, and covers rights after acquittal, mistrials and implied acquittal. Right to counsel – especially to effective counsel – is addressed in Chapter 11. Selection of the jury and challenges to the judge are covered in Chapter 12, followed by a 40-page discourse on all

aspects of the trial itself: a fair trial, press coverage, closed courtrooms, evidence presentation and cross-examination, jury deadlocks and inconsistent verdicts. Sentencing procedure and important rights at sentencing, including factors that may be used during sentencing, are discussed in Chapter 14.

The final chapter offers 30 pages on a subject dear to the hearts of already-incarcerated readers: the right of appeal and collateral attack. Because the book is designed around a model based on federal law, the collateral attack section gives detailed instructions on how to proceed under the federal habeas corpus statutes.

Each chapter provides the reader with citations to relevant U.S. Supreme Court case law, providing a good head start on further research into questions concerning one's own legal situation. As an added benefit, the compact size of *Advanced Criminal Procedure* makes the book desirable where storage space is limited.

*Advanced Criminal Procedure in a Nutshell* is available in *PLN*'s bookstore – see page 54 for ordering information. ■

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## Florida: Two Men Sentenced in Prison Canteen Kickback Scheme

A federal district court in Jacksonville has sentenced two men to short prison terms after they pleaded guilty to conspiracy charges related to paying kickbacks to former Florida Department of Corrections (FDOC) Secretary James V. Crosby, Jr. and former FDOC regional director Allen Wayne Clark.

Over a two-year period, Edward Lee Dugger and Joseph Arthur Deese paid Crosby and Clark to establish a business relationship between the FDOC and Keefe Commissary Network, LLC. Dugger and Deese created a company in 2004, American Institutional Services (AIS), to act as a subcontractor for Keefe to provide canteen services at the FDOC's prison

visiting parks. [See: *PLN*, Feb. 2011, p.42; Dec. 2006, pp.1, 4].

In return for the contract to operate the visiting park canteens, Dugger and Deese agreed to pay Crosby and Clark \$1,000 to \$14,000 a month. They also agreed to pay former Keefe Commissary President Jack Donnelly and another Keefe executive, Tyler Alcorn, about \$260,000 of the \$1.5 million in annual revenue generated by the canteens.

Both Dugger and Deese were indicted in June 2010 and pleaded guilty. They were sentenced on January 13, 2012, with Dugger receiving 26 months in federal prison and Deese receiving 14 months. They also were ordered to forfeit a total of

\$232,019.11, although Keefe Commissary Network has since filed a petition claiming an interest in the forfeited funds, alleging it is still owed money by AIS from the canteen sales. See: *United States v. Dugger*, U.S.D.C. (M.D. Fla.), Case No. 3:10-cr-00167-TJC-MCR.

Dugger and Deese will likely be released before Crosby, who is serving eight years in federal prison and is scheduled to complete his sentence in 2015. Clark has already finished his 31-month sentence and is now operating a marina in Dixie County, Florida. [See: *PLN*, Dec. 2007, p.32].

Sources: [www.ocala.com](http://www.ocala.com), [www.gainesville.com](http://www.gainesville.com)

## California Federal Judge Denies Habeas Petitions after Sitting on Them for Years

A federal judge's treatment of prisoner habeas petitions gives new meaning to the old adage that justice delayed is justice denied. U.S. District Court Judge Percy Anderson, who was named to the federal judiciary in 2002 by President George W. Bush, has established a track record of allowing potentially meritorious habeas corpus petitions to languish in his court in the Central District of California for years.

In July 2011, the *Daily Journal*, a legal publication, reported that Judge Anderson had sat on three habeas cases for periods ranging from 5½ to 8 years after magistrate judges had recommended granting relief.

California state prisoner Omer Harland Gallion filed a habeas petition claiming that he had been wrongfully convicted. A magistrate judge recommended that his petition be granted. However, Gallion died in prison six years later, in 2010, still waiting for Judge Anderson to act. When an attorney brought Gallion's death to his attention, Anderson finally did something – he dismissed the petition as moot.

Two other prisoners' petitions were denied on the same day in July 2011 that the *Daily Journal* asked Judge Anderson to account for the lengthy delays in habeas cases in his court. For prisoner Adilao Juan Ortiz, the delay was 5½ years. Prisoner Randall Amado waited 8 years. In both cases, a magistrate judge had recommended granting the petitions.

Amado was convicted of felony murder based on the testimony of a rival gang member – a convicted felon facing his own

murder trial who had obvious reasons to shade the truth in a manner favorable to prosecutors in Amado's case. In 2003 a magistrate judge found that the unreliability of that witness had rendered Amado's trial fundamentally unfair, and recommended that Judge Anderson order Amado's release if the state did not retry him.

Four years into his long, ultimately unsuccessful wait for Anderson to enter a ruling, Amado was able to get San Diego defense attorney John Lanahan to submit a motion requesting his appointment as volunteer counsel. Judge Anderson never ruled on the motion, leaving Lanahan – not to mention Amado – extremely frustrated.

Lanahan explained that had Anderson denied the motion, he would have been able to appeal it on Amado's behalf. Lanahan unabashedly expressed his view that Judge Anderson harbored bias against prisoners. "There is consistent animus with Percy Anderson. He puts you in a place where you can't get there from here," he said, adding, "inaction is definitely worse than denial."

Habeas petitioners are rarely successful. According to a 2006 study by Nancy J. King, a law professor at Vanderbilt University, while some 17,000 federal habeas petitions are filed by prisoners each year, only 1 in 284 is granted – a success rate of just .3%. Thus, when a judge routinely ignores a magistrate's recommendation for relief on the rare occasions when granting a petition appears to be warranted, there may be cause for legitimate concern

regarding the judge's impartiality.

Not surprisingly, the Chief Judge of the Los Angeles-based Central District, Audrey B. Collins, defended Anderson, calling him "an excellent judge." She described the long delays that have characterized her colleague's handling of habeas petitions which magistrates have deemed meritorious as "extremely unfortunate," but attributed such delays to the district's strained caseload.

In a statement that itself strains credibility, Chief Judge Collins said, "I have absolutely no reason to believe there was any bias that permeated [Judge Anderson's] handling [of the long-delayed petitions] or played any part whatsoever in this."

Others are more skeptical than Collins. University of Pittsburgh law professor Arthur Hellman, an expert on the federal judiciary, described the delays as "troubling." Noting that the lengthy delays have gone unexplained, he observed, "It certainly raises concerns that are going to persist as long as there's no explanation."

Under the Civil Justice Reform Act, federal judges must report cases on their docket that have been pending three years or more. As of mid-2011, Anderson's most recent report listed 18 such cases; of those, 17 involved habeas petitions or other actions filed by prisoners.

Sean Kennedy, the federal public defender for the Central District, the largest public defender agency in the nation, said that when a federal district court judge promptly accepts recommendations to

deny habeas petitions (as Judge Anderson does), but then “sits for years on the very few recommendations to grant relief, it causes petitioners to question the fairness of the proceedings.”

According to The Robing Room, a website “where judges are judged,” Judge Anderson is listed among the 10 lowest-ranked jurists in the country.

Hellman and other judicial scholars, along with defense attorneys, have called for a misconduct inquiry. “The misconduct process,” Hellman noted, “doesn’t exist just

to discipline judges who do unethical things, but also to assure the public that the judiciary cares, as an institution, that individual judges are doing their jobs without any kind of animus or improper attitudes.”

Not that the disciplinary process for federal judges is particularly effective, as it is overseen and controlled by members of the federal judiciary. [See: *PLN*, August 2009, p.1].

Sources: *Los Angeles Times*, [www.allgov.com](http://www.allgov.com), [www.therobingroom.com](http://www.therobingroom.com)

## California’s Experiment with Community Correctional Facilities Coming to an End?

From August to November 2011, the California Department of Corrections and Rehabilitation (CDCR) closed all but one of its community correctional facilities (CCFs).

In the past, the CDCR used CCFs to house low-level (minimum and medium security) prisoners in a dormitory-style environment at a cost-effective average daily rate of just under \$56 per bed, or about \$20,000 annually. By comparison, it now costs an average of around \$49,000 a year to incarcerate a convicted felon in state prison.

Use of CCFs had helped the state address its prison overcrowding problem, which recently led the U.S. Supreme Court, in *Plata v. Brown*, to affirm a lower-court ruling requiring California to reduce its adult prison population from approximately 200 percent to 137.5 percent of design capacity. [See: *PLN*, July 2011, p.1].

The CDCR had contracted with as many as 13 public and private CCFs, which in 2008 housed up to 5,913 prisoners—roughly 3.5 percent of the state’s adult prison population at the time. Today the CDCR continues to contract with only the Golden State Modified CCF in Kern County. That facility

houses 600 Level I and Level II adult male prisoners, less than 0.5 percent of California’s current prison population.

For the most part, prisoners formerly held in CCFs will now be housed in local county jails under a program known as the 2011 Public Safety Realignment Plan. Pursuant to the Realignment Plan, adopted by the state in response to the *Plata* ruling, CDCR facilities will be used only to house prisoners convicted of violent, serious and sexual offenses.

However, it is anticipated that county jail systems will not have the capacity to hold the tens of thousands of prisoners who will ultimately be “realigned.” Thus, it seems likely that some of the 5,300 CCF beds that were recently emptied will soon be filled again—this time with prisoners “realigned” into county jails—after the CCFs contract with county officials rather than the state.

The facilities would then house the same prisoners, just under a different designation.

Sources: *CDCR press release* (Dec. 7, 2011); [www.cdcr.ca.gov](http://www.cdcr.ca.gov)

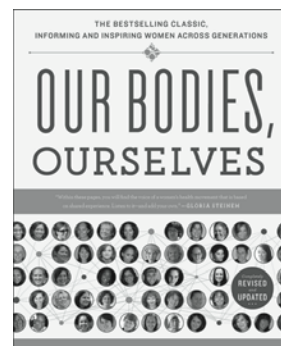


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# UTMB Challenges Texas State Audit, while Legislature Imposes \$100 Prisoner Health Care Co-Pay

by Matt Clarke

The University of Texas Medical Branch at Galveston (UTMB) has challenged the findings of a state audit of the prisoner health care services it provides. The challenged audit reported that UTMB improperly charged the state for about \$40 million in prison medical-related costs while reporting a \$95.1 million deficit. UTMB also complained that the \$900 million allocated by the Texas legislature for prisoner health care for FY 2011-2012 was inadequate, and threatened to cancel its contract. The legislature later approved a supplement to UTMB's funding. Meanwhile, in a glaringly inappropriate attempt to close the state's budget gap on the backs of its most disadvantaged citizens, Texas lawmakers passed a bill that imposes a \$100 annual medical co-pay on prisoners.

UTMB provides health care services to about three-quarters of the more than 152,000 state prisoners in Texas. The audit found that UTMB charged the state for over \$16.2 million in disallowed costs not directly related to prisoner health care, charged \$6.6 million that was not allowed under the prison health care contract over a two-year period, and gave its prison health care employees \$14.1 million in pay increases over a three-year period, all while reporting a \$95.1 million shortfall in what UTMB was paid for prisoner medical care compared to what it spent. [See: *PLN*, Dec. 2011, p.10].

The audit also reported highly questionable practices by UTMB, such as giving bonuses to 40 employees in its prison health care department which they were not eligible to receive, then charging the bonuses to the prison health care contract. At that time, all state agencies had been ordered to reduce their budgets

by 15% to close an estimated \$27 billion state budget gap.

The auditors further found that UTMB charged the contract more for inpatient, outpatient and physician services than allowed by Medicare and at least one large private insurer. The audit stated that the costs for physicians billed to the contract "average[d] 135% of the Medicare reimbursement amount."

"After a comprehensive look at the state auditor's report, UTMB respectfully believes that the primary findings are not correct," retorted University of Texas System Chancellor Francisco Cigarro. "Subject to approval of the state auditor, I have authorized the hiring of an independent auditor to expedite a review of the state audit findings and report to me and to the Board of Regents its findings and recommendations."

Essentially, UTMB wants to audit the state audit. However, that may have been part of a larger strategy to defend its prison health care services budget.

When the legislature approved the state's FY 2011-2012 budget, it significantly cut the amount of funds allocated to prisoner medical care – arriving at a figure of \$900 million. This prompted UTMB officials to complain about inadequate funding, citing potential losses of up to \$3 million a month and stating, "it is our intent to cease the delivery of correctional health services." [See: *PLN*, April 2012, p.24]. The Texas Department of Criminal Justice (TDCJ) responded that it was prepared to transition out of UTMB-provided prisoner medical care and would instead contract with local hospitals. Prisoner advocates saw disaster looming.

"Prisoners already receive grossly inadequate health care that state officials have previously admitted approaches being unconstitutional," noted Scott Medlock, director of the Prisoners' Rights Program of the Texas Civil Rights Project. "Throwing how prisoners receive care into limbo

would have disastrous consequences for prisoners' health, and virtually invites a return to the bad old days when federal courts had to supervise how Texas prisons were run."

State lawmakers were the first to blink, authorizing supplemental funding for prisoner health care services. At least for the next two years, UTMB will continue to be the primary provider of medical care at TDCJ facilities.

Meanwhile, the legislature came up with a less-than-brilliant idea to close the prisoner health care budget gap – start charging prisoners \$100 a year for medical care. The flaw in that plan is that Texas prisoners are predominately poor; according to TDCJ officials, about 60% of state prisoners are indigent. Further, they are not paid for their labor and are not allowed to operate any kind of business. Many who are not indigent, but receive a modicum of monetary support, would rather skip visits to the doctor and dentist than pay a \$100 annual fee for health care services.

Therefore, the state's estimate that the co-pay will generate \$10 million in revenue is, to say the least, unrealistic. In fact, health care costs may *increase* as prisoners try to avoid seeking treatment until their infections and diseases are well advanced, as the annual co-pay only applies to prisoners who request medical services. The co-pay is also bound to have administrative costs associated with collecting funds from prisoners' trust accounts. Thus, whether the \$100 annual health care co-pay will actually help close the state's budget gap remains to be seen.

The co-pay went into effect on September 28, 2011; it does not apply to emergency or life-threatening medical conditions, prenatal care, chronic care, follow-up services recommended by medical staff, or intake health screenings and evaluations. Prisoners who lack sufficient funds in their trust fund account will still receive medical care, and 50% of future deposits into their account will be applied toward the cost of the co-pay. ■

Sources: *Austin American-Statesman*, [www.gritsforbreakfast.blogspot.com](http://www.gritsforbreakfast.blogspot.com), [www.mcclatchydc.com](http://www.mcclatchydc.com), [www.tdcj.state.tx.us](http://www.tdcj.state.tx.us)

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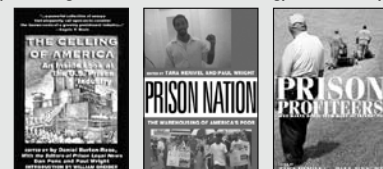
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# North Dakota Farmers Help Flush Out Escaped Florida Sex Offender

A Florida prisoner picked the wrong state when he fled from a private transport van and ran into a 310-acre corn field. "This is unique in the sense that, God bless North Dakota, we bring everybody together to solve the problem and we put guys up on combines," said Cass County Sheriff Paul Laney.

Convicted sex offender Joseph Matthew Megna, 29, was being transported from Florida to Washington state by Extradition Transport of America. During the evening of October 4, 2011, Megna escaped from a rest stop near Tower City, North Dakota. He was not handcuffed and was wearing street clothes when he fled, according to authorities, and the transport guards had left the van's side door open and the padlock to the transport cage unlocked.

In true cooperative spirit, local farmers fired up six combines and harvested about 100 acres of corn under SWAT team escort to flush Megna out of the field. The manhunt ended when he surrendered 22 hours after escaping.

Sitting in the backseat of a police vehicle, Megna was confused to see a throng of media. "Am I famous for running into a cornfield?" he asked a reporter. He said he had fled because he wasn't fed enough by the transport guards and was hungry. A vegetarian, he claimed he was given nothing but bread and cheese.

"I was starving, and that's why I escaped and fled out into the cornfield," he stated. "I wasn't trying to hurt anybody."

North Dakota law enforcement officials made it clear that they expected Extradition Transport to pay for the costs of the search. "Their mishandling of this situation cost the taxpayers of all these entities a lot of money," said Sheriff Laney. "It was incompetence," he added. "This was corrections 101. You account for and secure your inmates, and we wouldn't have had to do all this if they would have done their job the right way."

Laney noted that the company, which is bonded and insured against such incidents, was cooperating with authorities. He also suggested, however, that they might be subject to sanctions under Jeanna's Act, a federal statute sponsored by former North Dakota Senator Byron Dorgan that imposes certain requirements on prisoner transport companies. [See:

*PLN*, Sept. 2006, p.1].

Extradition Transport paid almost \$8,000 to local law enforcement agencies, but according to a September 7, 2012 news report the company refused to cover all the expenses associated with apprehending Megna, which were estimated at \$95,000 – including sheriff and police officers, a K-9 unit, the U.S. Border Patrol, U.S. Marshals Service, a SWAT team, a helicopter and a State Patrol airplane with thermal imaging equipment.

In June 2012 the federal government filed a lawsuit against the company for

violations of Jeanna's Act, seeking penalties and restitution for the costs of the search. The suit remains pending. See: *United States v. Extradition Transport of America, LLC*, U.S.D.C. (D. N.D.), Case No. 3:12-cv-00046-KKK.

Meanwhile, Megna pleaded guilty to a felony escape charge and was sentenced to three months time served in jail; he was then extradited to Washington. ■

Sources: *Associated Press*, [www.superior-telegram.com](http://www.superior-telegram.com), <http://correctionalcorner.com>, [www.inforum.com](http://www.inforum.com)

## Oregon Adopts 5% Prison Trust Fund Account "Service Fee"

Tasked with cutting \$28 million from its massive \$1.36 billion budget, Oregon prison officials had to look under every couch cushion for loose change. That means they once again turned their focus to prisoners and their loved ones, who present an easy and convenient target for generating additional revenue.

Consequently, the 2011 Oregon legislature enacted House Bill 3285, which grants the Oregon Department of Corrections (ODOC) expanded authority to seize money from prisoners, including funds received from friends and family members.

HB 3285 amends ORS 421.125 to authorize the ODOC to "assess and collect fees from inmates from funds to be credited to, or received for deposit in, inmate trust accounts, not to exceed five percent of the amount of the credit or deposit, to offset the costs of administering inmate trust accounts." ORS 421.125(2)(f).

The new legislation raises several important, yet unanswered, questions. For example, given that prisoner pay is "credited to ... inmate trust accounts" by the ODOC, the amendment appears to authorize a five percent pay cut for all state prisoners. This is on top of the five percent that is already deducted from prisoners' gross pay for a "general victim fund."

HB 3285 also applies to money "received for deposit in inmate trust accounts" from any outside sources, and makes no exemption for money that may not be seized by the state, such as veterans benefits, social security benefits and tribal

per capita payments. See, e.g., *Bennett v. Arkansas*, 485 U.S. 395, 108 S.Ct. 1204 (1988) (Social Security) and *Higgins v. Beyer*, 293 F.3d 683, 692-94 (3d Cir. 2002) [*PLN*, July 2003, p.4] (veterans benefits).

Additionally, one can only wonder why "the costs of administering inmate trust accounts" increase with the amount of money being "credited to, or received for deposit in" those accounts. For example, the funds seized under ORS 421.125(2)(f) vary from \$0.25 for a \$5.00 credit/deposit to \$2.50 for a \$50.00 credit/deposit, or \$25.00 for a \$500.00 credit/deposit, and so on, even though the administrative costs associated with managing the accounts should be fixed.

HB 3285 comes at an interesting time, as ODOC officials recently introduced "Access Secure Deposits," which allow prison trust account deposits to be made online (at [www.inmatedeposits.com](http://www.inmatedeposits.com)) – with fees "as low as \$2.95" – and by telephone (800-966-8755) – with fees "as low as \$3.95" – or through [www.jpay.com](http://www.jpay.com) with fees "starting at \$3.95."

One would think that utilizing these services would eliminate "the costs of administering inmate trust accounts," or that such costs would be covered by the deposit fees. Unfortunately, however, it appears that prisoners' loved ones will be hit on the front end with fees "as low as" \$2.95 or \$3.95, then prisoners will be hit on the back end with the 5 percent deduction from their accounts authorized by HB 3285.

Similar prison trust fund assessments

have survived legal challenges in other states. See, e.g., *Abney v. Alameida*, 334 F.Supp.2d 1221, 1228 (S.D. Cal. 2004) (“administrative fee” of 2% of funds sent to prisoners did not violate the Takings Clause of the Fifth Amendment because reasonable user fees that reimburse the cost of government services are not a “taking”); and *Sickles v. Campbell County, Kentucky*, 501 F.3d 726, 730-33 (6th Cir. 2007) [*PLN*, Feb. 2009, p.48] (upholding 25% deduction of all deposits to account). However, a similar 1% Arizona prison trust account fee is currently being challenged in federal court. [See: *PLN*, May 2012, p.38].

The 2011 Oregon legislature considered cutting \$16.6 million from the ODOC’s budget for prison-based addiction treatment, cognitive, parenting and work-based education programs, essentially gutting them. When the dust settled, however, lawmakers elected not to cut too deeply into prison program funding. They even gave the ODOC \$1 million to move certain prisoners into community-based programs for the final months of their sentences, yet that comes at a cost.

HB 3285 also amended ORS 421.125(2)(c) to authorize the ODOC to “assess and collect fees for self-improvement programs, services and assistance provided by the department to inmates who have sufficient moneys to pay for the programs, services and assistance.” Thus, prisoners who participate in prison- or community-based programs may be charged for such participation if they have funds in their trust accounts.

The ODOC must adopt adminis-

trative rules to implement the changes included in HB 3285. Details are in the works, but the statutory amendments are being described as more symbolic than lucrative for the state. Of course that depends on whom you ask, as prisoners

who are assessed the trust fund account deductions and program fees will undoubtedly feel the loss as being far more than symbolic. ■

Source: *Oregon HB 3285 (2011)*

## New Hampshire Court Invalidates City’s Sex Offender Residency Ordinance

A New Hampshire Superior Court has invalidated a local ordinance that prohibits sex offenders from living within 2,500 feet of a school, day care center, playground, athletic field, public beach or ski area, finding that it violated the Equal Protection clause of the New Hampshire Constitution.

In May 2007 the City of Franklin adopted ordinance § 247, which included three sections. The first concerned a residency restriction for sex offenders and the third related to landlords not being allowed to rent to sex offenders when the rental residence was within the 2,500-foot exclusion zone. The second section, which was not challenged, prohibited sex offenders from entering a school or daycare center.

When William Thomas and a friend moved from Massachusetts to New Hampshire, they rented an apartment in Franklin within the 2,500-foot zone. Thomas had been convicted of sexually assaulting a minor about 27 years earlier; he served three years in prison and was subject to sex offender registration laws. When he registered as a sex offender with the Franklin Police Department, he was

informed that he was in violation of the ordinance and had 30 days to relocate.

Rather than move, Thomas filed a lawsuit challenging the ordinance. The superior court granted a preliminary injunction on December 27, 2010. It then granted summary judgment to Thomas on January 18, 2012.

The court found that Thomas had a substantive right to use and enjoy property, and for the ordinance to stand it had to be substantially related to an important governmental interest. The court held the ordinance did not meet that test, as it did not protect the asserted interest: child safety. The court noted that one of the city councilors who voted for the ordinance said “he ha[d] not seen one single piece of evidence that th[e] ordinance will protect the children.”

As such, the ordinance was declared unconstitutional as it related to residency requirements that prohibit Thomas from living within 2,500 feet of a school, but “he may not set foot upon [the school] premises without prior authorization.” See: *Thomas v. Merrifield*, Merrimack, SS. Superior Court (NH), Case No. 10-CV-682. ■



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## Fourth Circuit Upholds North Carolina Sheriff's Bribery Conviction

On November 7, 2011, former Buncombe County, North Carolina Sheriff Bobby Lee Medford's conviction on federal bribery and conspiracy charges was upheld by the Fourth Circuit Court of Appeals. The decision highlighted a scheme in which Medford and his co-conspirators misused their office to illegally profit from the regulation of video poker machine operations.

Medford served as Sheriff of Buncombe County from 1994 through 2006. A 2000 state law required North Carolina sheriffs to supervise the operation of video poker machines in their respective counties; unfortunately, Medford and various officers under his direct supervision misused their official powers to solicit illegal bribes and campaign contributions.

According to the Fourth Circuit, Medford and his co-conspirators "accepted cash payments from the operators of video poker machines and store owners in which the video poker machines were located ... [and] allowed certain of the video poker machines to be registered and operated in violation of the 2000 law ... including allowing the operation of ... machines that on occasion paid out large sums of money."

The former sheriff also sponsored semi-annual golf tournaments as fundraisers, and received large donations from video poker machine operators and store owners. The donations were used for Medford's re-election campaigns or were paid "into credit union accounts held by Medford or his girlfriend."

Incredibly, one of the video machine operators, Henderson Amusement, made payments totaling \$32,000 directly to Medford plus gave over \$120,000 to several other co-conspirators, and included those payoffs on their expense reports.

Medford was indicted and convicted on various charges, including conspiracy to commit extortion under color of official right under the Hobbs Act, 18 U.S.C. § 1951; mail fraud, 18 U.S.C. § 1349; money laundering; conspiracy to obstruct the enforcement of criminal laws; and facilitating an illegal gambling operation. He was sentenced to concurrent terms of 180 months in federal prison.

The Fourth Circuit denied Medford's appeal, finding no violations of due process by the district court and no violations

of trial procedures or with the definition of honest services, based upon the facts presented at trial.

As noted by the appellate court, honest services fraud is available to prosecutors in "bribery and kickback schemes" such as those present in this case,

since the former sheriff had misused his official position and accepted payments to illegally enrich his co-conspirators and himself. Thus, Medford's convictions were affirmed. See: *United States v. Bobby Lee Medford*, 661 F.3d 746 (4<sup>th</sup> Cir. 2011), *cert. denied*. 🏠

## Texas Compensates Exonerees Unequally

by Matt Clarke

A succession of laws, cumulating in the most generous compensation package for wrongly convicted prisoners in the nation, has left Texas exonerees stuck at different levels of compensation depending on when they were proven innocent. Consequently, some earlier exonerees now claim they should receive compensation at the current higher rate.

Initially, Texas had no compensation law for wrongly convicted prisoners, and the only way for exonerees to recover damages for the time they spent in prison was to file a lawsuit. Even then, Texas juries rarely granted meaningful compensation. Between 1985 and 2001 only two exonerees were successful, receiving a combined total of \$50,970.

Starting in 1992, Texas exonerees could apply for compensation of up to \$25,000 for pain and suffering, with their total damages capped at \$250,000 – provided they had pleaded not guilty and received a full pardon from the governor.

In 2001 the compensation was raised to \$25,000 per year of wrongful incarceration with a cap of \$500,000. The compensation amount was increased again in 2007 to \$50,000 per year (\$100,000 per year if on death row), with no cap. And in 2009 Texas lawmakers changed the compensation statute to \$80,000 per year of wrongful imprisonment and added a monthly annuity in the same amount plus free state health insurance and free tuition at state universities, making it the most generous exoneree compensation package in the United States. [See: *PLN*, July 2009, p.12].

The monthly annuity, insurance and education benefits were made retroactive to exonerees who received compensation under prior versions of the law, but the increase in the lump-sum compensation amount was not. Thus, wrongly convicted prisoners who had filed claims under previous versions of the compensation statute received significantly less than

those who received payments under the 2009 law.

Entre Nax Karage spent over six years in prison after he was wrongly convicted of the rape and murder of his girlfriend, before DNA evidence led to his exoneration in 2005. Comparing the \$158,000 he received in compensation with the \$493,000 given to Ricardo Rachell, who also served six years before being exonerated by DNA evidence in 2008, Karage said, "It's not right, and it's unjust. We all did the same time and went through the same situation."

One problem with the lump-sum compensation payment was that much of it was often spent by exonerees to pay attorney fees and taxes. A person who has been incarcerated for a long period of time also might not have the best sense of how to deal with a large amount of money. Take the case of Willy Fountain, who in 2008 was discovered homeless and sleeping behind a Dallas liquor store five years after he received \$388,000 in compensation for serving fifteen years in prison following his wrongful conviction for sexual assault.

Although Fountain admitted he had burned through the compensation money quickly, paying attorney fees, taxes and "living large," public sympathy for his plight contributed to the 2009 amendments to the compensation law and the inclusion of the annuity for exonerees. Had Fountain been compensated under the current statute he would have received a lump-sum payment of \$1.24 million plus the annuity.

Larry Charles Fuller, who was exonerated in 2007 after serving twenty years for rape, sought additional compensation under the new law. He already received \$50,000 per year, \$1 million in total, and has been getting \$11,500 a month since the annuity statute was enacted in 2009. However, he would have received ap-



proximately \$1.6 million under the current compensation statute. He filed a petition for writ of mandamus with the Texas Supreme Court, asking the Court to order Texas State Comptroller Susan Combs, who denied his application for additional compensation, to pay the difference.

Fuller's attorneys argued that he is eligible for the supplemental compensation because he had requested it before the three-year deadline for filing the application expired, and the law does not bar exonerees from submitting multiple requests.

The petition was dismissed by the parties on November 18, 2011. According to the joint motion to dismiss, "The Comptroller has remitted payment to Mr. Fuller in connection with the application for compensation for wrongful imprisonment at issue in Mr. Fuller's mandamus petition." Fuller received a total compensation payment of \$1.75 million. See: *In re Fuller*, TX Supreme Court, Case No. 11-0018.

"I certainly wish those who received less under the old law could receive at least as much as those who have been compensated most recently," said state Senator Rodney Ellis, who led the efforts to increase compensation for exonerees. "Unfortunately, there has been consistent resistance in the legislature to make the lump-sum payment aspect of these reforms retroactive."

Perhaps that is because there are so many wrongly convicted prisoners in Texas who have been exonerated: Thus far, over \$42 million has been paid to 74 exonerees since 1992. And with the prevalence of DNA testing, that number – and corresponding amount of compensation – is likely to increase.

Previously, Texas officials have been criticized for denying compensation payments to some exonerees due to technical reasons and harassing them for back child support that accrued while they were in prison after being wrongly convicted. [See: *PLN*, April 2012, p.22].

Source: *The Texas Tribune*

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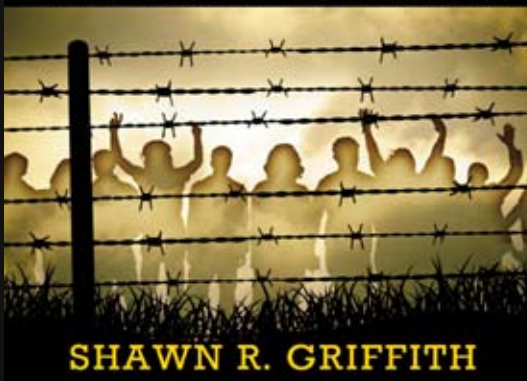
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# ***Criminal Law in a Nutshell, 5<sup>th</sup> Ed., by Arnold H. Loewy*** **(West Law School, 2009). 387 pages, \$38.00**

***Book review by John E. Dannenberg***

Loewy, a law professor, warns his students not to substitute reading this book for doing the hard work of mastering course material in their criminal law classes. Yet he admits that *Criminal Law in a Nutshell* constitutes the “succinct exposition of substantive criminal law” that his students must learn. For the non-law student, this book provides a compact, powerful summary of all facets of criminal law in a format suitable for self-study. As such, it is an ideal self-paced text for incarcerated readers.

*Criminal Law in a Nutshell* is divided into seven major topics that define all aspects of criminal law, each further divided into concise chapters. Professor Loewy begins by analyzing punishment, as that is the distinguishing feature of criminal law that separates it from other types of law. The first chapter covers the purposes of punishment, including the concepts of reformation, restraint, retribution and deterrence. Also examined are inequality in punishment, judicial discretion, disproportionality and capital punishment.


The next two chapters deal with all forms of homicide and their causation. Two more chapters cover other crimes against the person, including a special section on rape. A good discussion ensues on defenses to crimes, including imperfect self-defense, battered spouse syndrome and the retreat rule. Another chapter distinguishes crimes against property – larceny, theft, embezzlement, forgery, receiving stolen goods, robbery, extortion and burglary.

Professor Loewy then reviews the basic elements of a crime: intent and act. Of course, unless act and intent occur together, there is no crime. Defenses to crime are covered next, including insanity, irresistible impulse, infancy, intoxication, duress, necessity, entrapment and excessive government involvement. Another chapter discusses burden of proof.

Following sections deal with criminal attempts, group criminal actions, multiple party culpability and conspiracy. There is also a chapter on corporate crime lest white-collar offenses be left out. The book concludes with a discussion of limitations to criminal actions, including vagueness, *ex post facto* laws and victimless crimes.

While you won't be ready to take the bar exam after reading *Criminal Law in*

*a Nutshell*, you will have a good grasp of the elementary concepts of all facets of criminal law, as provided by an experienced law professor.

*Criminal Law in a Nutshell*, as well as other books in the *Nutshell* law series, is available in PLN's bookstore – see page 54 for ordering information. 

## **Former Delaware Prisoner Settles Sexual Assault Suit for \$287,500 and Policy Changes**

***by Derek Gilna and Brandon Sample***

Former Delaware state prisoner Michelle Bloothoofd has settled a federal lawsuit filed against the Delaware Department of Correction (DOC), the Baylor Women's Correctional Institution (BWCI), Warden Patrick Ryan, guard Anthony Antonio and other prison officials, after she was sexually assaulted by Antonio on October 12, 2008. Her complaint alleged deficiencies in the DOC's policies and procedures related to sexual activity at BWCI; it also alleged retaliation by guards and DOC officials after she filed an administrative complaint.

Bloothoofd stated in her lawsuit that she was fondled and groped by Antonio in her cell after she returned from a shower, and he forced her to perform oral sex. He then threatened that if she reported the incident she would be put into isolation at BWCI. After Antonio left the cell, Bloothoofd spit his semen into a blue plastic glove he had left behind; the next morning she went to the prison's medical unit and reported that Antonio had raped her. Warden Ryan and other prison officials were notified of the incident but took no immediate action.

Bloothoofd was then taken to Christiana Hospital where she turned over the semen-filled glove to a forensic nurse examiner, who swabbed the fluid in the glove and confirmed that sperm was present. The hospital contacted the Delaware State Police. Bloothoofd subsequently sent a letter to BWCI officials, including the Internal Affairs Investigation Department, with details of the rape.

Delaware State Police Detective Mary Basikowski interviewed Antonio, who admitted that he had had sexual contact with Bloothoofd, which was a prohibited act under 11 Delaware Code, Section 1259. Officer Basikowski advised Warden Ryan of Antonio's admission, and Antonio resigned his position at BWCI. Officer Perez, another

guard who had been implicated by Antonio in similar incidents, also resigned.

According to Bloothoofd's federal lawsuit, “At no time after Ms. Bloothoofd saw [the nurse] ... on October 13, 2008 did anyone from BWCI or DOC interview [her] about the rape, either before or after Antonio's resignation.”

The complaint detailed a harrowing laundry list of alleged actions and/or inaction, inattentiveness and lack of concern for the welfare of prisoners at BWCI. Despite the clear existence of unlawful sexual activity by prison employees that constituted Eighth Amendment violations, Warden Ryan and his staff “did not document facts and circumstances describing how, when, or where inappropriate sexual activities, sexual assaults, or rapes occurred within BWCI....” The absence of “policies to require investigation of the facts ... [resulted in] an environment where systemic problems in prison facilities, staffing, or procedures were not cured and where future similar sexual assaults could continue to take place.”

Three years after filing suit, in September 2011, Bloothoofd and the DOC entered into a settlement agreement wherein the DOC agreed to follow all regulations required by the Prison Rape Elimination Act (PREA). The terms of the 21-page settlement also included provisions requiring BWCI to: 1) adopt and enforce a written zero-tolerance of sexual abuse policy; 2) appoint a PREA coordinator; 3) set up a formal communications infrastructure and internal quality assurance mechanism to implement policy changes; 4) provide multiple ways for prisoners to easily, privately and securely report allegations of sexual abuse, or any retaliation connected with such complaints; 5) protect all prisoners and staff from retaliation for reporting sexual abuse; 6) provide for the investiga-

tion of third-party complaints of sexual abuse; 7) require all staff to report to the PREA coordinator and DOC Internal Affairs any knowledge or suspicion of sexual abuse or retaliation; 8) require reporting of sexual abuse that occurred at other DOC facilities; 9) provide supervision to protect prisoners from sexual abuse; 10) immediately respond to sexual abuse complaints; 11) set guidelines for first responders to preserve evidence in sexual abuse cases; 12) investigate all allegations of sexual abuse, including third-party and anonymous reports, for referral for criminal prosecution, disciplinary action or critical incident reviews; 13) exempt complaints of sexual assault from the prison grievance

process; 14) limit cross-gender viewing and searches; 15) increase the use of security cameras and safety and security upgrades in living units and shower areas at BWCI; 16) provide training to all BWCI guards and other staff concerning sexual abuse; and 17) appropriately discipline staff for any violations of the DOC's sexual abuse policy.

"We applaud the Delaware Department of Corrections for agreeing to take important steps to minimize sexual assault in Baylor Women's Correctional Institution," Kathleen MacRae, executive director of the ACLU of Delaware, said in a press release. "DOC is actively working to prevent, detect and appropriately

respond to the violent, criminal act of rape and other forms of sexual abuse. They are taking nationally recognized steps that will make Delaware a leader in efforts to create a safer prison environment."

In addition to the policy changes, the DOC agreed to pay a total of \$287,500 in damages and attorney fees, including \$60,000 payable to the ACLU Foundation of Delaware. Bloothoofd was represented by attorneys John W. Shaw and Pilar G. Kraman from Wilmington, Delaware and Richard H. Morse of the ACLU of Delaware. See: *Bloothoofd v. Danberg*, U.S.D.C. (D. Del.), Case Nos. 1:09-cv-00179-SLR and 1:10-cv-00868-SLR (consolidated). ■

## Eight Puerto Rican Prisoners Drown in Flooded Van

On November 7, 2011 in Puerto Rico, eight prisoners died in a transport van trapped in rising floodwaters. The van contained two guards and ten shackled prisoners, all of whom were pre-trial detainees; most had been unable to afford bail and were being transported to a detention center in Arecibo. Two of the prisoners who drowned were to be released that day.

The tragedy occurred during a torrential downpour when the guards took a shortcut in Arecibo to avoid flooded streets. On the new route, the transport van met two vehicles coming from the opposite direction, both of which stopped to warn of impassable water ahead. Undeterred, the guards drove on until the van became stuck in rising water.

The guards refused to unshackle the prisoners, fearing they might escape. Nearby residents heard the prisoners' cries for help as the van began to submerge. Hector Serrano said he and another man rescued the guards and two prisoners through a hole they cut in the van's roof. However, he said the guards refused to give them their keys so they could free the remaining prisoners.

"They were nervous," said Serrano. "The guards did not want to let them out ... supposedly because they would run away."

Testifying at an official inquiry, surviving prisoner Jason Santiago Lopez described how the guards had caused the tragedy by driving into the flooded area. He also added a few words for his rescuers.

"I thank them from the bottom of my heart," said Lopez, who was vis-

ibly shaken. "It was an unforgettable experience."

Prosecutor Chico Juarbe noted that the prisoners had "asked the driver to take another route because the van would not be able to go through" the rising floodwaters.

In February 2012, the family of one of the eight prisoners who drowned, Juan Huertas Cumbar, filed a lawsuit against Puerto Rican government officials, seeking \$1 million in damages.

The guard who was driving the van, Hector Cruz Santiago, was charged with eight counts of negligent homicide. Convicted on March 30, 2012, he

faces less than four years in prison. ■

Sources: *Puerto Rico Daily Sun*, [www.correctionsone.com](http://www.correctionsone.com), [www.huffingtonpost.com](http://www.huffingtonpost.com), *Associated Press*

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# Oregon Guard Shoots, Wounds Prisoner; Unreported Earlier Prisoner Murder Exposed

An Oregon state prisoner was shot by a tower guard on the recreation yard at the Snake River Correctional Institution (SRCI) last year, after he ignored orders to stop fighting. That incident followed an unreported prisoner murder on the same yard three months earlier.

On August 17, 2011, prisoner Brian C. Cole, 38, serving a life sentence, was transferred to SRCI. While on the recreation yard at about 8:15 p.m. the next evening, he was attacked by prisoners Kevin W. Jackson, 21, and Joel D. Stobbe, 23. At the time of the assault there were 188 prisoners and three guards on the yard, plus two armed tower guards monitoring the area.

Tower guard Jeff Curtis spotted Cole curled up on the ground as Jackson and Stobbe kicked him in the head and stomach. Curtis alerted other SRCI staff and ordered the prisoners to stop fighting.

"The attackers were unrelenting," reported guard Christopher Hovey. When Jackson and Stobbe did not stop their attack, Curtis fired one round from his Ruger Mini-14 rifle that struck Jackson in the hip.

"They were ordered to stop and refused," said Jeanine Hohn, an acting public affairs administrator for the Oregon Department of Corrections (ODOC). "Depending on the situation, a warning shot can be fired. In this case, a shot was fired to stop the assault."

After the shooting, a guard handcuffed Jackson "so he did not continue to grab staff with his blood soaked hands." Guard Jesse Kelsh tried to stop the bleeding using a prisoner's T-shirt, while two other guards held Jackson's head.

Jackson was taken by ambulance to a medical center in Ontario, Oregon, then flown to a Boise, Idaho hospital for surgery. Cole and Stobbe were treated at the prison for minor injuries, according to Hohn.

Following the August 18, 2011 incident, Cole was transferred to another prison and SRCI was placed on lock down. Jackson was hospitalized for eleven days before being returned to SRCI's segregation unit, where Stobbe had been moved.

"All in all, it went like clockwork," said Jamie Miller, SRCI's assistant superintendent of security. "It was a very

unfortunate circumstance. We do not want to have to use lethal force."

Oregon State Police (OSP) detectives were sent to SRCI to investigate. "It's like any officer-involved shooting," said OSP Lt. Gregg Hastings. "We will be interviewing inmates, officers and any eyewitnesses. We're trying to determine the facts under which the use of force was taken and if it was appropriate. The case will then be sent to the district attorney."

After receiving the OSP investigation – which included 47 staff and 171 prisoner interviews – Malheur County District Attorney Dan Norris commenced a review in November 2011 to determine if the shooting was justified. He will also consider whether criminal charges should be filed against Jackson and Stobbe.

Curtis remains on active duty and will likely be cleared of any wrongdoing, especially considering that another SRCI prisoner was murdered on the same recreation yard just three months earlier, according to Norris.

On May 21, 2011, prisoner Chris Lange, 54, was beaten to death by fellow prisoner and longtime rival Jimmy DeFranks. Lange was nearing release on a 1987 murder conviction, while DeFranks is serving life without parole. Murder charges are expected in the case.

The ODOC did not issue a news

release concerning Lange's death, Hohn admitted. She did not know why prison officials had failed to comply with ODOC rules requiring public disclosure of the homicide.

Following Lange's murder, SRCI tower guards were trained to stop life-threatening incidents by aiming at the prisoner's body "below the center of mass," often the hips, if the prisoner refuses to respond to orders to stop, said Norris. Hohn, however, stated she was unaware of any such training.

Jackson is the second SRCI prisoner to be shot by a tower guard, according to Hohn. In April 2008, a prisoner was shot when he refused to respond to orders during a large-scale disturbance.

An investigation found the 2008 shooting to be justified but recommended that cameras and sound equipment be upgraded, and that guards be separated prior to being questioned by police investigators following shooting incidents. The ODOC will conduct a similar internal review of the Jackson shooting once Norris completes his investigation.

On November 11, 2011, a tower guard at SRCI fired a warning shot to break up a fight involving 29 prisoners on the recreation yard. No injuries were reported. ■

Source: *The Oregonian*

## Oregon Passes Legislation to Move Juveniles Out of Adult Jails

"Youth who are held in adult jail[s] are at significantly increased risk of experiencing violence, committing suicide, and they're actually at much higher risk of recidivating as well," stated David Rogers, executive director of the Partnership for Safety and Justice (PSJ), based in Portland, Oregon. Thus, Rogers and PSJ have lauded the June 6, 2011 enactment of Oregon's House Bill (HB) 2707 as a progressive sentencing reform measure.

In 1994, Oregon voters passed Measure 11 (M11), which imposed mandatory prison sentences for 16 (later increased to 21) offenses. M11 also requires that 15-, 16- and 17-year-old offenders charged with an M11 crime be tried as adults.

Prior to the passage of M11, juveniles awaiting trial were held in youth deten-

tion facilities regardless of the offenses they were accused of committing. Since M11 was enacted, however, the default place of pretrial confinement for 16- and 17-year-old offenders has been adult jails. Although county sheriffs and juvenile justice officials retained discretion to hold juveniles in youth facilities, adult jails were generally the rule for M11 offenders.

"Research published in the past 15 years has shown that the juvenile system is better equipped to keep youth safe while they are in custody, and to provide treatment, services and supervision to prevent delinquency and reduce reoffending," according to a July 2011 report titled *Misguided Measures*, published by PSJ and the Campaign for Youth Justice. "National studies have found that



youth who are held in adult jails are at an increased risk of physical and sexual assault and are more likely to attempt or commit suicide.”

HB 2707 amended ORS 137.705 to state that “youth may be housed in an adult jail only if the director of the county juvenile department and the sheriff agree to detain the juvenile in a jail or other place where adults are detained.” As such, “counties that currently house youth in adult jails will need to re-evaluate that decision and hopefully will agree that Oregon’s youth are better served in juvenile detention centers.”

Additionally, juveniles under 16 years old who have been charged as adults may not be detained in jails or other facilities that hold adult offenders, either while awaiting trial or after they are convicted.

“Tough crime policy isn’t the same as smart policy,” observed Shannon Wight, PSJ’s associate director. “Passage of House Bill 2707 sends a strong message from legislators that youth should not be held in adult jails.”

Unfortunately, the message sent by HB 2707 isn’t quite as strong as PSJ would like to believe. The legislation does not limit the discretion of county officials to send a 16- or 17-year-old M11 offender to an adult facility for any reason, or no reason at all. Nor does the law contain any mechanism for seeking a juvenile’s transfer from an adult jail back to a juvenile detention facility. In short, if county officials decide to detain a juvenile in an adult jail there is no prohibition against that decision.

Thus, HB 2707 appears to be a piece

of “feel-good legislation” that looks useful on paper but ultimately does little to actually protect juvenile offenders. Still, Rogers sees HB 2707 as a significant victory. “This really kind of puts our approach to dealing with kids who are charged as adults much more in the direction of being a best practice,” he suggested.

Despite its shortcomings HB 2707 is a rare sentencing reform success in Oregon. For nearly two decades, prosecutors and victims’ rights advocates have threatened and bullied legislators into avoiding any appearance of being “soft on crime.” Even a simple no-brainer bill like HB 2707 faced unlikely odds of passage.

There is little doubt that HB 2707 would have died in committee had it not been for the tireless efforts of PSJ, which led to nearly unanimous legislative support for the measure. PSJ has since called for county officials to comply with the intent of HB 2707, and ensure that juveniles are not placed in facilities that house adult offenders.

“Counties should implement House Bill 2707 and remove youth from adult

jails. Young people awaiting trial on an adult charge should be held in juvenile detention or supervised on pretrial release,” recommended *Misguided Measures*. “While counties may experience short-term costs associated with this change” due to placing juveniles in youth detention facilities, such costs “could be reduced through the use of supervised pretrial release.” Moreover, “counties will reap long-term savings by reducing youth recidivism and subsequent reincarceration in the adult system.”

Sources: *The Statesman Journal*; *Oregon HB 2707 (2011)*; “*Misguided Measures: The Outcomes and Impacts of Measure 11 on Oregon’s Youth*,” *Partnership for Safety and Justice & Campaign for Youth Justice (July 2011)*

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## News in Brief

**Alabama:** On June 13, 2012, two state prisoners picking up trash on an outside road crew were hit by a vehicle on Interstate 10 near Loxley. One, Kenric Turner, was killed; the other, Kelvin Dejan Jordan, was transported by helicopter to the University of South Alabama Medical Center. The Department of Public Safety and local police are investigating the accident.

**Arizona:** A federal prison employee at FCI Phoenix was indicted on June 20, 2012 on 13 counts of sexual assault. Joe A. Martinez, 48, is accused of sexually abusing two female prisoners from 2008 to 2010, according to a joint investigation by the Bureau of Prisons and the FBI. Most of the assaults occurred near a scrapyard at the facility.

**Arizona:** Shortly after being convicted of arson for burning down his \$3.5 million mansion, ex-Wall Street trader Michael Marin, 53, appeared to put something in his mouth while sitting in the courtroom, then went into convulsions and quickly died. The June 2012 incident was caught on camera; law enforcement officials later found a container labeled "sodium cyanide" in Marin's vehicle. He reportedly

torched his house because he couldn't make the \$17,000 mortgage payments, and faced almost 16 years in prison following his conviction.

**Arkansas:** According to Crittenden County jail officials, prisoner Robert Turner, Jr. shot himself in the knee with a .25-caliber handgun on June 25, 2012. Turner likely obtained the handgun from one of three former jail guards who had been arrested a week before the shooting incident for smuggling contraband into the facility, including cell phones and tobacco. Chief Deputy Mike Callender said investigators weren't aware that a gun had been brought into the jail because they "didn't ask the right questions" when questioning the former guards – Antonio Tillis, 35, Joe Jimerson, 30, and Quirino Franklin, 35.

**California:** Lompoc prison employee Timothy McNally, 32, has been charged with second-degree murder for the March 8, 2012 killing of Victorville federal prison guard Gary Bent in a hotel room. Both were attending joint training at Lompoc; Bent was found dead in McNally's room with a fatal gunshot wound to his neck. A toxicology report indicated that Bent and McNally may have been using illegal drugs

– possibly cocaine or methamphetamines. According to a police detective, McNally was "playing" with a 9mm pistol at the time of the shooting, and sent a text to one of his friends that said, "Damn ... I just shot my friend in the damn neck.... Whoops...."

**California:** On June 19, 2012, an estimated 69 prisoners at the Salinas Valley State Prison engaged in a riot and mass fight on a recreation yard, resulting in at least 19 injuries. Prison guards responded with rubber bullets and chemical agents; one staff injury was reported, though it was not due to the riot. One of the injured prisoners was transported by helicopter to a hospital. The disturbance was classified as a level two mass casualty incident by Monterey County emergency medical services staff, and the prison was placed on lockdown.

**Canada:** The body of convicted murderer Rory Helson Wagner, 53, was found in a wooded area in British Columbia on May 30, 2012, partially eaten by a black bear. He was on parole for his involvement in killing a man accused of sexually assaulting a relative. Investigators said Wagner was already dead in his car when the bear broke in, dragged his body from the vehicle and ate parts of him. Drug

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paraphernalia and a bottle of alcohol were found in Wagner's vehicle.

**Colorado:** Former Florence federal supermax prisoner James Duckett, 48, was sentenced on May 11, 2012 to 42 months in prison in connection with the 2005 murder of prisoner Gregory Joiner at Florence. Duckett pleaded guilty to assault just before going to trial; he had held Joiner while another prisoner, Dominic Stewart, beat and stomped him to death. Stewart was convicted of second-degree murder and sentenced to life. Had he not killed Joiner, Stewart would have been eligible for parole in 2013.

**District of Columbia:** The Bureau of Prisons announced on June 22, 2012 that guards at seven federal facilities, including USP Atwater, would be allowed to carry pepper spray to use against violent prisoners. The policy change was prompted by the June 2008 death of USP Atwater

guard Jose Rivera, who was fatally stabbed by two prisoners, James Leon Guerrero and Joseph Cabrera Sablan. [See: *PLN*, Aug. 2009, p.10; Jan. 2009, p.50]. The pilot pepper spray program will also be implemented at selected federal prisons in Colorado, Pennsylvania, Florida, Virginia and Louisiana. Guards at the BOP supermax facility in Florence, Colorado are already allowed to carry batons.

**Florida:** On May 3, 2012, Franzetta Mathis, 42, a guard at the MTC-operated Gadsden Correctional Institution, was arrested on charges of grand theft and destruction of evidence. She is accused of pocketing a wallet dropped by a patient at the Capital Regional Medical Center, where she and another officer were guarding a prisoner. The theft of the wallet, which reportedly contained \$8,400, was captured on surveillance video. When confronted, Mathis said she had burned

the wallet after removing the money.

**Georgia:** Attorney Michael Stuart Winner was accused of offering to deliver drugs and tobacco to female prisoners at the Cobb County Jail in exchange for the prisoners exposing their breasts, according to April 2012 news reports. Winner, 45, also reportedly exposed himself to a female prisoner during an attorney-client meeting at the jail. He was arrested on felony charges that included conspiracy to commit crime, unlawful trading with prisoners and drug-related offenses.

**Illinois:** On May 11, 2012, two pre-trial detainees at the St. Clair County Jail, Teryun Jackson, 22, and Marlon K. Jackson, 23, assaulted a third prisoner who was not identified. During the attack, Teryun Jackson bit off a piece of the victim's ear and flushed it down a toilet. Teryun and Marlon were charged with aggravated battery and mob action, and

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## News in Brief (cont.)

held under \$100,000 bonds in addition to their pre-existing bonds. The victim will reportedly need surgery to repair his damaged ear.

**Mississippi:** A riot broke out at the Wilkinson County Correctional Facility in Woodville on June 19, 2012. Prisoners fought each other in several areas of the prison; there were 23 reported injuries during the hour-long incident, and three prisoners were transported to an outside hospital. The 1,000-bed facility is operated

by Corrections Corporation of America and holds state prisoners.

**Nebraska:** Former prison guard Michael Huston, 33, was sentenced on July 17, 2012 after pleading guilty to a misdemeanor charge that he had sex with a parolee. Since parolees are under the control of the Department of Corrections, they are still considered prisoners – and it is illegal for prison employees to have sexual contact with prisoners, whether consensual or not. Although Huston initially denied having sex with the parolee, the parolee became pregnant and gave birth to a girl, which Huston announced

in a birth notice published in a local paper. He was ordered to pay a \$250 fine plus court costs after entering his guilty plea.

**New York:** Former Tioga County Jail Lt. David Monell pleaded not guilty on June 11, 2012 to federal charges of violating the civil rights of prisoner David Coffey during a June 2010 incident in which Monell assaulted Coffey while he was handcuffed to a bench. Monell, who resigned two days after the beating, had been named “2010 Corrections Officer of the Year.” The assault was captured on video and the county settled a lawsuit filed by Coffey for \$62,000. ■

## Criminal Justice Resources

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Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### ***Amnesty International***

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***The Exoneration Project***

The Exoneration Project is a non-profit organization dedicated to working to free prisoners who were wrongfully convicted. The Project represents innocent individuals in post-conviction legal proceedings; typical cases involve DNA testing, coerced confessions, police misconduct, the use of faulty evidence, junk science and faulty eyewitness testimony, and ineffective assistance of counsel claims. Contact: The Exoneration Project, 312 North

May Street, Suite 100, Chicago, Illinois 60607 (312) 789-4955. [www.exonerationproject.org](http://www.exonerationproject.org)

### ***Family & Corrections Network***

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) publishes the FAMMgram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### ***Innocence Project***

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### ***Just Detention International***

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### ***Justice Denied***

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### ***National CURE***

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### ***November Coalition***

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

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**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada**, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, PLN Publishing, 221 pages. **\$49.95.** Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, paralegal and college correspondence courses. 1071 ☐

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# PRISON

## Legal News

VOL. 23 No. 11

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

November 2012

### Bailing on Justice: The Dysfunctional System of Using Money to Buy Pretrial Freedom

*by Tracy Velázquez, Melissa Neal and Spike Bradford\**

The practice of requiring someone to pay money to a court in order to remain free while awaiting trial is known as “money bail.” While considerable attention has been focused on other aspects of our criminal justice system, money bail is a component that has been under-examined but has huge impacts on costs, communities, and those who are arrested and required to make bail. This article will examine the practice of money bail as well as the for-profit bail bonding industry, and explain why neither should be part of a fair and effective justice system.

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#### Money Bail Increases Pretrial Incarceration

Money bail is one of the primary drivers of growth in our jail populations. About 11.8 million people are processed through jails across the United States each year, with over 725,000 people held in jail at any given time.<sup>1</sup> U.S. jails have operated at an average 91 percent capacity since 2000, resulting in a huge financial burden to states, cities and counties, and frequently inhumane conditions for people who are jailed.

What many don't know is that a majority of those held in jail are presumed innocent: approximately three in five people in jail are awaiting trial or pending charges.<sup>2</sup> In 2011, detaining people in jail before their day in court was costing counties around \$9 billion a year alone.<sup>3</sup>

Many people remain in jail pretrial because they don't have the cash to “buy their freedom” by paying required money bail. However, the ability to pay money bail is an indicator neither of a person's guilt nor of their risk to public safety. Meanwhile, those too poor to pay money bail remain incarcerated regardless of their risk level or presumed innocence. There is no national data regarding how long people stay in jail until their case is resolved; however, in the 75 most populous counties, people accused of felonies who did not post bail in 2002 stayed in jail a median of 51 days until trial (that is, more than half waited 51 days or more).<sup>4</sup>

A recent study concluded that 25% more people being held in jail pretrial

could be safely released than are currently being released.<sup>5</sup> Keeping those persons incarcerated hinders their ability to take care of their families, jobs and communities while overcrowding jails and increasing costs to taxpayers.

#### Money Bail is One of a Number of Pretrial Release Options

There are several ways that someone may be released from jail after their arrest as they await their court date. Sometimes, judges or court representatives will combine release options. Release options that do not involve the upfront payment of money bail include:

- Release on recognizance – The person signs a contract agreeing to appear in court for their hearings as required.

- Unsecured bond – The person signs a contract agreeing to appear in court for their hearings and accepting liability for a set amount of money should they not appear as required.

- Conditional release – The person is given a list of stipulations that must be honored in order to stay out of jail while awaiting trial. These often include drug and alcohol testing, orders to attend mental health or substance abuse treatment, and/or monitoring by a third party such as a family member or pretrial service agency.

- Release to pretrial services – Where available, people released from jail may be required to be supervised by a pretrial service agency. These organizations typically conduct risk assessments and provide appropriate supervision as indicated by

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## **Bailing on Justice (cont.)**

the risk assessment findings.

Other release options that require money in order to get out of jail pretrial include:

- **Money bond** – Also known as cash bond, a person (or their friends or family) pays the bail amount in full in order to be released from jail. Upon the resolution of their case, they are reimbursed for the full amount less administrative or other court fees. Some jurisdictions allow cash bail to be paid with a credit card; others don't.

- **Deposit bond** – The person pays a percentage of the bail amount (usually 10 percent) to the court, with the understanding that failure to appear at court hearings will make them liable for the full bail amount.

- **Property bond** – In lieu of cash, someone may provide a deed and other paperwork to allow the court to put a lien on property for the value of the bond amount; until they appear in court, the court holds the deed on a house or title to other property like a boat or car.

- **Surety or commercial bond** through a for-profit bail bond company – This is the most common release mechanism for people required to post money bail. A person or their friends or family pays a non-refundable premium – often ten percent of the full money bail amount – to a bail bondsman, who then guarantees that the bonded person will appear at their court hearings.

### **What is For-profit Bail Bonding?**

For-profit bail bonding – the practice of hiring a third party to pay or provide a surety guarantee for one's bail – is commonly believed to have begun in the U.S. around 1898 in San Francisco. Over a hundred years later, the bail bonding industry is now a billion-dollar business with considerable political influence. Campaign donations and lobbyists promote the industry's right to exist, reduce competition from alternatives to commercial bail like pretrial supervision and ensure that profit margins remain high through reduction of risk in the form of forfeitures (payment of the full bail amount when someone does not return to court).

As early as the 1920s, critics raised worrying issues about the bail bonding industry that continue today. Arthur L. Beeley, in his 1927 study *The Bail System in Chicago*, noted that poor people remained

in pretrial detention solely due to their inability to pay even small bail amounts. He believed the role of bail bondsmen had become too prominent in the administration of justice, and corruption and a failure to pay bond forfeitures plagued the industry. Amazingly, those issues are still at the heart of what is wrong with the for-profit bail bonding system in America today.<sup>6</sup> The United States is the only country besides the Philippines that allows commercial, for-profit bail bonding.

### **How do Bail Bonds Work?**

No one who is offered release on money bail has to use a bail bondsman. After being arrested, a person may be given the option of posting bail (by paying a set amount of money to the court) in order to be released prior to their trial. He or she – or, more typically, their friends or family members – may pay the full bail amount directly to the court. When they appear for their trial date, the amount paid in bail is refunded less court fees. If they do not show up for court – they “fail to appear” (FTA) – their bond may be forfeited and a warrant issued for their arrest.

Barring extenuating circumstances that prevented their appearance in court, such as being hospitalized, someone who fails to appear and is apprehended by the police may be required to stay in jail until the final disposition of their case. Sometimes the court will set a new, higher bail amount following an FTA, and the bonding process begins again.

Many people, though, do not have and cannot raise the full bail amount. They may then turn to a commercial bail bondsman. For a fee – most often ten percent of the total bail amount – a bondsman will secure someone's pretrial release. The person (or their friends or family) who pays for the bond also signs an agreement to pay the full amount if they fail to appear in court. They may have to prove to the bondsman that they have adequate resources available to cover the full amount. While the bondsman does not have to pay the full bail amount to the court at the time of the person's release from jail, they must provide evidence that they have available assets to pay the full bail; for example, deeds for property, bank statements or, most commonly, insurance coverage underwritten by a large national company that supplies “surety” insurance to underwrite bail bonds.

If the person who has been bonded appears at trial as required, the bail bond is terminated and the agreement ended,

## Bailing on Justice (cont.)

although those who paid the bond fee to a bondsman do not get it back. If the person does not appear at trial, the bondsman is responsible for finding them – at this stage, they are colloquially called a “skip” – and returning them to custody. If the bail bonding agency is unable to do this, they are liable for paying the entire bail amount to the court (forfeiture). Bondsmen will then turn to the people who signed the bond agreement and take whatever actions are necessary to recover their costs.

For-profit bail bonding is a system that exploits low-income communities; it is ineffective at safely managing pretrial populations, distorts judicial decision-making and gives private insurance agents almost unlimited control over the lives of people they bond out. In some cases, the power the system inherently cedes to bail bondsmen leads to corruption, coercion and criminal collusion.

### As Bail Bonding Industry Grew, So Did Bail Amounts

The average bail amount nearly doubled between 1992 and 2006, from \$25,400

to \$55,500. Among people released on bond, the average bail amount increased from \$7,800 in 1992 to \$17,100 in 2006. Overall, whereas 25 percent of people released on bond had a bail amount set at \$25,000 or more in 1998, that number increased to 37 percent by 2004. Not only do high bail amounts pose a threat to the right of people not to be subjected to “excessive bail” under the Eighth Amendment, they also are believed to put persons with low incomes at a disadvantage when facing plea bargains.<sup>7</sup> People may feel pressured to plead guilty – or plead guilty to more serious charges – because remaining in jail has such significant negative consequences, such as losing their job or housing, or not being able to care for their children.

Many studies over the years have shown that people held in jail pretrial have worse outcomes than those who are released. Those who stay in jail are more likely to be convicted of a felony,<sup>8</sup> receive a sentence of incarceration and receive longer sentences than those who are free while pending trial.<sup>9</sup>

### Money Bail and Bail Bonding have Serious Negative Consequences

People who post bail or pay a bondsman’s fee to get out of jail may deplete their funds and the funds of family members and friends that are needed to pay rent, buy groceries and cover medical expenses or other bills.<sup>10</sup> Those who are unable to pay their money bail or a percentage to a bondsman, and remain in jail, may lose their jobs, default on vehicles, lose their homes, get behind on child support payments, lose custody of dependent children and more. The implications of the bail system can make or break a person’s ability to successfully return to the community after their charges have been resolved.

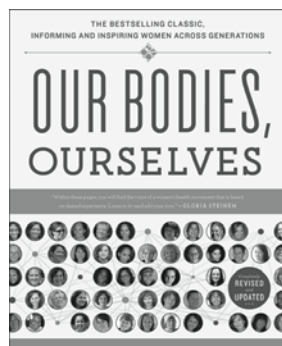
There are also racial disparities in the existing bail bond system. Annual jail population data indicate that while African Americans comprise only 12 percent of the total U.S. population, they made up 38 percent of the U.S. jail population in 2011.<sup>11</sup> Estimates show that the rate of black/African American people being detained in jail was nearly five times higher than white people and three times higher than Hispanic people.<sup>12</sup>

A recent study revealed correlations between race and all pretrial outcomes analyzed, concluding that “each correlation indicated harsher treatment for African Americans.”<sup>13</sup> The study results indicated that African Americans were less likely to be released on their own recognizance than white defendants,<sup>14</sup> and African Americans ages 18 through 29 received significantly higher bail amounts than all others facing charges.<sup>15</sup>

Although the study did not indicate that race directly predicted pretrial decision-making, the relationship or “interaction” between race and other factors – such as age, gender and socioeconomic status – directly impacted pretrial decisions. Since being jailed while awaiting trial has a direct effect on case outcomes such as conviction rates and sentencing, racial disparities in the pretrial process have a ripple effect throughout the justice system. The U.S. Supreme Court has described the pretrial process as “perhaps the most critical period of the proceedings,”<sup>16</sup> thus the impact of race on decisions made during this time, including bail, is of particular importance.

### Money Bail Isn’t Effective at Reducing Failure to Appear or Re-arrest Rates

Money bail is widely believed to incentivize people to show up at court hearings; however, the increased use of money bail and higher bail amounts has



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coincided with an increase in FTA rates. Whereas in the 1960s and 70s the failure to appear rate among the most populous cities was 6-9 percent,<sup>17</sup> the FTA rate for felony cases in 2006 was 22 percent.<sup>18</sup>

According to 2006 data on people facing felony charges in the 75 most populous counties, about 12 percent were under the supervision of a pretrial service agency. Many pretrial service agencies have implemented programs that have high rates of success in lowering re-arrests of people awaiting trial and, if further expanded, it is likely that the rate of re-arrests could be reduced substantially. For example, a program in Santa Cruz County, California found that 92 percent of people under pretrial supervision were not re-arrested for new offenses.

### Bail Schedules Aren't Risk-based and Lead to More Pretrial Incarceration

Some jurisdictions use "bail schedules" or "bond schedules" to determine money bail amounts for alleged offenses. Such schedules may be legislatively mandated or used informally, and are intended to standardize the amount of bail regardless of an individual's personal characteristics or demographics.<sup>19</sup> Among

states, and even within a state, the amount of bail set for a certain offense may vary widely. Often the bail amount is grossly inflated, sometimes greatly exceeding the potential cost of damage or loss were the person found guilty.

Further, the severity of the charge is not correlated with risk of flight or re-arrest, making bail schedules an irrational way to determine whether someone should be held pretrial. Despite the unknowns concerning the effectiveness of bail schedules, they are still relied on heavily due to the general acceptance of money bail in the judicial system. A 2009 study of 112 of the most populous counties in the U.S. found that 64 percent of the participating jurisdictions utilized a bail schedule when determining money bail amounts.<sup>20</sup> Bail schedules are in effect the pretrial equivalent of "mandatory minimums," and result in people who could be safely released from jail remaining incarcerated.

### People Without Counsel at Bail Hearings may Receive Higher Bail Amounts

It is common sense that someone whose liberty is at stake would be better served by having an attorney present. Yet the application of the Sixth Amendment,

which assures the right to an attorney, is largely neglected at hearings where bail is set, as many jurisdictions "instead rely on their own sense as to when counsel should be appointed, if at all."<sup>21</sup> As of 2011, only ten states and the District of Columbia provided for indigent access to counsel at initial appearance hearings before a judicial official, while ten states had no provisions for indigent defense at that stage of criminal proceedings. The remaining 30 states provided indigent access to counsel that varied among different jurisdictions.<sup>22</sup>



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## Bailing on Justice (cont.)

Given the rise in the use of money bail, there is concern that freedom is granted to those who can afford to pay bail or those who can pay a percentage to a bondsman; thus, having an attorney present at a bail hearing to argue for a lower bail amount can be critical.

### High Bail Makes People More Susceptible to Plea Bargains

People held in jail because they can not make bail are put under greater pressure to enter a plea bargain, which has become the *de facto* standard for resolving more than 95 percent of criminal cases. Prosecutors can and often do ask judges for pretrial detention as leverage in plea bargaining negotiations with people who have limited financial resources. Those with children at home, a job or housing at stake, or a desire to avoid the harsh conditions of jail are coerced into entering guilty pleas to avoid pretrial detention, particularly if the time they have already served will count toward their sentence.<sup>23</sup> This not only fulfills the prosecutor's goal of closing another case with a "win" but

also enables the criminal justice system to function, as it couldn't accommodate numerous people who choose to go to trial rather than accept plea bargains.<sup>24</sup> In this way, high bail amounts mean more plea bargains, which help to keep the criminal justice system moving even if justice is not necessarily served.

"We see clients at arraignment not wanting to plea, saying they want to fight their case. Then they hear the bail that the prosecutor is going to ask for, and they'll turn to their defense lawyer and say, 'I'll take the plea,'" said Robin Steinberg, executive director of the Bronx Defenders.<sup>25</sup>

Conviction rates for people charged with felonies stood at 68 percent in 2006, with 96 percent of convictions resulting from guilty pleas. Only 3 percent of those cases actually went to trial.<sup>26</sup> This high rate of guilty pleas is a matter of concern because people often will plead guilty despite their innocence. A 2012 study suggested that in an effort to avoid the ominous maximum penalties of a potential conviction in an inherently coercive<sup>27</sup> and unfamiliar system, more than 50 percent of innocent people held in jail pleaded guilty to get a lower sentence rather than

a strong incentive to take a "lesser" deal from a prosecutor if they fear their attorney (who in many cases is an overburdened public defender) will not be able to prove their innocence.<sup>29</sup> All of these factors demonstrate how pretrial detention is wielded to serve purposes other than assuring court appearance and public safety. This is an abuse of power that leads to wasteful use of taxpayer dollars, unfair treatment of people based on their financial resources and violations of their constitutional rights.

### Alternatives to Money Bail that Protect People's Rights and Public Safety

There are a number of strategies, some of which are discussed below, that can reduce the negative impacts of money bail on low-income populations while safely decreasing the number of people held in pretrial detention.

***Valid risk assessments can provide risk-supported decision-making and eliminate the need for money bail.***

Risk assessments are tools that, when used properly, can provide a dependable prediction as to whether a person will be involved in pretrial misconduct, whether by failure to appear in court or being a danger to the community. Typically in the form of an electronic or paper survey, risk assessments provide a method to make an objective assessment while minimizing bias on the part of the interviewer. The assessment findings provide a classification, usually "low risk," "moderate risk" or "high risk," which aids in determining the most appropriate form of bail and

risk a conviction – albeit wrongful – that would have resulted in harsher punishment.<sup>28</sup>

Particularly in the face of mandatory minimum sentences, people in jail pretrial have


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pretrial supervision.<sup>30</sup>

Although the use of pretrial risk assessments is intuitive and based on more than 30 years of research, the practice of assessing risk in determining pretrial release and bail amounts is not commonplace. Field experts estimate that only about 85 jurisdictions in the U.S. use a validated risk assessment tool in their pretrial release determinations.<sup>31</sup> However, the use of valid risk assessments for release options other than money bail is crucial for reducing the number of people held in jail while ensuring public safety.

Risk assessments support the release of those who can safely be freed from jail (with or without additional supervision conditions), and provide insight into the possible need to detain others who may pose a safety or flight risk. Few states have codified the use of risk assessments but more are beginning to implement such tools.

***The use of citations instead of arresting and transporting people to be booked can provide cost savings.***

The use of citations has been recommended since the 1920s to reduce arrests and subsequent dependence on bail bondsmen. Current models using citations include a risk assessment component (either completed by the police officer or a pretrial service agency), which allows officers to confirm that someone would be an appropriate candidate for a citation versus going through the booking process at a jail. Technology that allows fingerprinting and positive identification of people charged with crimes is now available to assist police officers in the

field. The state of Kentucky has codified the use of citations and is currently in the process of releasing its evaluation findings. Other jurisdictions that have started to increase their use of citations include Maryland and the District of Columbia. A 2012 survey found public support for citations in lieu of arrest for various types of offenses.<sup>32</sup>

***Many people can be safely released on their own recognizance.***

Risk assessment studies indicate that people who are rated low risk and released from jail on their own recognizance generally complete the pretrial process successfully by attending court hearings and not having any incidence of re-arrest. They also are more likely to complete the pretrial process successfully by not having additional court-ordered expectations placed on them,<sup>33</sup> as they are already attending to other responsibilities. This means there is a large proportion of people held in jail who can be released on their own recognizance and trusted to comply with pretrial requirements while avoiding re-arrest.

One of the negative pretrial outcomes that judicial officials are trying to avoid is failure to appear, because this disrupts already overbooked court schedules. However, many missed court appearances are not due to flight. Common reasons given for missing a hearing include forgetfulness, oversleeping, starting a new job, being told the wrong court room and needing to take a family member to the doctor.<sup>34</sup> Recognizing and addressing these issues may help lessen the severity of a missed court appearance and encourage the use of releasing people on their own recognizance.

***Many more people could be safely released with conditions while awaiting trial.***

When used in conjunction with a valid risk assessment, judicial officials may safely release some people with conditions that will ensure their return to court and safety in the community. Common conditions include alcohol and/or drug testing, holding or obtaining a job, attending education classes, curfews, no contact with victims or witnesses,<sup>35</sup> and remaining

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## Bailing on Justice (cont.)

under the supervision of a family member, community service organization or pretrial service agency. However, judicial officials should take precautions to match the conditions with the level of risk determined by the risk assessment. Placing inappropriate or unnecessary conditions on people with low risk ratings, such as drug testing or additional supervision, can result in higher failure rates.<sup>36</sup>

It is recommended that minimal conditions be placed on those who pose less risk and are already attending to other responsibilities. Conditions are generally more useful for people who score high on their risk assessment. Judicial officials should also take care to order requirements that match the needs of each individual.<sup>37</sup> For example, someone who does not have substance abuse problems or a history of substance abuse may not need to undergo alcohol or drug tests; adding such an unneeded condition could cause unnecessary technical violations should the person forget to show up for testing.

***Effective pretrial service agencies can provide the risk assessment and supervision needed to monitor people while their cases are pending.***

As of 2011, less than a third of the 3,007 counties in the U.S. were served by about 300 pretrial service agencies.<sup>38</sup> However, effective pretrial service agencies have been safely saving jurisdictions money since the 1960s by reducing the need to keep people in jail and effectively monitoring them in the community prior to trial. Pretrial service agencies have a demonstrated track record of reducing jail populations, assuring court appearances and maintaining safe behavior among

their clients.

This is accomplished by providing three main services: risk assessment, bail recommendations and community supervision. Most pretrial service agencies use an assessment tool to determine risk for failing to appear at court hearings and engaging in illegal behavior while awaiting trial. Usually under very strict time constraints, pretrial service agency staff will conduct fact-finding to assure the information gathered from all parties is accurate. They will then make recommendations to judicial officials regarding bail decisions. If someone is released under a condition of pretrial service supervision, the pretrial service agency will then provide supervision services as needed in accordance with the risk assessment findings.

Another component that some pretrial service agencies provide (not examined here) are diversion programs in which low-risk individuals agree to certain requirements in exchange for having their record cleared. Not all pretrial service agencies provide diversion programs.

***Court notifications are an effective way to ensure people appear for their court hearings.***

People who are awaiting trial in the community may miss a court date for myriad reasons that are unrelated to an unwillingness to appear, ranging from lack of transportation, uncertainty about the criminal court process or just plain forgetfulness. Pretrial service agencies have been effective in reducing the number of FTAs for people under supervision, but for the thousands of people who are released pretrial without supervision, FTAs may still be a challenge without reminders of court dates. Those who are incarcerated because they failed to appear in court are not generally considered to be a risk to

public safety, and keeping them in jail is a drain of public resources. Jurisdictions that have implemented court date notification systems show promising results in reducing FTAs.

Court notification systems – such as text messages or phone calls made either by a service or a volunteer or court employee – have been proven to reduce FTAs and save thousands of dollars.<sup>39</sup> Failures to appear require a substantial amount of paperwork, add an extra burden to local law enforcement and the courts, and lead to increased jail populations and thus increased incarceration costs.<sup>40</sup> Implementing a court date notification system can help reduce FTA rates, thus saving resources and reducing the number of people held in jail.

## The Current Unfair Bail Bonding System Persists Largely Due to Profit

For-profit bail bonding has become a multi-billion dollar industry backed by special interest groups and large insurance companies. As such, the industry has been successful in using its wealth and influence to promote industry-friendly legislation and thwart reform efforts.

Until the late 1950s, for-profit bail bonding was typically performed by bondsmen who used their own money and property to serve as collateral for the bonds they wrote. Around that time, savvy bail agents such as Florida's Hank Snow sought to expand the industry by getting the financial backing – also known as underwriting – of national and regional insurance companies. This allowed bondsmen to write more and larger bonds. While some for-profit bail businesses are still locally-owned, even those are almost all backed by insurance companies. In fact, some states like Florida no longer allow bail agents to underwrite themselves.

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With the support of insurance companies and the coordination of newly-formed trade associations the industry grew rapidly, but it wasn't until the early 1990s that the for-profit bail bonding influence machine truly began to make its power known. Today, the industry does a conservative estimate of \$2 billion in business annually and is supported by around 30 insurance companies. An estimated 15,000 people are employed in the industry, and commercial bail bond agencies can be found in nearly every jurisdiction within the 46 states that allow the practice.<sup>41</sup> Bail bonding is big business and has the power, money and organization to affect criminal justice policy and practices nationwide.

### The Influence of the For-profit Bail Bonding Industry

As a multi-billion dollar industry with the institutional backing of large insurance companies, bail bond agents and associations have the resources to hire professional lobbyists to protect their interests in statehouses across the country, particularly when legislation involving pretrial services or forfeiture regulations is in play. In recent years bail bond lobbyists have been hired in Florida, Texas, California, Virginia and North Carolina, to name but a few. As in other industries, lobbyists not only work by testifying in front of committees but also by building relationships with legislators. In Maryland, for example, bail bondsmen in 2011 hosted a social event for lawmakers during the legislative session at the Annapolis Yacht Club.<sup>42</sup>

Each state records lobbying spending

differently, making a detailed analysis difficult. However, an American Bar Association study indicated that the for-profit bail industry engages in "multimillion dollar lobbying efforts"<sup>43</sup> to increase its profitability and attack public pretrial service agencies. In California alone, the bail industry has spent almost a half-million dollars on lobbying since 2000.<sup>44</sup>

The effects of strong lobbying efforts should not be underestimated. In places where the for-profit bail bonding industry has launched attacks on pretrial reform, they have occasionally triumphed in the face of opposition by the courts, law enforcement and the public.

Further, campaign donations from the bail bonding industry are substantial. An analysis of state campaign donation records reveals that bail agents, businesses and associations have contributed over \$3.1 million to state-level political candidates from 2002 to 2011.<sup>45</sup> Eighty-two percent of those donations (\$2,600,070) were made within ten states – primarily California, Texas and Florida.

In 1992, members of the for-profit bail industry met to discuss ways to better combat what they perceived as unfair competition by government-funded pretrial service programs. They formed what would become the American Bail Coalition (ABC), a national organization committed to lobbying for the for-profit bail industry. ABC's members include about half of the industry's largest insurance companies and the coalition has become the country's leading for-profit bail advocacy organization. In 1994, ABC joined forces with the American Leg-

islative Exchange Council (ALEC), a powerful conservative group that provides dues-paying corporate members with access to issue-friendly legislators in a private setting for the purposes of influencing policy. ABC has referred to ALEC as a "life preserver" for the organization's ability to turn ABC's agenda into actionable legislation.

ABC president William Carmichael sits on ALEC's Private Enterprise Board, while ABC executive director Dennis Bartlett served on ALEC's Public Safety and Elections taskforce before the taskforce was eliminated in April 2012.<sup>46</sup>

ABC senior legal counsel Jerry Watson, who chaired ALEC's Private Enterprise Board from 2006 to 2008, received ALEC's Leadership Award in 2010. "There is no way to accurately evaluate the benefits thus far to our industry by our involvement in ALEC," he said.<sup>47</sup>

Together, ABC and ALEC have worked to draft model bills that reduce regulation and oversight of bail agents, promote higher bail amounts in bail schedules, increase the court's burden when pursuing bond forfeitures, and restrict the funding of pretrial service agencies and limit those eligible to participate in pretrial release programs.

### Recommendations for Reform

As a result of extensive research, the Justice Policy Institute has set forth the following recommendations for reform:

#### 1. Eliminate money bail.

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## Bailing on Justice (cont.)

ly have an effective pretrial service agency, validated risk assessments and other processes in place to assure people return to the community safely and attend their court hearings. Since 1968, for example,

the District of Columbia has had a robust pretrial services system that implements all the provisions of the Bail Reform Act of 1966. Due to their extremely limited use of nonfinancial bail options, for-profit bail bonding companies, although not banned, are nonexistent because there is no market for their business.<sup>48</sup> Currently 80 percent

of people charged with an offense in DC are released on nonfinancial bail options to await resolution of their charges, while 15 percent are held in pretrial detention. Only 5 percent are released using some form of financial bail, but there is no use of for-profit bail bondsmen. The Pretrial Services Agency has reported that 88 percent of their clients successfully complete the pretrial process by appearing in court and not being re-arrested.<sup>49</sup>

### 2. Ban for-profit bail bonding companies.

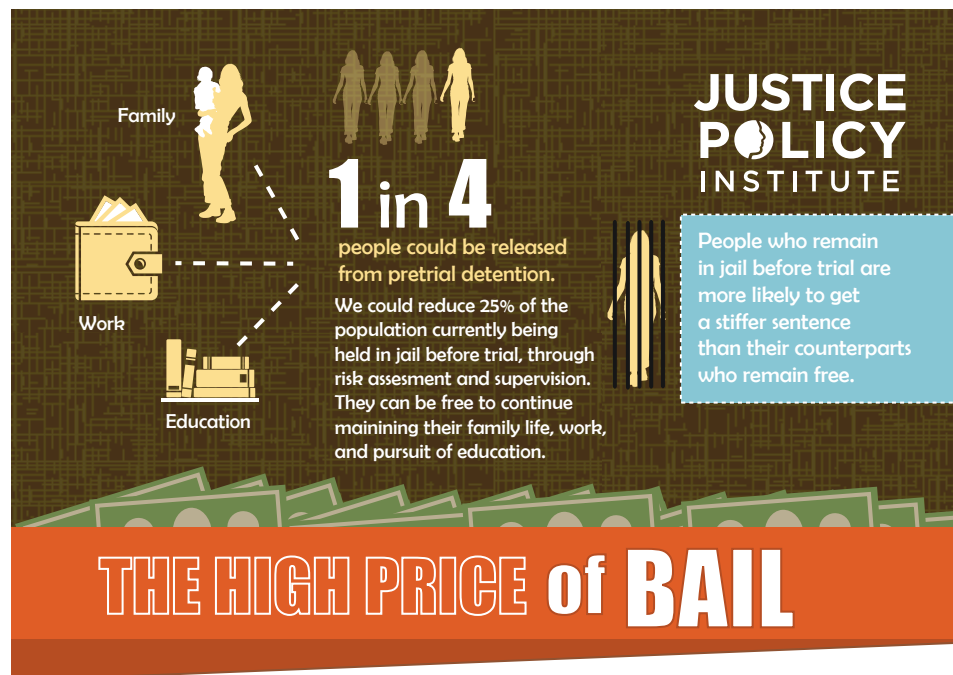
Four states have banned the involvement of private, for-profit bail businesses: Kentucky, Wisconsin, Illinois and Oregon. Around the U.S., various local jurisdictions have chosen to ban bail bondsmen even if their state has not, such as Broward County, Texas<sup>50</sup> and Philadelphia, Pennsylvania. As money bail already presents a number of problems, the addition of for-profit companies only serves to reinforce the practice of money bail. For-profit bail bonding agencies have an interest in preserving money bail, which is the source of their income, at the expense of individuals facing charges and their families, the criminal justice system and taxpayers.

### 3. Include the voices of all involved parties, including victims, to ensure that reforms to the pretrial process are meaningful and effective.

As victims and their advocates provide a unique and critical understanding of the harm done as a result of crime, it is important to include them in the pretrial release decision-making process. As issues differ depending on the specifics of each alleged offense, a systematic consideration of victim advocates' perspectives or guidance may help in determining the most effective pretrial processes. Victim advocates will also be supportive in creating a more just process as victims are interested in seeing the person who actually committed the harm be held accountable, rather than having innocent people who cannot afford to make bail enter into plea bargains just so they can get out of jail.

### 4. Expand community education programs that inform people how to navigate the pretrial process.

The confusing and inherently coercive pretrial process is challenging even for those with adequate financial resources and educational backgrounds. Understanding the process, one's legal rights and what to expect can help people navigate the pretrial process more successfully. However, many



## \$3.1 M in Lobbying

From 2002 to 2011, the bail industry influenced pre-trial policy through at least 3.1 million dollars of donations to state-level lawmakers.

## \$14 B in Bonds

With a typical fee of 10%, over \$1.4 billion is paid annually to bondsmen by arrested people primarily from low-income communities. This is money they will never get back, even if they're found innocent.

## 1992 to 2006

the average bail amounts doubled.

Between 1992 and 2006, the amount of people charged with felonies and released on their own recognizance (i.e., with no financial conditions) decreased from 41% to 28%. Likewise, average bail amounts have increased from \$25,400 to \$55,500, a 118% change increase for the same population.

## 8 in 10

people would have to pay over a full year's wages to make the average bail amount.

In 2006, the average bail amount of \$55,500 was greater than the annual compensation for about 82% of U.S. wage earners.

## 7 in 10

people had to pay money bail.

In 2006, 70% of people accused of felonies were required to post financial bail in order to be released before trial.



#### SOURCES

Average net compensation in 2006: \$37,078 (<http://www.ssa.gov/oact/cola/central.html>)  
Average bail amount in 2006: \$55,500 (2006 SCPS data report)  
125,429,536 wage earners out of the total (153,852,734) earned up to \$54,999.99 - (<http://www.ssa.gov/cgi-bin/netcomp.cgi?year=2006>).  
Thomas H. Cohen and Tracey Kyckelhahn, "Felony Defendants in Large Urban Counties, 2006," State Court Processing Statistics, 2006, Washington, DC: Bureau of Justice Statistics, 2010.  
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are susceptible to fallacies in the pretrial process because they are concerned about their responsibilities outside of jail. It is hard for people to weigh the collateral consequences of a criminal record beyond the immediate impact of losing one's job or not being able to take care of one's children, for example, while they remain incarcerated. Informing communities about the pretrial process and the implications of pretrial decisions could reduce bail amounts, decrease the number of plea bargains to false charges and promote a better, more just pretrial process.

**5. Use citations and summons to reduce the number of people being arrested and processed through jails.**

This is one solution to our jail overcrowding problem, as police officers can more easily dispense citations while on the streets without needing to transport individuals to a booking facility. If more information is necessary, police officers, working alone or in conjunction with pretrial service agencies, can use risk assessments to issue citations and summons instead of arresting someone accused of an offense.

**6. Use standardized, validated risk assessments to determine whom to release from jail and how to release them.**

Before making risk assessments mainstream, it is important to ensure the risk assessment put in place is appropriate. Standardized, validated risk assessments are the key to maintaining objectivity in the pretrial process. These tools produce data that result in informed bail decisions. Some jurisdictions are currently using risk assessments that have not been validated.

Not only can non-validated assessments reduce public safety, they may also reinforce racial and ethnic biases in the system. Once the proper tool is in place, a process for applying risk assessment findings into the pretrial decision-making process must be implemented. Judicial officials and all parties involved must be educated about the assessment tool and how it can assist in making meaningful pretrial release decisions.

**7. Implement measures of pretrial detention and release services to evaluate current programming and better inform pretrial reform efforts.**

Currently, no standardized data is being collected relative to pretrial detention across the nation for both misdemeanors and felonies. There is little consistent measurement among the many pretrial service agencies regarding the outcomes of their services. In order to better understand the impact of pretrial detention and how the U.S. is performing compared to other nations, national data on pretrial detention should be gathered from jails and detention facilities that hold people going through the pretrial process. Additionally, within reasonable expectations, pretrial service agencies should utilize measures already in place to provide the public with a clear picture of their work and their effectiveness in preventing failures to appear and re-arrests of people awaiting trial.


**8. Reporting requirements for the for-profit bail bonding industry should be expanded.**


Currently there is little regulation or oversight of the bail bonding industry.

Bail bondsmen exercise a tremendous amount of power over those held in jail by choosing, based on factors related to their own financial gain, for whom they will post a bond.<sup>51</sup> Bondsmen also have the ability to put people on bond back into jail at any time, for any reason. For-profit bail bondsmen play a crucial role in our justice system that affects both public safety and whether people remain in jail. Only when for-profit bail bonding companies are required to report on indicators of pretrial performance and outcomes will policymakers be able to make educated decisions about the use of money bail and bail bonding as opposed to non-financial pretrial release options.


**9. Utilize pretrial supervision agencies.**

Cost studies confirm that it is much more affordable to assess and monitor people in the community through pretrial services rather than keep them in jail. In order to reduce the justice system's reliance on jails, pretrial services should be expanded to allow for the safe and informed release of persons awaiting trial. Evidence-based practices, such as screenings with a validated risk assessment, are important to ensure the effectiveness of such programs. Pretrial service agencies can assist law enforcement and judicial officials by providing risk assessment and fact-finding services. Using the findings from risk assessments, pretrial service agencies can provide appropriate community supervision to ensure that people complete the pretrial process successfully. Given that pretrial service agencies may also provide other programs that can help





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## Bailing on Justice (cont.)

those awaiting trial (such as substance abuse treatment, job placement, etc.), longer term outcomes of money bail versus pretrial services should be examined.

### 10. Use court notification systems.

Through personally manned or computerized programs, reminding people about their upcoming court hearings has proven to reduce FTA rates. Notification systems should be a part of every court's budget to ensure that time and money are not unnecessarily spent trying to track down or punish those who miss court hearings.

### 11. Amend the Bail Reform Act and bail policies to comply with the Equal Protection Clause.

Current practices allow for people to be treated differently within the criminal justice system based on their financial status; this may be a violation of the Equal Protection Clause and should be remedied. Elimination of money bail is an important step towards eliminating disparities in our criminal justice system. ■

\* Tracy Velázquez is Executive Director of the Justice Policy Institute (JPI), and Melissa Neal and Spike Bradford are JPI Senior Research Associates. This article, written exclusively for *Prison Legal News*, is largely excerpted from two JPI reports, "Bail Fail: Why the U.S. should end the practice of using money for bail" by Melissa Neal, and "For Better or For Profit: How the bail bonding industry stands in the way of fair and effective pretrial justice" by Spike Bradford. Both publications are available in their entirety at [www.justicepolicy.org](http://www.justicepolicy.org).

[Ed. Note: For prior coverage of the bail bonding industry in *Prison Legal News*, see: *PLN*, Sept. 2012, p.36; Dec. 2010, p.23; Jan. 2009, p.30; and Dec. 2007, p.34].

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## Guantanamo Detainees Cost \$800,000 Annually

The U.S. military base at Guantanamo Bay, Cuba has become the world's most expensive prison, at around 30 times the average cost to house prisoners in detention facilities in the United States.

Each year the Department of Defense "spends approximately ... \$800,000 per detainee," Attorney General Eric Holder, Defense Secretary Leon Panetta and other Cabinet members wrote in a letter to Senate Republican leader Mitch McConnell. "Meanwhile, our federal prisons spend a little over \$25,000 per year, per prisoner, and federal courts and prosecutors routinely handle numerous terrorist cases a year well within their operating budgets." [See: *PLN*, Sept. 2012, p.26].

The prison at Guantanamo opened in January 2002 and as of September 10, 2012 held 167 "enemy combatants" or detainees suspected of terrorist acts, at a cost of about \$139 million annually. More than 600 detainees have been released since the prison opened; of those currently held at Guantanamo, 87 have been approved for release but remain incarcerated.

"We are running a five-star resort and not a detention facility for terrorists," said Florida Republican Representative Allen West, a former Army lieutenant colonel. "For example, why do they need 24 cable-TV channels?"

Cooperative detainees do get in-cell

satellite television, which allows them to watch sports, news, religious programs and Arabic soap operas. They also have access to a 24,000-title library that contains videos, magazines and books – including popular selections like *Harry Potter*. Detainees who are taking a life skills class can use laptop computers to practice writing résumés, in case they are released.

Daily meal costs per detainee at Guantanamo are \$38.45, compared to under \$2.30 for Florida state prisoners.

Of course the guards at the military prison have cable television, too. And their own gym, housing quarters, newsletter, dining room, chapel, mental health services, massage chairs, mini-mart and movie theater. Plus the base has a school system for the children of Guantanamo staffers.

A guard holding the rank of petty officer 3rd class with four years of Navy experience earns \$2,985.84 per month and hazardous duty pay equal to combat pay in Kabul, Afghanistan. A commander at Guantanamo with fifteen years' experience and no children earns \$7,840 a month, inclusive of hazardous duty pay. The base has a revolving staff of 1,850 employees, including guards, laborers and intelligence analysts.

And the costs don't stop there. The military is spending \$750,000 to replace the

camp hospital with a new "infirmary hub" and "expeditionary medical shelters." No one knows what it will cost to equip the new hospital; the Navy Logistics Command has put out bids for supplies ranging from microscopes to resuscitators.

Guantanamo officials are also contracting for capital improvements, such as \$2 million worth of new computers. "Everything from paper clips to bulldozers," as well as personnel, must be brought in on ships or aircraft, driving up costs, noted retired Army Brigadier General Greg Zanetti, who served as Guantanamo's deputy commander in 2008.

"What complicates the overall command further is the lawyers, interrogators and guards all operating under separate budgets and command structures," Zanetti said. "It's like combining the corporate cultures and budgets of Goldman, Apple and Coke. Business schools would have a field day dissecting the structure at Guantanamo."

Which is an indication that the cost of housing detainees at Guantanamo has less to do with expensive amenities for prisoners, and more with staffing expenses and the inherently high overhead of maintaining an island military base on foreign soil. ■

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# From the Editor

by Paul Wright

This month's cover story on the bail bonding industry focuses on one of the lesser discussed but equally important economic players in the U.S. prison industrial complex. One of the main causes of jail overcrowding in many local jurisdictions tends not to be mundane things like crime but rather bail practices – and as with the rest of our nation's criminal justice system, the burden and expense fall disproportionately on the backs of the poor.

Many pretrial detainees languish in jail, presumption of innocence be damned, simply because they cannot afford to post bail even in small amounts. The Justice Policy Institute recently issued several detailed reports on the bail bonding industry that formed the basis for this month's cover story. The bail bonding industry, which is almost totally unregulated, exists exclusively to profit from the criminalization of poverty at the expense of everyone else. As the need for criminal justice reform becomes even more urgent there is equally a need to question the involvement of the many parasitic businesses that profit from mass incarceration. These include private prisons, prison phone companies and, yes, bail bondsmen.

PLN readers should have received our annual fundraiser letter by now. Unlike many non-profits, we do not bombard our readers with endless pleas for donations. Rather, we do one end-of-the-year fundraiser to ask for your support because our income from subscriptions, book sales and advertising revenue does not cover all of our operational costs.

This year we are asking for your support to help fund the Campaign for Prison Phone Justice. We are close to getting the Federal Communications Commission (FCC) to cap the rates for interstate prison phone calls, but need to keep the pressure on them. Thus, this year's annual fundraiser asks for two things: that you contact the FCC and ask them to act on the Wright petition (see the ad on page 39 for details on how to do this), and to make a donation to help cover the expenses of the Campaign for Prison Phone Justice.

This is very much a case where you as an individual can make a difference, first by writing to the FCC and telling

them how you and your family have been negatively affected by the high cost of prison phone calls; second, by making a donation to PLN to help us cover the costs of staffing the campaign; and lastly by encouraging your friends and family members to contact the FCC and make donations, too. Every letter and every contribution helps. Our goal for this year's annual fundraiser is \$60,000 to cover our end of the Campaign for Prison Phone Justice through 2013.

As the holidays approach, a subscrip-

tion to PLN or some of the books we distribute make the perfect gift for someone who has everything or the person in prison who can receive virtually nothing. We have added a number of new titles to PLN's book store, so please be sure to review our book list on pages 53 and 54 of this issue of *PLN*. The book list did not run in last month's issue and we apologize for any inconvenience that may have caused.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

## \$15,700 Plus Boombox to Settle California Prisoner's Excessive Force Claim

The California Department of Corrections and Rehabilitation (CDCR) agreed to pay \$15,700 plus a boombox to settle a prisoner's excessive use of force claim.

The lawsuit, filed by state prisoner Tracey B. Washington, stemmed from events that occurred at Salinas Valley State Prison. Washington's problems began on April 10, 2004, when he was told to pack his property to move to another unit. He was initially resistant but then agreed to comply.

Guards became impatient with how long it took him to pack, so they intervened and completed retrieving his property. Washington was handcuffed in front due to a physical disability and taken to the sally-port gate. Once in the sally-port, Sgt. E. Moore shoved him face-first into the fence and held him there. Other than a medical report at Washington's request, no reports were written about the incident.

Two days later, Washington's unit was on "cell-feeding" status. At the breakfast meal he asked guard C. Baez for some blankets because he had no bedding and his cell was cold. Baez responded that because it was a weekend, he could not get any blankets until the next day. When it was time to turn in the food tray, Washington again asked for a blanket, requested to see a supervisor and refused to return the tray when his requests were denied.

A few hours later, Baez and CDCR guards L. Hernandez, Zamora and Aguire approached Washington's cell with their batons in hand. When the cell

door opened, Hernandez rushed in and hit Washington in the mouth with his baton.

As the cell door was closing, Washington stuck his cane in the door, causing it to jam. The guards' attempts to break the cane were initially unsuccessful, so they pepper sprayed Washington twice. He then complied with an order to strip and cuff up. Once cuffed, guard A. Gomez held onto the cuffs through the door's "feed-port" and subsequently snatched the cuffs upwards and backwards, spinning Washington around and flinging him to the concrete floor face-first.

Washington filed suit in federal court, alleging Eighth Amendment violations for excessive use of force. The case settled on March 8, 2012 for \$15,700 and a provision that Washington be given or allowed to purchase a boombox, which are no longer permitted under CDCR property rules. He was represented by attorneys Margaret Anne Keane and Sebastian L. Miller. See: *Washington v. Duncan*, U.S.D.C. (N.D. Cal.), Case No. 3:05-cv-02775-WHA.

Washington later filed a motion seeking to enforce the settlement, as CDCR officials would not give him a boombox or let him buy one and have it "grandfathered in." However, in a September 18, 2012 order, the district court held that it no longer had jurisdiction over the case to enforce the settlement, and that Washington would have to file a breach of contract suit in state court if he wanted to contest the CDCR's refusal to let him have a boombox pursuant to the settlement agreement. ■

# Annual PLN Fundraiser

Prison Legal News, a project of the Human Rights Defense Center, cannot fund its operations through subscriptions and book sales alone. We rely on donations from readers and supporters like you!

We only conduct one fundraiser a year and do not bombard our readers with endless donation requests. Every dollar counts and is greatly appreciated, and is put to good use.

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# Liberty for Sale: Should Ohio Prisoners be Commodities in a For-Profit Venture?

by German Lopez, *Cincinnati CityBeat*

In 1997, Corrections Corporation of America (CCA) opened a private prison in Youngstown, Ohio. The Northeast Ohio Correctional Center was to hold out-of-state prisoners with the promise of profits and tax revenue for Youngstown, a largely industrial city that had struggled economically since its steel industry went downhill in the 1970s and '80s. CCA quickly staffed the prison with inexperienced guards and then received 1,700 prisoners – most charged with violent crimes – transferred from Washington, D.C. Within a year, 20 prisoners were stabbed and two were murdered. Six escaped.

Public outrage came fast. Citizens in Youngstown demanded the prison be shut down. Local and national media outlets picked up the story. *Mother Jones*, a respected, independent investigative news magazine, reported that George McKelvey, then-mayor of Youngstown, told reporters, “Knowing what I know now, I would never have allowed CCA to build a prison here.” The city sued CCA to get the prison to abide by new safety standards.

CCA eventually shut down its Youngstown prison because having to abide by the new standards made it no longer profitable. The prison remained closed for a few years and then opened under a new model – as a holding center for people waiting for federal court hearings. Today, the Youngstown example seems long forgotten. Last year Ohio became the first state to sell a state-owned prison to a private company. This deal, which was fully supported by Gov. John Kasich and the Republican-controlled Ohio legislature, sold the Lake Erie Correctional Institu-

tion to CCA, the same company that couldn't handle running the Youngstown facility in 1997.

In the past, private prison companies built their own prisons, and at times state governments have asked private companies to manage state-owned prisons. But this is the first time in history a state prison has been sold to a private company, which will house the state's prisoners for at least 20 years. Ohio had actually planned to sell five prisons as part of its 2011-12 budget, but the state was only able to complete the Lake Erie deal because none of the other sales saved enough money.

Critics of prison privatization are not happy with the sale or the precedent it sets. Mike Brickner, a researcher at the ACLU of Ohio, citing the lessons of Youngstown, wants Ohio to remember the security and public policy risks behind private prisons. And Policy Matters Ohio, a left-leaning research organization, suggests that private prisons might not end up saving the state money anyway.

## Private Problems

The primary concern over the private prison model is the possibility of a fundamental conflict of interest. America's main private prison companies – CCA, Management and Training Corporation (MTC) and the GEO Group – make more money when more people are incarcerated. But it's largely believed to be in the public interest to imprison as few people as possible and rehabilitate prisoners to be functional citizens. This presents a fundamental contradiction for policymakers: They want to hire private prison operators, but then

private prison operators, which gain a substantial amount of power by virtue of owning and running prisons, push against policies the public wants and needs.

“The companies get paid a per diem for the number of people that are in their prison, so it's in their interest to keep those prisons as full as possible,” Brickner says.

The conflict between costs and adequate safety measures presents real-life consequences. A study at George Washington University found private prisons have a 50 percent higher rate of prisoner-on-staff assaults and a 66 percent higher rate of prisoner-on-prisoner assaults than publicly managed prisons. Another study, in the *Federal Probation Journal* in 2004, had similar results – it found that, compared to public prisons, private prisons have a 50 percent higher rate of prisoner-on-staff assaults and prisoner-on-prisoner assaults.

These examples suggest making prisons profitable by cutting costs might not be sustainable. A 2011 ACLU report, which Brickner co-authored, attributed the higher rates of assault in private prisons to poorly trained staff. The report noted high staff turnover rates at private prisons: 53 percent compared to 16 percent at public prisons. According to the ACLU, the high turnover rate creates a vicious cycle involving private prisons shuffling less experienced, poorly trained staff to replace former staff.

Focusing on the bottom line also presents problems for rehabilitative programs. The ACLU report found the two private facilities in Ohio have fewer rehabilitative programs than prisons managed by the state.

Brickner says this makes sense from a profit perspective: “It doesn't make any difference to them whether or not a person eventually integrates back into society. Looking from a cynical approach, it actually helps them if that person (is convicted again) because they come back into their prison and they get money off them again.”

There is also the issue of accountability. In Ohio, the state Supreme Court has repeatedly ruled against anyone seeking public records from private entities doing

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public work. The court instead said private facilities – specifically a nonprofit community corrections organization in the case of *Oriana House, Inc. v. Montgomery* – do not fall under public records laws.

Brickner says Gov. Kasich's proposal is unlike past proposals because it is not just leasing state prisons and letting private companies operate them. Instead, the state sold the land and prison to a private company. Brickner is worried that private ownership of the prison will make it more difficult for the state to take back the prison from CCA if something goes wrong.

But practicality is not the only reason for opposition and criticism of private prisons. The ACLU also opposes the private prison model from a philosophical standpoint.

"The model of prison privatization is that they earn their money off of incarcerating people, and we believe that incarceration is one of the greatest deprivations of liberty that the government can dole out to a person," Brickner says. "We should not be in the business that private corporations earn money off the deprivation of liberty."

### Faulty Math

One of the more surprising assertions made by critics of private prisons is that privatization does not save money. If supporters of private prisons have one thing on their side, it's that private prisons are supposed to be more efficient in order to generate profit. While these companies certainly enjoy profits – CCA posted \$162.5 million in net income for 2011 – it turns out those profits might not come at the benefit of taxpayers.

That was the conclusion of reports released by Policy Matters Ohio in 2011. The reports did not conclusively find private prisons cost more than public

prisons, but they did find that the state is using some fairly shady math to get its savings numbers.

Zach Schiller, a researcher at Policy Matters Ohio, says the reports' findings show the state's claim that it's getting more than 5 percent in savings, which is the legally required amount to allow a private prison operation, has not been adequately demonstrated.

The state did demonstrate an immediate, one-time profit on the sale of the Lake Erie facility. The facility cost about \$43.9 million to build, and the state sold it to CCA for \$72.8 million. That's a \$28.9 million profit.

Where problems arise is how the state calculates savings from ongoing contractual costs. Under the contract, the state has to pay two major fees to CCA: a per diem fee, which is how much the state pays each day for each prisoner held at Lake Erie; and an annual ownership fee, which is how much the state pays for using CCA's facility to house prisoners. The question is whether these fees will cost the state more than managing the prison would have cost under public ownership.

Schiller says it's possible the fees might be more expensive. He points to the faulty budget gimmicks unveiled in the Policy Matters Ohio reports. One such gimmick is the state's assumption that each prisoner transferred to a private prison would result in one-to-one savings. In other words, if the state transferred 5 percent of its prisoners to a private prison,

the state assumed it would produce 5 percent in prison health care savings.

But Schiller says that kind of assumption makes little sense. In reality, if the state is transferring 5 percent of its healthiest, safest prisoners to a private prison – somewhat likely, says Schiller, considering private prisons rarely house the most dangerous, unhealthiest criminals – that is not going to produce 5 percent in savings. On the contrary, healthy prisoners use considerably fewer health services, so it's possible transferring 5 percent of prisoners could only produce a fraction of that in medical savings.

That budget trick was used repeatedly in the state's numbers, including food and education programs, according to the Policy Matters Ohio report. This led Gerry Gaes, former research director at the federal Bureau of Prisons and visiting scientist at the National Institute of Justice, to call the state's numbers "bogus" in the Policy Matters Ohio report.

"These get to be very specific, narrow criticisms, but, nevertheless, I think they undercut the state's numbers," Schiller says. "They make it difficult to have any confidence that we're saving money."

Schiller further noted the state's announcement detailing what it will do with the prisons that weren't sold. The state originally intended to sell five prisons. Instead, the state sold one and put two others under private management. The state also took the North Coast Correctional Treatment Facility that was originally managed

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## Liberty for Sale (cont.)

by MTC, put it back under public ownership and combined it with Grafton Correctional Institution.

“What we found is the greatest amount of savings was not by private operation,” Schiller says. “It was by taking the one private facility back into public control and combining it with another [facility].”

Schiller acknowledges the merger could play a bigger role in the savings than public ownership, but he says, regardless, the example undermines the cost savings of privatization – and that’s all by using the state’s own numbers.

There are also problems that could pose more costs down the road for taxpayers. To Schiller, one troubling highlight of the deal with CCA is that the state must pay for 90 percent occupancy even if the prison isn’t 90 percent full. That means if the state were successful in reducing its prison population, it would still have to pay for 90 percent occupancy at Lake Erie.

Schiller says such a prison population reduction is unlikely, but if it came to pass within the next two decades it would force the state to either transfer prisoners to the Lake Erie facility or not make full use of the capacity it’s paying for.

But perhaps the most troubling part of the deal with CCA is how straightforward the company is with its intent to raise costs to the taxpayer for the sake of profit. The latest Policy Matters Ohio report on private prisons found part of CCA’s strategy for growth is “enhancing the terms of our existing contracts.” In other words, CCA will try to raise fees to make bigger profits by renegotiating its contract to include more income and less cost. The contract between CCA and Ohio will be renegotiated every two years.

To illustrate CCA’s tactic, Schiller points to a 2008 case in Colorado when CCA threatened to bring in out-of-state prisoners to fill up beds in one of its four facilities in Colorado if the state did not increase the per diem fee by 5 percent. Colorado eventually compromised with CCA by approving a 4.25 percent hike, but the state later rescinded the hike in the face of budget problems. Still, Schiller says this shows the extent to which CCA will go to make a profit at the expense of everyone else.

*Cincinnati CityBeat* repeatedly contacted the offices of CCA, the GEO Group and MTC, the three major private corrections operators in Ohio, so they

could respond to criticisms leveled by the ACLU of Ohio and Policy Matters Ohio. MTC did not grant an interview before press time, and CCA and the GEO Group never responded.

### Follow the Money

If private prisons are so bad, why do state governments continue allowing them? Brickner attributes this to an honest belief among policymakers that privatization is cheaper, but he also points to campaign contributions.

“We can’t ignore that there is a lot of money at play here,” says Brickner, citing the massive profits from private prison companies and the campaign contributions they give to politicians.

According to campaign contribution data from the Ohio Secretary of State, the GEO Group donated \$10,000 to Kasich and \$52,000 to the Republican Governors Association, which helped fund Kasich’s gubernatorial campaign, in 2010. Between 2003 and 2006, CCA gave \$7,000 to Ohio Republicans and former Gov. Bob Taft. In 2010, CCA gave \$50,000 to the Republican Governors Association. There were also reports that CCA gave \$10,000 to Kasich’s transition fund in December 2010. Between 2007 and 2010, MTC donated a total of \$99,000 to state policymakers.

That money might not seem like much in comparison to federal campaigns that raise millions of dollars a month. But in state terms, it’s a lot. Three contributors giving a few hundred thousand dollars is a decent amount of cash in the context of state elections, and that’s only what can be found in public records.

There are also some questionable connections between state officials and private prison companies. Kasich’s office in particular has been heavily involved with CCA in the past. Gary Mohr, director of the Ohio Department of Rehabilitation and Correction (ODRC), is a former CCA employee. Donald Thibaut, former chief of staff for Kasich when Kasich was in Congress, now works as a lobbyist for CCA. When he was a U.S. senator for Ohio, Ohio Attorney General Mike DeWine helped CCA reopen its Youngstown prison in 2004 with a federal contract.

Rob Nichols, spokesperson for Kasich, said he could not comment on private prison issues because the state is dealing with a lawsuit filed by the Ohio Civil Service Employees Association (OCSEA), a union for public prison staff, regarding

private prisons.

Ohio state Senator Bill Seitz admits to accepting donations and even meeting with MTC officials, but he says that has little bearing on his support of private prisons.

“If I thought private prisons were going to not follow the program of sentencing reform and recidivism reduction through increased training and educational opportunities in prison, I certainly wouldn’t support privatizing prisons,” he says.

Brickner says it’s true that contracts with private prisons typically require them to keep similar standards to state prisons, but he says that’s not how it works in reality: “They may provide the same number of programs, but that doesn’t go into how effective the programs are. There isn’t really anyone monitoring or holding accountable the private prisons for how effective they are. That’s typically not worked into the contracts.”

In his defense, Seitz cited the Talbert House, a halfway house that he says is “among the most highly respected organizations in all of Hamilton County.” He added: “There’s nothing intrinsically evil about having private companies in this space. Many of them do a very fine job.”

*Cincinnati CityBeat* repeatedly attempted to contact the ODRC to answer questions regarding criticisms of private prisons and the possible conflict of interest presented by Mohr being director of the ODRC. The department refused to grant an interview. Instead, the ODRC offered a statement saying Mohr separated himself from the prison sale process. No further details were provided.

### Alternative Reform

Regardless of what anyone thinks about private prisons, the fact is Ohio’s prisons are overcrowded. This is reflective of a nationwide problem. A 2008 study by the Pew Center on the States found that one in 100 Americans is behind bars.

Privatization offers what Brickner says policymakers see as an easy solution. Politicians typically want to keep an image of being “tough on crime,” but they also know costs have to be cut somewhere. With the belief privatization makes prisons cheaper, Brickner says politicians can have their cake and eat it too.

The ACLU argues private prisons go after the symptoms of the problem, not the cause. If policymakers want to tackle the issue of prison costs, the ACLU says they should pass reform that makes im-

prisoning so many people unnecessary.

To the credit of Republicans that typically support private prisons, many have supported sentencing reform. Seitz in particular sponsored S.B. 337, which provides new ways for criminals to get their records expunged and allows released criminals to obtain a certificate of qualification from courts for employment. He also supported H.B. 86, which provides sentence-reduction incentives for prisoners to get job training and education programs while in prison. Both bills were passed by the Republican-controlled Ohio legislature and signed into law by Kasich.

But Brickner and the ACLU argue that's not enough. Instead, they say policymakers should move away from private prisons, and push for more policies that stop putting nonviolent offenders behind bars. The ACLU cites the war on drugs as one policy that puts people in prison for nonviolent crimes.

Some organizations are pushing more forcefully against private prisons. The OCSEA is suing the state after union members were fired due to prison privatization, including the sale of the Lake Erie facility. The union claims it's unconstitutional for the state to sell its prisons to private entities.

But Brickner is not convinced more reform is coming, and he doesn't see Republicans backing down on private prisons anytime soon. He cites the experience of the 1990s, in which states jumped on board with prison privatization, only to back down by the early 2000s when clear problems arose – like those at Youngstown.

“Unfortunately, what we have to wait for the tide to turn is another round of safety issues at these facilities,” he says.

In other words, for policymakers to address concerns, Brickner believes history will have to repeat itself. 🐻

*This article was originally published by Cincinnati CityBeat (www.citybeat.com) on September 19, 2012 in a longer version. This edited version is reprinted with permission.*

*Ed. Note:* On September 25, 2012, the ODRC said it would not seek further privatization of state prisons. “We’re going to stay the course on those [sentencing reforms] and I think privatizing additional prisons would take away from that reform effort that we have, so I’m not anticipating privatizing any more prisons in the short term here,” stated ODRC director Gary Mohr.

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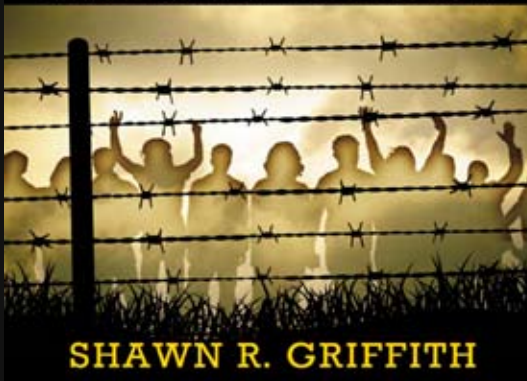
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# ***PLN* Readers Flood the FCC with Letters; Campaign Fights for Prison Phone Justice**

*by Mel Motel*

In June 2012, *Prison Legal News* began running a full-page flyer for the Campaign for Prison Phone Justice, asking people to get involved and take action. Within weeks, letters from *PLN* readers began flooding the Federal Communications Commission, urging the FCC to cap the high costs of interstate prison phone calls. The letters and comments described the exorbitant phone rates that prisoners and their families have to pay, and explained the consequences – personal, financial and societal – of expensive prison phone calls.

“My parents, 84 and 85 years old, barely can pay their bills with their income,” wrote prisoner Robert Taylor in his letter to the FCC. He noted that telephone calls are the only way to communicate with his aging parents, as his mother suffers from macular degeneration, a medical condition that results in loss of vision, and cannot read or write.

His parents “often go without meals to be able to cover the cost of hearing my voice,” Taylor said. “It’s a shame for these companies to be able to gouge our families so hard that they have to miss meals just to speak to their loved ones.”

According to FCC Docket #96-128 (known as the Wright Petition), more than 200 people from Oregon to Virginia have submitted letters since *PLN* started running the Campaign for Prison Phone Justice flyer in June. Of those, 173 were comments from prisoners and the rest came from prisoners’ families, friends and other people concerned about expensive prison phone calls.

The letters to the FCC highlight the devastating effects that prison phone rates have on prisoners’ ability to communicate. Vickie Goodwillie lives in Eugene, Oregon, but her son is incarcerated at the Mississippi State Penitentiary in Parchman. “Because of the cost of collect phone calls being so high, I haven’t been able to speak to him at all,” Goodwillie said.

Homeless and with an income of just \$130 a month, she added, “If the calls were cheaper, I could pay a friend at least once a month for a collect call. But as it is now I’d be paying my friend every penny of my income and have nothing left over to live on.”

“Right now, my father is dealing with health problems and I can’t call him to see what’s going on,” wrote Terry Barton, a prisoner at the Sussex II State Prison in Virginia. “Every day I just hope I don’t get bad news that he’s passed away and I couldn’t talk to him before it happens.”

The Campaign for Prison Phone Justice is a joint project of Media Action Grassroots Network (MAG-Net), Working Narratives and the Human Rights Defense Center – the parent organization of *Prison Legal News*. The Campaign’s current focus is on the national issue of getting the FCC to limit interstate (long distance) prison phone rates, as the FCC only has jurisdiction over interstate phone services. The next phase will prioritize supporting statewide campaigns for fair local and intrastate phone rates for prisoners and their loved ones.

Of course the Campaign is not the first effort to mobilize people to fight against the unjust prison phone industry. When *PLN* researcher and writer Mike Rigby collected data on prison phone contracts in 2008 and 2009 [see: *PLN*, April 2011, p.1], he found that eight states did not accept kickback commissions from phone companies, which resulted in lower rates. Many organizations and individuals in those states had worked to put pressure on policymakers to end price-gouging by prison phone companies.

The Campaign for Prison Phone Justice has drawn lessons and inspiration from such organizing to continue to push for changes on the federal level and to strengthen local efforts, and letters from prisoners have helped drive the message home in meetings with elected officials.

In August 2012, Amalia Deloney from MAG-Net and the Campaign for Prison Phone Justice met with staff from FCC Commissioner Mignon Clyburn’s office, highlighting the hundreds of letters and comments entered on the docket for the Wright Petition.

“Staff were very excited to hear about the hundreds of online postcards filed from the Mother’s and Father’s Day actions, and they were incredibly moved to hear about the letters from inmates themselves,” Deloney stated.

Additionally, the Campaign has

brought together grassroots groups and individuals to meet with elected officials in California, New York and West Virginia to urge them to press the FCC to act on the Wright Petition, which has been pending for almost ten years.

Some federal lawmakers are taking up the fight for prison phone justice, too. On September 12, 2012, U.S. Representatives Henry A. Waxman (D-CA) and Bobby L. Rush (D-IL) sent a letter to FCC Chairman Julius Genachowski, calling on the FCC to take action on the issue of high prison phone rates.

“Research shows that regular contact between prisoners and family members during incarceration reduces recidivism. Phone calls are the primary means for families to maintain contact with incarcerated relatives,” the Representatives wrote in their joint letter.

“Experts across the political spectrum have recommended minimizing the cost of prison phone calls as a way to support strong family relationships with inmates,” Waxman and Rush noted. “Yet under current policies and practices, prisoners and their families pay unusually high rates for phone service that discourage regular contact.”

No one knows better than prisoners and their family members who is harmed by the high phone rates and the commission kickbacks that drive up the cost of prison phone calls.

“It is unfair to lock up the poorest people in this country only to allow predatory phone companies to exploit them,” federal prisoner Kevin Johansen said in a letter to the FCC. “Limiting a prisoner’s connection to his family damages his stability in prison and in transitioning back into the [free]world.”

“I hope you can see that the practice of prison phone price gouging affects the prisoner’s family and society as a whole in a way that outweighs any justification put forth by prison officials. All they care about is kick-backs,” wrote Matthew Davis, incarcerated at the Stateville Correctional Center in Illinois.

Commenters who sent letters to the FCC also spoke about the impact of exorbitant prison phone rates on their ability to communicate with their children.



"The phone call prices are so outrageous it is impossible to keep in touch with my children," remarked Eric Vickers, one of the many prisoners at Sussex II State Prison in Virginia who contacted the FCC.

"Although I cannot have an immediate impact on my children's lives, I would still love to have some type of influence on them and the choices they make so that hopefully they never end up inside the walls of prison other than to visit their father," he added.

"Please help us, help our children. Please," Vickers stated. His request is a reminder that the effects of high prison phone rates extend beyond prisoners, to their families and to entire communities.

However, prisoners and their supporters are not the only ones contacting the FCC; prison phone companies are submitting letters and comments, too. For example, on October 3, 2012, Global Tel\*Link, the nation's largest prison phone service provider, filed a comment with the FCC that summarized its positions on issues related to the prison telephone industry, including justifications for high phone rates. Five days later the Human Rights Defense Center filed a response

with the FCC, rebutting the points addressed by Global Tel.

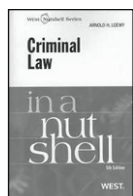
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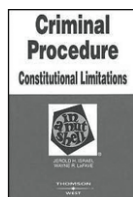
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If you don't take action, then you have no right to complain about the abusive practices of prison phone companies and how they exploit prisoners and their families. So get involved, and encourage others – both in prison and on the outside – to get involved, too. The website for the Campaign for Prison Phone Justice is: [www.phonejustice.org](http://www.phonejustice.org).

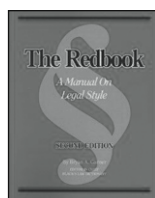
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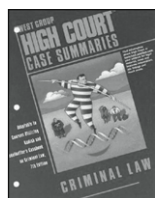
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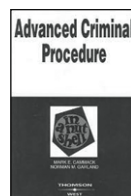
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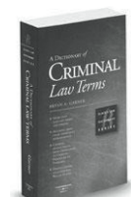
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# The Other Death Sentence

*More than 100,000 Americans are destined to spend their final years in prison. Can we afford it?*

*by James Ridgeway*

William “Lefty” Gilday had been in prison 40 years when the dementia began to set in. At 82, he was already suffering from advanced Parkinson’s disease and a host of other ailments, and his friends at MCI Shirley, a medium-security prison in Massachusetts, tried to take care of him as best they could. Most of them were aging lifers like Lefty, facing the prospect of one day dying behind bars themselves, so they formed an ad hoc hospice team in their crowded ward. They bought special food from the commissary, heated it in an ancient microwave, and fed it to their friend. They helped him to the toilet and cleaned him up. Joe Labriola, 64, tried to see that Lefty got a little sunshine every day, wheeling his chair out into the yard and sitting with his arm around him to keep him from falling out.

But Lefty, who was serving life without parole for killing a police officer during a failed bank heist in 1970, slipped ever deeper into dementia. One day he threw an empty milk carton at a guard and was placed in a “medical bubble,” a kind of solitary confinement unit with a glass window that enables health care staffers to keep an eye on the prisoner. His friends were denied entrance, but Joe managed to slip in one day. He recalls an overpowering stench of piss and shit and a stack of unopened food containers—Lefty explained that he couldn’t open the tabs. Joe also noticed that the nurses in the adjoining observation room had blocked the glass with manila folders so they wouldn’t have to look at the old man.

Lefty had been popular among the prisoners, though. A minor-league ballplayer turned 1960s radical—his southpaw, not his politics, earned him the nickname—he was the subject of one of the most infamous manhunts in Massachusetts history. He had already been in and out of prison several times on robbery offenses when he fell in with a group of Brandeis University students who decided that stealing guns and money could help them foment a black revolution. They held up a bank in 1970, and when Boston police responded, guns drawn, a patrolman named Walter Schroeder was shot dead. Lefty claimed that he never meant

to shoot the guy—that it was a warning round that ricocheted—but the jury didn’t buy it, and he was convicted of first-degree murder and sentenced to death. (The students got no more than seven years).

In 1972, after the Supreme Court briefly banned capital punishment, Lefty became a lifer. Over time, he also became a jailhouse lawyer—a prisoner paralegal who puts together legal cases for fellow prisoners—settling disputes and eventually gaining a rep as something of an elder statesman. When Lefty died last September, his friends were denied permission to hold a memorial service in the prison chapel, so they ended up holding it in a classroom. The service culminated in some 80 men sailing paper planes into the air as a tribute. “We loved the old man,” Joe Labriola wrote me in a letter.

Lefty Gilday was no ordinary prisoner, but in one regard he typified a growing segment of America’s prison population—geriatric prisoners. The United States leads the world in incarceration, with more than 2.2 million people in its prisons and jails, and the graying of this population is shaping up to be a crisis with moral, practical and economic implications for cash-strapped governments. In recent years, a growing number of advocates—and even a handful of corrections officials and politicians—have dared to suggest that we consider setting some of these old-timers free.

As of 2010, state and federal prisons housed more than 26,000 prisoners 65 and older and nearly five times that number 55 and up, according to a recent Human Rights Watch report. (Both numbers are significant, since long-term incarceration is said to add 10 years to a person’s physical age; in prison, 55 is old). From 1995 to 2010, as America’s prison population grew 42 percent, the number of prisoners over 55 grew at nearly seven times that rate. Today, roughly 1 in 12 state and federal prisoners is 55 or older.

The trend is worsening. A new report from the American Civil Liberties Union estimates that, by 2030, the over-55 group will number more than 400,000—about a third of the overall prison population. “It’s huge,” says Bob Hood, the former

warden of the mammoth federal correctional complex in Florence, Colorado. “We’re behind the eight-ball on this.”

The boom in geriatric prisoners is the inevitable result of legislation from the tough-on-crime 1980s and 1990s, which extended sentences and slashed parole opportunities, both dramatically so. According to a June 2012 report by the Pew Center on the States, drug offenders released in 2009 had spent 36 percent longer behind bars, on average, than those released in 1990. One in ten state prisoners nowadays is a lifer, and about the same proportion of federal prisoners over 50 are serving 30 to life. In short, more than 100,000 prisoners are currently destined to die in prison, and far more will remain there well into their 60s and 70s. Many of these men—as most of them are men—were never violent criminals, even in their youth. In Texas, for example, 65 percent of the older prisoners are in for nonviolent acts such as drug possession and property crimes.

Keeping thousands of old men locked away might make sense to die-hards seeking maximum retribution or politicians seeking political cover, but it has little effect on public safety. By age 50, people are far less likely to commit serious crimes. “Arrest rates drop to 2 percent,” explains Hood, the retired federal warden. “They are almost nil at the age of 65.” The arrest rate for 16-to-19-year-olds, by contrast, runs around 12 percent.

Once released, therefore, the vast majority of the older prisoners never return. Data from New York state, for example, tracked 469 prisoners who were originally sentenced for violent crimes and were later released as senior citizens—over a 13-year period, just 8 of those former prisoners went back to prison, and only 1 went back for a violent offense. “The mass incarceration of the elderly is an example of our criminal justice system at its most heartless and its most irrational,” says David Fathi, director of the ACLU’s National Prison Project. “Most such prisoners are long past their crime-prone years and pose little to no public safety risk.”

Beyond any questions of efficacy or mercy lies the looming issue of the price tag. According to the ACLU, caring for

aging prisoners costs American taxpayers some \$16 billion annually. We shell out roughly \$68,000 a year for each prisoner over 50, twice what it costs to keep a younger person locked up. And the older the prisoner, the greater the cost. "I've had inmates where a total cost of \$100,000 a year is on the low side," Hood says.

Even when you factor in post-incarceration expenses – for parole, housing and public benefits such as health care – the ACLU projects that taxpayers save \$66,000 a year, on average, for each prisoner over 50 our prisons set free. "States are confronting the complex, expensive repercussions of their sentencing practices," notes a 2010 report from the Vera Institute for Justice.

It's not difficult to see why it costs so much. "The medical conditions that present themselves to long-term elderly inmates run anywhere from dialysis to cardiac treatment to dementia," says Carl ToersBijns, who worked his way up from guard to deputy warden during his 30 years in the New Mexico and Arizona prison systems. "It is staff intensive," he says. And the number of elderly prisoners "is outgrowing the ability of corrections officers to handle and manage them – they're not medically trained."

Nor are prison facilities designed for people with mobility problems. Their assisted-living and hospice units are often chock full, Hood says, leaving the unlucky elders stuck in the general population without the services they need. Unless states start releasing them, Hood says, we will need to "retrofit every prison in America to put assisted-living units in it,

wheelchair accessibility, handicapped toilets, grab bars – the whole nine yards."

In recent months, I have been corresponding with several older men in Massachusetts state prisons, and have visited one of them in person. They are all lifers with murder convictions, which makes them atypical even among the long-termers. These men will never be paroled, and they are unlikely to qualify for early release no matter how rehabilitated they might be or how aged and decrepit they become. They have accepted this, and have generally tried to make something of their lives in prison – serving as jailhouse lawyers, organizing against abusive conditions, and helping their friends survive.

I am 75, so we share camaraderie of sorts as we compare notes on our aches and pains and medication regimens. They know I understand what it's like to be getting old and facing illness and death. They also know I have no idea what it's like to deal with these things behind bars. Their letters tell of lives filled with daily indignities – trying to heave an aging body into the top bunk, struggling to move fast enough to get a food tray filled or get a book at the library, fighting off younger troublemakers. But worst of all is the pervasive nothingness and isolation.

Prison officials tend to discourage close friendships, and they dislike anything that smacks of organizing, which is considered a security threat. So they routinely transfer prisoners between prisons and deny them the right to communicate with friends in other facilities. The activities available – which are few, since lawmakers wiped out most rehabilitative programming

during the 1980s and 1990s – are accessible only to prisoners who can walk long prison hallways or climb stairs. For some old-timers, a cell is their entire world; doing time simply means awaiting death.

Joe Labriola is a former Marine combat hero. Now 66, he joined the Marines at 17 and served two tours in Vietnam, receiving a Purple Heart and Bronze Star with Combat "V" for valor. After returning home, he was convicted of killing a drug dealer who was an FBI informant and got life without parole. So far he has served 38 years – 18 in solitary.

Labriola has chronic breathing problems that he attributes to Agent Orange

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## The Other Death Penalty (cont.)

exposure. He says it's hard for him to walk more than 10 steps without help from an oxygen machine, so he's in a wheelchair a lot of the time. At least 75 prisons in 40 states now have hospices, but you won't find any in Massachusetts. At MCI Shirley, Labriola lives in a ward called Assisted Daily Living, which he describes in his letters as a clutch of hospital beds in a corridor. "We live in an 11-man ward with all the beds side by side," he says. "No ventilation or windows that can open. We do have hospital beds and standing wall lockers, something the general population does not have." Unlike most assisted-living facilities, this setup provides little actual assistance, he says, other than what "the prisoners who clean the floor and bathrooms render us when we ask."

Residents get to move around outside the ward for just 10 minutes every hour, which means the person pushing Joe's wheelchair must race from place to place – the prison library, he estimates, is a quarter mile away.

From his window, Labriola has a view of the prison hospital. "I see men coming up for medication and insulin at least three to four times per day," he says. "They come in chairs, Canadian canes, geriatric walkers. In one week alone we had three deaths." The hospital's inpatient facilities consist of a series of five small wards with five beds in each. Men in various stages of bad health or terminal illness lie in bed all day long with nothing to do but watch soap operas. "What they need is mental, spiritual and human stimulation in the form of a one-to-one care provided by trained prisoners who would be first cleared for drug usage and sex crimes as there are female nurses in the area," Labriola suggests in one of his letters. "There are many men willing to volunteer their time and energies into making this a reality."

Lifer John Feroli told the following story in one of his letters: "A guy in his 70s I knew personally was in the [solitary confinement] unit because he failed to stand for the afternoon count. He was on the third floor of the housing unit, he was partially paralyzed from a stroke and the batteries in his hearing aid were dead and he never heard the announcement for Count Time."

Another convicted murderer, 73-year-old Billy Barnoski, wrote me in April

to report that he was in solitary after a younger cellmate jumped him and beat him up. His friends came to his aid, there was a melee, and four people were thrown in the hole. Barnoski suffers from a heart condition called atrial fibrillation, which is treated with a blood thinner called Coumadin. He also has high blood pressure, high cholesterol, shingles, and severe arthritis in his back and neck. He takes 25 pills daily. "There have been many times, so many, that they simply say, 'We haven't got that med today,'" he writes. "Mind you it has been heart meds just last week. Locked in this hole without necessary meds is torture."

Then there's Frank Soffen, also 73. Sentenced to life for second-degree murder, he has spent more than half of his life in prison. Nowadays he is confined to a wheelchair. He has kidney and liver disease and has suffered four heart attacks. He currently stays in the assisted-living wing of Massachusetts' Norfolk prison. And because of his failing health and his clean record during 40 years behind bars – which included rescuing a guard being threatened by other prisoners – he has been held up as a candidate for compassionate release.

Soffen is physically incapable of committing a violent crime. He cannot even hold a pen, in fact, so I had to rely on the other prisoners' accounts of his situation. They told me he has already participated in prerelease and furlough programs, and has a supportive family and a place to live with his son. One member of the state parole board recommended his release. But the board has denied him parole twice – in 2006 and again in January 2011. He won't be eligible for review for another five years – if he lives that long. These days he's warehoused in a medical observation bubble, bedridden, clad in adult diapers, unable to wash.

Gordon Haas, 68, is in better health, but he too has been in prison the better part of four decades, ever since his 1975 conviction for murdering his wife and children. While inside, Haas earned a master's degree from Boston University, but such opportunities are exceedingly rare nowadays. Ever since Willie Horton – the furloughed Massachusetts prisoner who went AWOL and committed rape only to become the bane of Michael Dukakis' 1988 failed presidential run – Haas has witnessed the rollback of parole and the end of programs that once allowed prisoners to work outside prison gates and further themselves on the inside.

This past May, I visited Haas at

Norfolk Prison, about 45 minutes outside Boston. Norfolk was designed for 750 men and holds 1,500. Built during the 1920s to mimic a college campus, its buildings look more like dormitories than cell blocks, if you ignore the razor wire.

Haas tells me his advocacy for prison reform has earned him the scrutiny of the prison's Inner Perimeter Security force, an internal police unit. They read his letters, he says, and monitor his phone calls. So rather than make a formal media request, I simply go in as a regular visitor.

Once I pass through the metal detectors – presenting ID, taking off my shoes and showing the bottoms of my feet, the underside of my collar, and the inside of my waistband – I proceed across the campus into a large visiting room filled with rows of chairs. Prisoners and visitors may sit next to, but not opposite, one another. They must keep their feet flat on the floor at all times and their backs against the chair backs. Guards posted at stations at either end of the room roam about and escort visitors to the toilet. Prisoners are strip searched before they enter and after they leave.

Haas enters wearing a short-sleeve button down, pressed blue jeans and thick glasses. With his neatly combed gray hair, he reminds me of an IBM executive on a visit to the factory floor. He is affable, and a keen storyteller. In addition to leading the Lifers Group, a collection of men unlikely to ever get out, Haas is chairman of the Store & Finance Committee of the Norfolk Inmate Council. He takes a big interest in Project Youth, which teaches younger prisoners to speak to students and youth groups about what led them to prison.

As of June 2012, according to its own figures, the Massachusetts Department of Correction had 11,679 prisoners. About 19 percent of them were 50 or older and 6 percent were at least 60. Last year, Haas used the DOC's figures to produce his own report, which notes that the 60-plus contingent is the fastest-growing demographic in the state's prisons.

Haas says he has been urging the state to adopt a hospice program for more than 15 years. "Our contention is that since lifers will probably be in need of such care, we are a resource for others now," he says. But "the DOC does not sanction prisoners helping other prisoners. There is one outlet, and that is prisoners can volunteer to take those who can go outside out for programs and fresh air, even



those in wheelchairs. That is good, but it is all there is."

The DOC confirms that it has neither prison hospices nor immediate plans to build any. By 2020, according to the state's DOC Master Plan, Massachusetts will need three "new specialized facilities" to house an estimated 1,270 prisoners with medical or mental health issues that would preclude them being housed in "regular" prisons. "We don't have a position on compassionate, geriatric, or any other type of release," a DOC spokeswoman told me via email. "That's up to the Legislature." And while Massachusetts legislators have introduced a bill "establishing criteria for the compassionate release of terminally ill inmates," it has yet to make it past the "study" stage.

By 2010, according to the Vera Institute, 15 states and DC had approved some form of "geriatric release," while others had medical- or compassionate-release programs that could potentially apply to frail, aging prisoners. But "the jurisdictions are rarely using these provisions," its report notes, thanks to fearful politicians, a less-than-sympathetic public, narrow eligibility criteria, and red tape that discourages prisoners from applying and can draw out the process indefinitely. Nobody

has aggregated the state-to-state data, but it appears that the number of prisoners released under these programs totals no more than a few hundred.

Jack Donson, who spent 23 years as a case manager for the federal Bureau of Prisons, points to the shortcomings of the Elderly Offender Pilot Program, part of 2008 federal legislation called the Second Chance Act. The law made the criteria for early release so strict, and the paperwork so extensive, Donson says, that it applied to only a few dozen prisoners nationally. "I actually referred the first offender in the country" to the program, he notes on his website. "The bureaucrats deemed this offender dangerous to the community" because of a record of violence 30 years earlier, "yet he had been incarcerated in a camp setting (without a fence), was a model inmate with an outstanding work ethic who even participated in unescorted medical furloughs in the community."

Little has changed in the interim. But Hood believes America is approaching a politically expedient moment. "You spend \$68,000 to watch an inmate who is truly hospital-bound? I think most people would get that. They would understand that if there's another way to do it – let's

do it outside the prison," he says. "Sixteen billion a year. Think about that number. It has to wake up some people."

"States just can't support the burden anymore," agrees former state warden Carl ToersBijns. "The only solution will be to release them or to ignore them." If we choose the latter, he cautions, prison death rates will skyrocket.

Of course, ignoring elderly prisoners after release could be just as devastating. The ACLU's Fathi emphasizes that institutionalized old folks will require plenty of help transitioning back into the community and getting the services they need. "For many elderly prisoners," he says, "particularly those with serious medical needs, simply pushing them out the prison door will be tantamount to a death sentence." ■

*James Ridgeway is a senior correspondent for Mother Jones magazine. This article was originally published by Mother Jones on September 25, 2012 with support from a MetLife Foundation Journalists in Aging Fellowship, a collaboration of New America Media and the Gerontological Society of America. It is reprinted with permission.*

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# Private Prison Companies Use Political Influence to Increase Incarceration

*by Matt Clarke*

A June 2011 report by the Justice Policy Institute (JPI) reveals how for-profit private prison companies use political campaign donations, lobbyists and relationships with government officials to increase their profits by promoting policies that result in more people being incarcerated.

Even in tight budgetary times when many policymakers want to safely reduce prison populations in order to cut costs, private prison companies seek to preserve the status quo in terms of punitive criminal justice policies and high incarceration rates. Since private prison companies receive their revenue almost exclusively from the government, taxpayers are indirectly funding an industry that opposes criminal justice reforms that would benefit the public.

As of December 31, 2010 there were about 128,195 state and federal prisoners being held in private prisons in the U.S., comprising 9.1% of the federal and 3.2% of the state prison populations. This represented an increase in the use of private prisons since 2000 of approximately 120% for the federal government and 33% for the states. During that same time period, the overall U.S. state and federal prison populations increased by less than 16%.

According to the JPI report, corrections spending increased 72% between 1997 and 2007, with total corrections spending in 2007 estimated at \$72 billion. In 2010 the two largest private prison companies, Corrections Corporation of America (CCA) and GEO Group, had combined gross revenue of almost \$3 billion. The report uses CCA and GEO as representative examples for the private prison industry as a whole.

Private prisons are big business. And like other big businesses, private prison companies work hard to create a market for their services. Where such companies differ from other types of business is in the fact that they are dependent on the government to purchase their services, as there is no private market for incarceration. [See: *PLN*, Oct. 2011, p.1].

Since governments are their only customers, private prison companies spend a portion of their profits to ensure

continued demand for their services by influencing policymakers and government agencies. Thus, the influence exerted by private prison companies is not only to secure contracts to incarcerate state and federal offenders, but also to increase the overall number of prisoners – thereby creating more demand for private prisons. To this end, private prison companies have been accused of supporting and even sponsoring legislation such as “three-strikes,” “truth in sentencing” and harsh immigration enforcement laws, which drive up incarceration rates.

## An Industry is Formed

From their beginnings in the early 1980s, both CCA and GEO were politically-connected. CCA co-founder Tom Beasley was a former chairman of the Tennessee Republican Party and had served on a committee that selected the head of Tennessee’s prison system. Together with Doctor Crants and Don Hutto, the then-president of the American Correctional Association, Beasley jump-started the modern private prison industry with a bold attempt to have CCA take over Tennessee’s entire state prison system in 1983. Although that effort and a similar attempt in 1997-98 were unsuccessful, CCA went on to build an extensive network of private prisons.

By 2010, CCA managed 66 facilities – owning 45 of them – and had contracts with 19 states and the District of Columbia, with annual gross revenue of \$1.67 billion that was divided almost evenly between state and federal contracts. On the federal level, private prison companies contract with Immigration and Customs Enforcement (ICE), the Bureau of Prisons and the U.S. Marshals Service.

Founded as Wackenhut Corrections Corporation in 1984, GEO Group now operates 118 prisons and residential treatment facilities with approximately 80,600 beds in the U.S., U.K., Australia and South Africa. Around 66% of GEO’s \$1.27 billion in gross revenue in 2010 came from its U.S. operations, about equally divided between state and federal contracts. On August 12, 2010, GEO acquired Cornell Companies, a private

prison firm with annual revenue of \$400 million. [See: *PLN*, Feb. 2012, p.12]. This acquisition placed more than 75% of all private prison beds in the U.S. under the control of just two companies: CCA and GEO Group.

More prisoners equates to more profit for private prison companies, and their greatest success has been in the federal system where the number of prisoners held in privately-operated facilities has grown at an average annual rate of 10% between 2000 and 2009 – mainly due to increased immigration detention. Texas, Florida, Oklahoma and Mississippi had the highest number of prisoners housed in in-state private facilities. California has around 9,500 prisoners in out-of-state CCA prisons but plans to return them by 2016. [See: *PLN*, July 2012, p.28].

## Campaign Contributions

Through their Political Action Committees (PACs) and contributions by their executives and employees, private prison companies have given over \$6 million to state politicians and more than \$835,000 to federal lawmakers since 2000, according to the JPI report.

State-level political giving was concentrated in California, Georgia and Florida – the latter where GEO Group is headquartered. The purpose of such contributions is to gain access to lawmakers who are agreeable to passing legislation favorable to the private prison industry, and to purchase political influence.

With their campaign contributions, private prison companies pursue a strategy of not seeking out candidates who are necessarily ideologically agreeable to prison privatization, but rather political winners. They tend to make a small donation early in the campaign, then a larger one once the probable winner is clear. Thus, 75% of political contributions from private prison companies go to winning candidates.

About half of the private prison companies’ state-level political giving was to party committees and 16% went to ballot measures, while most of the remainder was directed at legislative or gubernatorial candidates.

## Lobbying

Another strategy used by private prison companies to influence policymakers involves lobbying. Campaign contributions are subject to statutory limits and require coordination by private prison company-funded PACs. Lobbying has no such limitations. And while donations are subject to public disclosure laws, the information available on lobbying is more limited, with lobbyists not even being required to report whether they are supporting or opposing a bill when they buy a politician lunch or a round of golf at a local country club.

The private prison industry spends more than a million dollars a year on lobbying federal policymakers. CCA alone spent over \$900,000 annually on federal lobbyists between 2003 and 2010, on average.

State-level lobbying is harder to track, with much lobbying taking place behind closed doors and reporting requirements varying among the states. CCA and GEO Group employ over 30 lobbyists in Florida alone to advocate for prison privatization. Even in Montana, with only 1.5% of its prison population in private prisons, CCA

spent \$36,666 on lobbying during a year with no legislative session.

There is no doubt that lobbying pays off for private prison companies. For example, a strong GEO lobbying effort in Florida led to a provision in the 2011 state budget requiring the privatization of all prisons in South Florida, where GEO Group happens to be headquartered. In February 2012, after a concerted campaign by private prison opponents, the state Senate narrowly rejected a bill that would have privatized the South Florida prisons. [See: *PLN*, April 2012, p.38; Feb. 2012, p.1].

## Relationships and Associations

A third strategy that private prison companies employ to influence policymakers involves prior relationships, associations and networks. One way to achieve this strategy is to stack government agencies with former private prison employees and supporters. Private prison companies also hire former government officials and policymakers who have inside connections, known as the “revolving door” between the public and private sectors.

For example, Stacia A. Hylton was

the Federal Detention Trustee when she founded a private consulting firm, Hylton Kirk & Associates, in 2010. She retired from her federal position and promptly accepted a \$112,500 consulting contract from GEO Group, which holds numerous federal detention contracts. President Obama then appointed Hylton to serve as head of the U.S. Marshals Service – the federal agency that accounted for 19% of GEO’s 2010 revenue. [See: *PLN*, Feb. 2011, p.16].

In Maine, Governor Paul LePage appointed former CCA warden Joe Ponte as Commissioner of the state’s Department of Corrections in 2011 after receiving a \$25,000 contribution from CCA. Maine has no private prisons but CCA has been negotiating with the City of Milo for the past three years to build and operate a \$150 million facility.

Joe Williams, the former Secretary of Corrections for New Mexico, was a GEO Group warden before his appointment and returned to work for GEO after he left office. During his tenure he was criticized for failing to levy fines against CCA and GEO due to contract violations, mainly related to understaffing. [See: *PLN*, March 2011, p.42].

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## Private Prison Politics (cont.)

In Ohio, Gary C. Mohr, director of the Ohio Department of Rehabilitation and Correction, worked as a managing director for CCA before he was appointed to head the state's prison system in 2011. That same year, Ohio became the first state to sell a prison to a private company, when CCA purchased the Lake Erie Correctional Institution. [See: *PLN*, May 2012, p.42].

As yet another example of the revolving door between the public sector and the private prison industry, on June 1, 2011, CCA hired former Bureau of Prisons director Harley G. Lappin as the company's chief corrections officer. Lappin had resigned from the BOP shortly after he was arrested on a DUI charge in Maryland. [See: *PLN*, July 2011, p.20]. Former BOP director J. Michael Quinlan also works for CCA.

A more subtle approach for influencing policymakers involves professional associations. The American Legislative Exchange Council (ALEC) is a non-profit organization that brings together state legislators, business professionals and private companies. Lawmakers pay \$50 a year in membership dues but corporations pay tens of thousands of dollars each, for a total of \$6 million in annual corporate dues. That money buys them access to legislators at elaborate "conferences," as well as positions on issue-specific ALEC task forces. Both CCA and GEO Group have participated in ALEC in the past but are reportedly no longer members.

The JPI report noted that one of ALEC's main functions is to develop model legislation that lawmakers can introduce in their home state. ALEC averages 1,000 pieces of model legislation each year, and about 20% of the bills based on model ALEC legislation are eventually passed into law.

ALEC has previously drafted model bills for mandatory minimum sentences, "truth in sentencing" (requiring prisoners to serve most or all of their sentences without an opportunity for parole) and three-strikes laws, all of which drive up incarceration rates. ALEC is also behind some immigration enforcement laws, including Arizona's controversial SB 1070, which are widely expected to increase the number of immigrants placed in detention. CCA participated in ALEC's

Criminal Justice Task Force (later called the Public Safety and Elections Task Force) when such model legislation was being developed. [See: *PLN*, Jan. 2012, p.20; Nov. 2010, p.1].

Organizations such as ALEC allow private prison companies to spend large sums of money to influence lawmakers with virtually no public oversight. CCA has denied that it lobbies for harsher sentencing laws or an increased reliance on incarceration, but has failed to adequately explain why it was a member of ALEC for over a decade.

### Who Loses?

So what is so bad about private prison companies influencing policymakers and the government agencies with which they contract? In short, it causes public officials to focus on incarceration as a solution to crime – which, although profitable for private prison companies, may be more expensive for taxpayers and less effective than other approaches. Just as if defense contractors were to control foreign policy, all diplomacy would be war, should private prison companies control criminal justice policy, all prosecutions would result in lengthy imprisonment.

Since incarceration is ineffective at curtailing future criminal behavior, as evidenced by high recidivism rates, wise public policy would explore other avenues of preventing criminality – such as education, mental health treatment, substance abuse programs and community-based corrections. Additionally, keeping people in prison is expensive, averaging \$78.88 per prisoner per day. Thus, increasing incarceration rates can force governments to cut spending in other important areas, such as public education, in order to pay for prison budgets. Less public education leads to more crime and more incarceration, and a vicious cycle is created.

Studies have shown there are few or no cost savings over the long-term for private prisons compared to publicly-run prisons. By cherry-picking the healthiest and easiest to manage offenders, private prisons may actually increase the average cost of operating public prisons, which must house prisoners who are more expensive to incarcerate – such as maximum security prisoners and those with serious medical and mental health needs. Thus, the government and taxpayers are losers in the private prison game.

Other losers are both the prisoners

and guards at private prisons. Private prison companies pay their staff less than in the public sector in order to cut costs and generate profit. Private prison employees also receive less training and fewer benefits, and have higher turnover rates. Underpaid and less experienced private prison guards contribute to institutional instability, which leads to higher levels of violence in private prisons. [See, e.g.: *PLN*, Dec. 2011, p.18].


### Summary

The JPI report describes how the entire concept of prison privatization is a bad idea from a public policy perspective. Not only do prisoners and staff in private prisons suffer due to the need for private prison companies to make money, the for-profit prison industry results in a corrupting influence on policymakers and government agencies.

One of the most egregious cases of such corruption occurred in Luzerne County, Pennsylvania, where two judges sentenced thousands of juvenile offenders to serve time in facilities operated by a private prison company in exchange for millions of dollars in bribes from the company. [See: *PLN*, May 2012, p.28; Nov. 2011, p.14; June 2010, p.26; Nov. 2009, p.42; May 2009, p.20].

Although the media and government officials expressed outrage at this blatant corruption of the criminal justice system by the private prison industry, few have said anything about the influence that private prison companies exert through their political donations, lobbyists, and relationships and associations described in the JPI report.

This report was one of several studies on the private prison industry released in 2011. Other reports, some of which also addressed the political influence of private prison companies, were released by the ACLU of Ohio, Ohio Policy Matters, AFSCME, Detention Watch Network, the ACLU National Prison Project, the National Council on Crime and Delinquency, and the PICO National Network and Public Campaign. [See, e.g.: *PLN*, Dec. 2011, p.22].

The JPI report is available at [www.justicepolicy.org](http://www.justicepolicy.org) or on *PLN*'s website. 

Sources: "Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies," Justice Policy Institute (June 2011); <http://bjs.ojp.usdoj.gov>



# California Prison Psychologist Faked Her Own Rape

Unhappy with where she lived, Laurie Ann Martinez, 36, a psychologist employed with the California Department of Corrections and Rehabilitation (CDCR), decided to convince her husband that they needed to move to a safer neighborhood.

Rather than simply having a conversation with her spouse about her desire to relocate, Martinez, who was employed as a supervising senior psychologist at the California State Prison in Sacramento, conspired with a friend, Nicole April Snyder, 33, to create the appearance that she had been beaten, robbed and raped by a stranger. For reporting the fake crime on April 10, 2011, Martinez and Snyder were charged with multiple counts of conspiracy.

Arrested in November 2011 and facing three years in prison, Martinez was freed on \$50,000 bail. On January 26, 2012, she pleaded no contest and was sentenced to five years of probation and 180 days on electronic monitoring, plus \$4,000 in restitution to cover the cost of the police investigation. She also lost her husband, who filed for divorce a month after the false rape report, and was fired from the CDCR. Additionally, her medical license was suspended.

Martinez's fake rape plot unraveled after one of her prison co-workers told the police that Martinez had talked at work about staging a crime to persuade her husband to move. By then, police detectives and crime scene investigators had spent hundreds of hours on the case.

In an understatement, Sgt. Andrew Pettit of the Sacramento Police Department said, "If all [Martinez] wanted to do is move, there's other ways than staging

a burglary and rape." He added, "She went to great lengths to make this appear real."

Indeed, Martinez reportedly split her own lip with a pin, scraped her knuckles with sandpaper, ripped open her blouse, wet her panties and had Snyder punch her in the face with boxing gloves. Then, when police responded to Martinez's 911 call, she cried hysterically and told them she had arrived home to find a stranger in the kitchen. When she tried to run away, she said, the suspect grabbed her and hit her in the face, knocking her unconscious; she awoke to find her pants and wet underwear pulled down to her ankles, suggesting she had been raped.

Her purse and various items from her home were missing, Martinez told police, saying they had been stolen by the rapist. In reality, the "missing" items, including two laptops, a camera, a gaming console and credit cards, were at Snyder's house.

Snyder cooperated with investigators, pleaded no contest to a misdemeanor charge and was sentenced to three years of probation plus community service and \$4,000 restitution to the police department.

"Law enforcement is not a toy to be casually utilized by people to further their own personal agenda," said Deputy District Attorney Chris Carlson. 📰

Sources: *Associated Press*, [www.huffingtonpost.com](http://www.huffingtonpost.com), <http://lsacramento.cbslocal.com>, [www.sacbee.com](http://www.sacbee.com)

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## \$60,411 Attorney Fee Award in Maryland Prisoner's Public Information Act Suit

The State of Maryland has agreed to pay more than \$60,000 in attorney fees to settle a longstanding lawsuit brought by a prisoner who had requested public records pursuant to the state's Public Information Act.

While incarcerated at the Western Correctional Institution (WCI) in May 2002, Richard L. Massey, Jr. filed requests for four different types of information with then-Warden Jon P. Galley. The requests were made under Maryland's Public Information Act, § 10-623 of the State Government Article.

Concerned that WCI's practices may be exposing prisoners to hepatitis C, Massey asked for records related to the facility's contract with Prison Health Services. He also requested information concerning testing, treatment and education programs for prisoners with hepatitis C. Finally, he made several requests related to photocopy costs charged to prisoners and prison commissary costs.

Massey filed suit in circuit court in July 2002 after Warden Galley and the Department of Public Safety and Correctional Services failed to answer his requests in a timely manner. Over the course of almost ten years, the case bounced between the circuit court and appellate courts. Prison officials argued that under the state's Prisoner Litigation Act, Massey needed to pursue administrative grievances before filing suit.

However, on May 11, 2006, the Court of Appeals, Maryland's highest court, held "that the exhaustion of administrative remedies provision of the Prisoner Litigation Act has no application to, and thus does not preclude, the statutory cause of action under the Public Information Act," and remanded the case. See: *Massey v. Galley*, 392 Md. 634, 898 A.2d 951 (Md. 2006) [*PLN*, April 2007, p.33].

Thus, prisoners do not need to go through an "elaborate" administrative grievance process and may file a lawsuit when denied public records they request under the Public Information Act, said Deborah Jeon of the Maryland ACLU, one of the attorneys who represented Massey. "It was necessary to litigate this case," she added.

Meanwhile, Massey, who has since been released, received the records that he originally requested.

The parties agreed to withdraw their appeals in the case with resolution of the attorney fee award, which the Maryland Board of Public Works approved on December 21, 2011 – almost a decade after the suit was filed. "The state wanted to avoid paying the attorney's fees and it just really dragged out," said Jeon. The Public

Justice Center, which was lead counsel, received \$44,388 while the Maryland ACLU received \$16,023. See: *Massey v. Galley*, Circuit Court for Allegany County (MD), Case No. 01C02020975. ■

Sources: *Cumberland Times-News*, [www.publicjustice.org](http://www.publicjustice.org)

## Hawaii AG Study Confirms Ineffectiveness of Mainland Private Prisons

by Joe Watson

Academic researchers in Hawaii believe that exiling offenders to private prisons thousands of miles away on the U.S. mainland is misguided. And the Hawaii Attorney General's office (AG) – the state's Big Kahuna of law enforcement – actually agrees.

A federally-funded report released last year by the AG recommends that Hawaii lawmakers should think twice about relying on privately-operated mainland prisons, namely Corrections Corporation of America (CCA) facilities, where about 54% of the state's 3,700 prisoners are incarcerated.

According to researchers at the University of Hawaii at Manoa, in collaboration with the AG's office, rehabilitation is too often viewed "mainly through the prism of cost," also referred to as "humonetarianism." And that's a mistake, they contend.

"[The] focus on short-term financial costs often deflects attention away from deeper problems that plague the correctional system, such as inconsistent sentencing policies, the provision of decent medical care, the protection of inmates from sexual assault ... and the over-representation of racial minorities and the poor at all stages of the criminal justice system," the researchers wrote. "In Hawaii and elsewhere, problems such as these suggest the short-sightedness of cost-based corrections, including the use of private prisons.

Sociologists at UH-Manoa began studying Hawaii's imprisonment policies in 2006, about 10 years after the state initially sent 300 prisoners to two private facilities in Texas.

"Since then," according to the report, "the number of persons incarcerated in out-of-state private prisons has increased

almost sevenfold." Approximately 1,870 prisoners from Hawaii are incarcerated at CCA's Saguaro Correctional Center and Red Rock Correctional Center, both in Eloy, Arizona, and about 160 female prisoners were held at CCA's Otter Creek Correctional Center in Kentucky before they were returned to Hawaii following a sex scandal involving CCA employees. [See: *PLN*, Sept. 2011, p.16; Oct. 2009, p.40].

For the past several years, the report contends, Hawaii has led "all other states in holding the highest percentage of its prison population in out-of-state" facilities.

The study's project director, Paul Perrone, chief of research and statistics for the Hawaii AG's office, oversaw UH-Manoa researchers who examined Hawaii Paroling Authority files and coded each parolee based on demographics, criminal and sentencing history, and disciplinary record while incarcerated. After analyzing data for 660 former prisoners, 168 of whom served time on the mainland, researchers found no evidence that private prisons save the state money or result in lower recidivism rates, in comparison with state-run facilities.

In terms of recidivism, the report found that "The recidivism rate for the mainland cohort (53 percent) was slightly lower than the recidivism rate for the Hawaii cohort (56 percent), but this difference is not statistically significant."

Researchers noted that "Since there is no empirical justification for the policy argument that private prisons reduce recidivism better than public prisons, the State of Hawaii should decide whether to continue, discontinue, expand, or contract its reliance on private prisons based on other criteria. While cost is one criterion, it is not the only one that is important to consider."

Hawaii pays CCA about \$62 per day to incarcerate its prisoners in Arizona, as opposed to \$118 per day to hold them in Hawaii facilities. But "the costs of private imprisonment are more than merely financial, because relying on mainland private prisons severs a [prisoner's] family ties, undermines rehabilitation, and decreases the odds of successful employment after release," according to the report.

"The present estimate of the cost of private imprisonment," the researchers added, "is far from all-inclusive, for it does not include several hidden costs, including transportation to and from the mainland, ... lower levels of staffing and service in private prisons that may be preoccupied with the 'bottom line,' increased expenditures on inmates' phone conversations and in-person visits with family and friends, ... and losses in federal funding that come because the U.S. census counts persons according to the states in which they are incarcerated."

And citing a federal study that indicated private prisons were susceptible to higher rates of staff turnover, escapes and drug use by prisoners, the report further weakened the appeal of sending more Hawaii prisoners to mainland facilities in the future.

"States and their leaders have a responsibility to care not only about crime control and the costs of incarceration but also about the present welfare and future well-being of criminal offenders and the communities from which they come," the researchers noted. "The pressures to be penny-wise and pound-foolish are especially strong in this time of financial crisis, and that is another reason why they must be resisted."

Prior to the release of the AG study, the State Auditor of Hawaii had strongly criticized the state's private prison contracts in a December 2010 report. [See: *PLN*, Aug. 2011, p.38]. However, despite such criticism, and Governor Neil Abercrombie's expressed desire to return Hawaii prisoners from mainland facilities, the state has insufficient prison bed space on the islands. Lacking the political will or courage to enact sentencing reform, Hawaii continues sending its prisoners to private prisons on the mainland. ■

Source: "*Hawaii's Imprisonment Policy and the Performance of Parolees Who Were Incarcerated In-State and on the Mainland*," *State of Hawaii Attorney General* (Jan. 2011), available at [www.hawaii.gov/lag/cpja](http://www.hawaii.gov/lag/cpja)

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# Florida Jail Abandons Postcard-Only Mail Policy, Pays Prisoners' Attorney Fees

In February 2012, a Florida U.S. District Court approved a consent decree that settled a civil rights action challenging a postcard-only mail policy at the Santa Rosa County Jail (SRCJ). As a result of the settlement, prisoners are no longer restricted to postcards and can send and receive an unlimited number of regular letters. Further, the county has to pay attorney fees and costs to the prisoners' counsel.

The ACLU of Florida and the Florida Justice Institute (FJI) filed the lawsuit in September 2010 on behalf of prisoners at the jail, alleging that the SRCJ's policy of restricting prisoners' ability to communicate with their families and friends by limiting their mail to short, publically viewable messages on postcards was a violation of their First Amendment right to free speech. The mail policy, the ACLU and FJI argued, was the paper equivalent of requiring prisoners to communicate by "tweet" (i.e., very short messages).

"Under a postcard-only policy, Martin Luther King could not have sent his famous letter from the Birmingham Jail in 1963," noted Benjamin Stevenson, staff attorney for the ACLU of Florida. "It's not just about a specific inmate being unable to communicate – everyone suffers when people can't share ideas."

The postcard-only policy also created an obstacle to helping prisoners reintegrate back into society by preventing them from maintaining close ties with their families and friends on the outside. "Simply because someone is in jail doesn't mean they cease to be part of their family," said FJI Executive Director Randall C. Berg, Jr. "Yet, this postcard-only policy forced them to choose between writing everything in a very public and abbreviated form or writing nothing at all."

The settlement was approved on February 13, 2012 after the district court had previously denied the county's motion to dismiss the case. In addition to abandoning its postcard-only policy, the SRCJ agreed to provide writing materials to indigent prisoners and pay \$135,000 in fees and costs to the ACLU and FJI attorneys.

"Today's ruling should be a clear sign that limiting or restricting the speech of people in jail ... is illegal, will be challenged, and the costs can be significant," said Stevenson. "It's equally important

to remember that free speech rights work both ways – the government can't restrict your right to speak to others or restrict the way you receive information." See: *Hamilton v. Hall*, U.S.D.C. (N.D. Fla.), Case No. 3:10-cv-00355-MCR-EMT.

A number of other jail postcard-only mail policies have been successfully challenged in other jurisdictions, including by *Prison Legal News*. [See, e.g., *PLN*, Jan. 2012, p.30; Nov. 2011, p.20; Oct. 2011, p.33]. ■

## Prisoner's Coma-Inducing Latex Allergy Triggers Lawsuit, Burning Questions

by Alan Prendergast

A prisoner's lawsuit against the Colorado Department of Corrections, claiming a latex allergy so severe that he's suffered burns and respiratory problems when touched by glove-wearing guards, appeared to have been resolved in August 2012 when DOC officials testified that they no longer use latex in their facilities. But Albert Abeyta says he's still getting burned by his unsympathetic handlers, and the strange case seems to be headed back to federal court.

Abeyta, 44, a sex offender serving a sentence of seven years to life, claims to have experienced some "itchiness" from exposure to latex for some time. His sensitivity developed into an extreme case three years ago, when he was working as a kosher prep cook at the Colorado Territorial Correctional Facility. According to court records, he began to feel a burning sensation in his wrists, had difficulty breathing and was diagnosed at the prison infirmary as having "an acute reaction to latex gloves."

That exposure led to treatment at a Pueblo hospital and eventually in the burn unit of the University of Colorado Hospital, where he received morphine and lapsed into a coma. After he got well, Abeyta testified, a nurse practitioner at the prison provided him with a document stating that he was not to be exposed to latex — but a correctional officer ripped the note from his cell door and destroyed it.

Since 2009, Abeyta has spent time in five different prisons, enduring several encounters with latex-wearing officers doing pat-downs or escorting him. Some DOC officials have expressed skepticism of his claims of a severe allergy and accused him of using an inhaler to make odd marks on his skin. But the marks and burns persisted even after his inhaler was

taken away from him, and his attorney suspects that some staffers went out of their way to harass Abeyta because he's a sex offender — and thus on the bottom rung of the prison's social order.

"It seems like every time the staff got used to him and his latex problem, he'd get transferred again," says Boulder attorney Alison Ruttenberg. "It was like they were trying to avoid coming up with a policy for dealing with him."

In August, U.S. District Court Judge Philip Brimmer concluded that Abeyta had presented sufficient evidence to show that he does have an extreme sensitivity to latex. But Brimmer declined to issue an injunction prohibiting the use of latex on Abeyta because "the probability of Mr. Abeyta being exposed to latex gloves in the future is increasingly unlikely." The DOC has recently made a "system-wide change" and uses vinyl gloves instead of latex in its prisons, according to testimony by Travis Trani, warden of the Centennial Correctional Facility.

Abeyta and Ruttenberg say that isn't true. Shortly after Brimmer's ruling, Abeyta was transported from Denver back to the Fremont prison outside Canon City — and was patted down by a DOC officer wearing latex gloves, he claims. "I sustained numerous burns on the back of my neck and upper back," he stated in a sworn affidavit, adding that another transport officer told him that staff continues to wear latex "to protect themselves from diseases from the inmates."

Ruttenberg has filed a motion requesting a hearing and reopening of the case. "They convinced the judge they weren't using latex any more, and that was clearly a misrepresentation," she says.

But DOC officials deny Abeyta's version of events. "The department does



not use latex gloves during transports and searches,” insists spokeswoman Katherine Sanguinetti. “We are disputing the allegations that Mr. Abeyta has made and are filing a response to the court as such.”

Ruttenberg suggests that the larger issue raised by a case like Abeyta’s is that the DOC rarely makes an effort to address prisoner complaints of abuse until hammered by a civil-rights lawsuit — and she’s detected a pattern in which the department abruptly changes policy practically on the eve of trial, so that federal judges can declare the matter moot and decline to award attorney fees to plaintiffs. She cites a similar case she pursued, involving a mother being denied access to visit her son, in which the prisoner’s claim that his rights were violated was dismissed by a federal judge because the visitation policy had changed.

“They changed the policy — magically, by coincidence,” Ruttenberg says. “I was unable to claim attorneys’ fees. They said it had nothing to do with the lawsuit, but I don’t believe it would have happened if I hadn’t filed the lawsuit. It’s a great result for the family involved, but I can’t afford to do this for free.”

The end result of the policy reversals,

she adds, is that attorneys are discouraged from taking on prisoner lawsuits out of fear that they won’t be able to recover their costs.

Judge Brimmer has ordered the Department of Corrections to file a formal response to Abeyta’s motion seeking to reopen the case. [See: *Abeyta v. Clements*, U.S.D.C. (D. Col.), Case No. 1:10-cv-01864-PAB-KLM]. ■

*This article was originally published by Westword on Sept. 19, 2012, and is reprinted with permission.*

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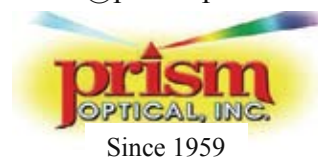


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# California Settles Suit with Prison Guards' Union for \$3.5 Million, Interest-Free

Avoiding the uncertainty of litigation, in January 2012 the State of California settled a lawsuit it had initiated two years earlier against the prison guards' union, the California Correctional Peace Officers Association (CCPOA).

According to the suit, the CCPOA owed the state at least \$4.5 million for wages and benefits paid to CCPOA leaders from July 2005 to May 2011 when they were absent from their jobs while tending to union business. The state alleged causes of action that included breach of express contract, breach of implied-in-fact contract, breach of the covenant of good faith and fair dealing, and unjust enrichment.

The CCPOA disputed the amount of the debt, arguing that the Department of Mental Health and Department of Corrections and Rehabilitation were significantly overestimating the amount owed for "union paid-leave."

State officials eventually agreed to a deal in which the CCPOA will repay \$3.5 million – one million less than what the state claimed it was owed but around \$500,000 more than what the CCPOA said it should have to pay – over a 9-year period ending in 2021, with no interest unless the union defaults on a payment. In effect, the CCPOA received an interest-free loan from taxpayers to subsidize union business.

The CCPOA agreed to make an initial payment to the state of \$750,000. The union may make its 2013 and 2014 First Period Payments of \$250,000 either in cash or a combination of cash and "a deduction of hours from the Release Time Bank," or RTB. CCPOA members donate hours of earned leave credits, such as vacation time, to the RTB, which are then available for use by other union members. The parties agreed in the settlement that the CCPOA had 8,963 hours of RTB worth \$492,965 that "can potentially be used to satisfy the First Period Payments."

Beginning in 2015, the CCPOA must make annual payments of \$350,000 until the balance of the settlement amount is paid in full.

Ron Yank, a former CCPOA attorney who now heads the California Department of Personnel Administration – the agency handling the litigation for the state

– defended the settlement. Yank noted on the one hand that "the state's bookkeeping problems are credible," and on the other that "litigation is never a slam dunk."

Aside from the fact that a court fight would be risky, state officials were aware that the CCPOA had lost a \$5 million federal defamation case in 2010, *Dawe v. CUSA*. As a result of that loss, the CCPOA had been forced to put up most of its assets as collateral to cover the cost of the judgment while it pursues an appeal.

"That was a reason to take the money and run," Yank said. "If CCPOA loses *Dawe*

[the state] might end up with nothing."

Another potential reason for settling the lawsuit was that the state had already spent \$277,393 on outside attorneys to litigate the case, and absent a quick resolution the legal costs would have continued to grow. As part of the settlement, the CCPOA agreed to drop its pending appeal in the case. See: *State of California v. CCPOA*, Sacramento County Superior Court (CA), Case No. 34-2010-00075552. ■

Sources: *Sacramento Bee*, [www.ccpoa.org](http://www.ccpoa.org)

## State Auditor Finds Flaws in Texas Criminal Justice Information System

by Matt Clarke

In September 2011, the Texas State Auditor released a report on the Criminal Justice Information System (CJIS) used by the Texas Department of Public Safety (DPS) and Texas Department of Criminal Justice (TDCJ). The audit, which covered the period from September 2009 through November 2010, found inaccuracies and incomplete records in the CJIS as well as the potential for unauthorized changes to be made.

The CJIS includes the Computerized Criminal History System (CCHS) maintained by DPS and the Corrections Tracking System (CTS) maintained by the TDCJ. The goal of the CCHS is to provide accurate criminal background checks to law enforcement while the CTS tracks people who are under the supervision of the state's criminal justice system. Both systems depend on the input of numerous persons, many of whom are not employed by DPS or the TDCJ.

The CCHS relies upon the input of 4,272 separate agencies, including 2,309 law enforcement agencies such as police departments or sheriff's offices, 507 district or county attorney offices and 1,456 district or county courts. By statute, the CCHS is supposed to include information related to the prosecution and disposition of all felony cases and misdemeanor cases that are not punishable solely by a fine. However, the audit found that only 73.68% of arrests were entered into the

CCHS. That was a slight improvement over the 71% submission rate from a previous audit conducted in 2006.

The audit also discovered many incomplete records in the CCHS, including 65,424 prosecutor or court records with no matching arrest record. DPS cannot control the agencies it depends on for data, thus there is no penalty for failing to submit complete records. Further, the CCHS rejects submissions that lack state identification numbers but may not inform the information systems of courts and prosecutor offices of the rejection or data entry errors. Therefore, despite efforts by DPS to improve the CCHS, problems persist. Complicating matters is the fact that once a court or prosecutor office submits information to the CCHS, it can only be corrected manually via fax.

One suggestion made by the auditors for improving the completeness of CCHS records was to link the database with information in the CTS. This would provide the outcomes for all persons placed on probation or sent to prison.

The CTS also had a problem with incomplete data entries. Close to a fifth of all prisoner entries and about 7% of probationer entries had no arrest incident number. The TDCJ has no control over the local law enforcement and probation offices that make the data entries, but the auditors suggested that the TDCJ adopt a policy encouraging the collection and

submission of arrest incident numbers.

The CTS issues a flash notice when individuals with CTS records who are on probation or parole are rearrested, to inform the probation or parole officer about the arrest. Officials in over 47% of the counties in Texas do not view the pertinent arrest record within 90 days of receiving a flash notice, indicating they are not using the flash notices. Nearly 42% of the audited system users had not accessed their CTS accounts within a six-month period.

In Bexar County, one of the two county Community Services and Corrections Departments that the auditors visited had no flash notice coordinator and did not know about the flash notice process. The TDCJ was unaware of this because it does not monitor the frequency with which flash notice coordinators view pertinent arrest records or the length of time an account is dormant. The auditors recommended that the TDCJ begin tracking the use of flash notices.

DPS was about two months behind in entering criminal records submitted in hardcopy format. The auditors recommended that DPS speed up the process. Nearly 60% of CCHS arrest record entries had incorrect disposition codes; the most common error was showing the person as

incarcerated when he or she had been released. The auditors also discovered errors in the submitting agencies' identification codes, especially when the person was arrested out-of-county.

The TDCJ maintains a log of errors in local probation department entries but fails to track the errors to ensure they are corrected. The auditors suggested that the TDCJ begin monitoring such errors.

The CCHS had a number of security issues, such as 26 staff members who could modify criminal records, security configurations and application functionality when only one should have such system access. Plus there were two former DPS employees who retained the ability to modify criminal records. Further, DPS inappropriately gave eight programmers administrative access that could let them modify the CCHS database.

DPS also failed to appropriately manage access to criminal records stored on an external website used to conduct background checks. Ten percent of the audited website users had no need to conduct such background checks yet retained the ability to do so. Auditors found no unauthorized changes had been made in the CCHS database; however, they criticized the fact that DPS had no formal process for monitor-

ing security events related to suspicious attempts to access CCHS.

CTS had several security issues, as the TDCJ failed to restrict programmers' access to production data. Thus, the programmers could modify criminal records and both TDCJ and contractor personnel could make changes to data. The TDCJ also failed to have an audit trail activated for modifications to the database.

Overall, the report found improvements since the last audit was conducted in 2006, but noted a number of persistent problems. Both DPS and the TDCJ agreed with the audit findings and stated they would implement recommended changes to correct identified security lapses. ■

Source: "An Audit Report on the Criminal Justice Information System at the Department of Public Safety and the Texas Department of Criminal Justice," Texas State Auditor's Office, Report No. 12-002 (September 2011)

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# Seventh Circuit Upholds Injunction Against Wisconsin Transgender Prisoner Treatment Ban

The Seventh Circuit Court of Appeals affirmed a district court's injunction barring the application of a Wisconsin law that prohibits certain types of medical care for transgender prisoners.

Several Wisconsin Department of Corrections (WDOC) prisoners have been diagnosed with Gender Identity Disorder (GID), a psychiatric condition in which an individual identifies "strongly with a gender that does not match their physical sexual characteristics."

GID is a recognized condition in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM IV); it is treated with psychotherapy, hormone therapy and, in severe cases, sexual reassignment surgery.

The WDOC GID prisoners were prescribed hormone therapy for their condition. However, in 2005 the Wisconsin legislature enacted the "Inmate Sex Change Prevention Act" (Act 105), which prohibited the WDOC from paying for "hormonal therapy or sexual reassignment surgery" for prisoners diagnosed with GID. See: 2005 Wis. Act 105, codified at Wis. Stat. § 302.386(5m)(2010).

WDOC prisoners are not allowed to seek outside health care and thus must rely on the prison system for medical treatment. However, the "defendants did not produce any evidence that another treatment could be an adequate replacement for hormone therapy" for prisoners with GID.

Following passage of Act 105, the WDOC discontinued hormone therapy for all GID prisoners. "When hormones are withdrawn from a patient ... severe complications may arise. The dysphoria and associated psychological symptoms may resurface in more acute form," the Seventh Circuit wrote. Additionally, the patient may suffer "severe physical effects such as muscle wasting, high blood pressure, and neurological complications." GID prisoners experienced some of these symptoms when their hormone treatment was discontinued.

Several GID prisoners filed lawsuits to enjoin the provisions of Act 105, alleging that the law violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Equal Protection Clause of the Fourteenth

Amendment. The federal courts agreed, first issuing a preliminary injunction in 2006 [see: *PLN*, Aug. 2006, p.28], then finding in another case that the statute was unconstitutional both facially and as applied. See: *Fields v. Smith*, 712 F.Supp.2d 830 (E.D. Wis. 2010). In the latter case the court enjoined enforcement of Act 105.

On appeal, the Seventh Circuit noted that the "Defendants do not challenge the district court's holding that GID is a serious medical condition," and that "refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture."

"Just as the legislature cannot outlaw all effective cancer treatments" for prisoners, the Court of Appeals held that "it cannot outlaw the only effective treatment for a serious condition like GID." The appellate court affirmed the district court's finding that Act 105 is facially unconstitutional because "any application of Act 105 would necessarily violate the Eighth Amendment."

The Seventh Circuit also concluded the defendants were barred from arguing

that the injunction violates 18 U.S.C. § 3626(a) of the Prison Litigation Reform Act (PLRA). Rejecting the plaintiffs' contention that the defendants had waived that argument, the Court of Appeals instead found "the record establishes an admission, not a waiver." The district court had "asked defendants' counsel not once, but twice, 'whether or not the Defense believed the order ... is as narrow as is required'; counsel replied that it was."

The Seventh Circuit concluded that "[e]valuating the record as a whole, the district court did not abuse its discretion in enjoining the entirety of Act 105." The plaintiffs were represented on appeal by the Roger Baldwin Foundation of the ACLU of Illinois. See: *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), cert. denied.

Previously, in September 2010, Wisconsin prison officials had settled a federal lawsuit filed by another transgender prisoner, agreeing to provide her with an outside medical specialist and prison-issued bras and female underwear, and to continue her hormone therapy and pay \$5,000 in damages, among other provisions. [See: *PLN*, May 2011, p.31].

## \$20,000 Settlement in Arkansas Jail Prisoner's Failure to Protect Suit

Officials in Baxter County, Arkansas agreed to pay \$20,000 to settle a former prisoner's lawsuit that alleged he was assaulted by another prisoner as a guard stood by and failed to intervene.

The suit was filed by Howard Johnson for events that occurred on January 30, 2007 at the Baxter County Detention Facility. While in "B Pod" that day, a guard, who was named as John Doe I in the complaint, brought prisoner Philip Rasmussen into the pod.

The guard stayed in the unit and watched as Rasmussen checked the lower and upper tier cells. As Johnson was sitting on a stainless steel table, Rasmussen came down the stairs and, in an unprovoked attack, struck him in the jaw and began assaulting him.

The guard did nothing but watch until other prisoners attempted to assist Johnson, at which time he pushed them away and allowed the beating to continue. Other guards arrived and separated Johnson and

Rasmussen by using a chemical spray.

Johnson was taken to a local hospital, which could not fully treat his injuries. The Sheriff's Office then released him from custody to avoid responsibility for his medical costs, the complaint alleged. Johnson was then taken to a hospital in Missouri where he underwent surgery and had his mouth wired shut. Despite that and several additional surgeries, his jaw never healed properly and he still experiences pain.

Rasmussen was later found guilty of second-degree battery and ordered to pay Johnson's medical bills.

The \$20,000 settlement with Baxter County was reached on June 14, 2012; the county did not admit any fault or liability. Johnson was represented by Mountain Home, Arkansas attorney John O. Russo. See: *Johnson v. Montgomery*, Circuit Court of Baxter County (AR), Case No. 2010-403-1.

Additional source: *Associated Press*





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# New York City Pays \$2 Million to Settle Suit Over Death of Juvenile Killed by Other Prisoners Acting as Guards' Enforcers

The City of New York has paid \$2 million to settle a lawsuit filed by the mother of a juvenile offender who was beaten to death at the Robert N. Davoren Center (RNDC) on Rikers Island.

Christopher Robinson, 18, was killed in October 2008 by a gang of prisoners who were acting as enforcers for Rikers guards. [See: *PLN*, Feb. 2010, p.28; Jan. 2009, p.20]. The guards used enforcers as part of an intimidation campaign known as "the Program" to maintain rigid control over the juvenile unit. Numerous prisoners were assaulted and severely injured by other prisoners as part of the Program, while guards condoned and covered up the attacks.

The guards enlisted gang members to enforce the rules and run the unit; those who resisted the gang or violated unit rules were regularly beaten. The enforcers decided who had phone privileges and who could use chairs in the common room. They also robbed other prisoners of their commissary items and clothes. According to the Bronx District Attorney, the jail was an "incubator for violent criminal activity sanctioned by adults in positions of authority." Robinson was in RNDC on a minor parole violation for breaking curfew to work late at a new job. His mother, Charnel Robinson, said her son was putting his life together while incarcerated.

"When he left this world, I was extremely proud of him," she stated. "He made a mistake. He paid for it, and I expected him to come home."

While the June 14, 2012 settlement agreement specified that the City of New York did not admit fault or liability, Charnel said she thought it was an acknowledgment that things went horribly wrong. Still, the settlement did not assuage her pain. "It just hurts every day, and it doesn't get any better, and this will not help," she remarked.

"This involved a very tragic situation," said attorney Muriel Goode Trufant, who represented Robinson's mother in the lawsuit. See: *Robinson v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:09-cv-7446-LTS.

Two Rikers guards, Michael McKie and Khalid Nelson, pleaded guilty to assault and attempted assault in connection with the Program. On January 17,

2012, McKie was sentenced to two years in jail and Nelson received one year as part of plea agreements. Neither was directly implicated in Robinson's death. Two juvenile offenders who took part in killing Robinson are now serving 10- and 12-year sentences.

"I'm not happy. It's not a win for me. My son is gone," said Charnel Robinson. "At the end of the day, these people are still able to see their families. My only child is a sight I'll never see again."

Jail officials claimed they had made improvements at RNDC. "The list of actions we have taken both prior to and since Robinson's death includes plenty of steps the department has taken to address violence, including, specifically, in adolescent housing units," said Department of Correction spokesman Stephen Morello.

However, city officials later investigated whether staff at RNDC had covered up high levels of violence involving juvenile offenders. RNDC officials received an award in May 2011 based on a 62% drop in the number of fights at the facility. But when RNDC warden Williams Clemons was replaced, incoming warden Raino

Hills found that numerous assaults and two use of force incidents had not been reported.

"The record has been amended to reflect these two incidents, and the culpable staff disciplined," said Department of Correction spokeswoman Sharman Stein. Further, on July 31, 2012, former RNDC prisoner Dwaine Taylor filed a lawsuit in which he claimed the Program continued to operate at the facility until late 2011. Taylor said he experienced two beatings from gang members acting as enforcers in the Program. Guards encouraged him not to report the first assault in May 2011, which left him with a broken jaw; after he insisted, he was later placed back into general population at RNDC, where he was again beaten in November 2011 and again suffered a broken jaw. Taylor's lawsuit remains pending. See: *Taylor v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:12-cv-05881-RPP. ■

Additional sources: *www.timesunion.com*, *New York Times*, *Village Voice*, *www.cor-specops.com*, *New York Daily News*, *New York Post*

## \$2,500 Settlement in Illinois Prisoner's Telephone Disconnect Suit – After Nine Years

An Illinois prisoner has accepted \$2,500 to settle a lawsuit against Ameritech, in which he accused the telecommunications company of fraudulently and intentionally disconnecting phone calls made by prisoners.

Prisoner Johnnie Flournoy filed suit in state court in 2002. He alleged fraud and negligence against Ameritech, a prison phone service provider, for intentionally disconnecting his collect calls early in order to force a second call that would require another connection fee and surcharge.

The state court dismissed the lawsuit on the grounds that the Illinois Public Utilities Act grants the Illinois Commerce Commission exclusive jurisdiction over complaints concerning excessive rates or overcharges. The Third District Court of Appeal for Illinois, however, found the matter was a civil action based upon alleged fraud and negligence that resulted in multiple surcharges and connection fees,

and held the circuit court had jurisdiction. [See: *PLN*, Dec. 2004, p.31].

The parties litigated the case for the next seven years, including another appeal and appellate ruling in favor of Flournoy. [See: *PLN*, Aug. 2009, p.37]. The eventual settlement provided that Ameritech, which is owned by the Illinois Bell Telephone Company, denied wrongdoing. Nonetheless the company agreed to pay \$2,500 to settle the matter. Flournoy represented himself pro se through the litigation. See: *Flournoy v. Ameritech*, Twelfth Judicial Circuit Court (IL), Case No. 02MR855. ■

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Only with your support will we end the abusive cost of prison phone calls. Encourage others to join us in this struggle!

**For more information: [www.prisonphonejustice.org](http://www.prisonphonejustice.org) and [www.phonejustice.org](http://www.phonejustice.org)**

# Pennsylvania Jail Major Pleads Guilty to Beating Prisoner After Escape Attempt

On October 29, 2011, James M. Donis, 50, who had been major of the guards and the fourth-highest-ranking official at the Allegheny County Jail in Pittsburgh, Pennsylvania, was fired from his \$68,631-a-year position. He had worked at the jail since 1989.

A federal lawsuit filed on October 7, 2011 accused Donis of beating a prisoner, Gary W. Barbour, who had allegedly attempted to escape through the jail's ventilation system in April 2010. He was caught and offered no resistance. Nonetheless, Donis allegedly put on leather gloves and repeatedly punched Barbour in the face after telling him, "I'm your worst nightmare." Other guards allegedly participated in the assault.

According to the suit, after the beating Barbour's bloody and soiled clothes were changed before he was taken to a hospital. He was also denied follow-up medical care by jail staff, was not taken to a surgical appointment for repair of a deviated septum and was placed in a psychological observation cell for more than a month.

Attorney Ronald D. Barber, who represents Barbour in the lawsuit, said it was "too early to tell" what effect the firing would have on the litigation. Allegheny County spokeswoman Judi McNeil refused to comment on Donis' termination "because it's a personnel matter."

Human Rights Coalition Fed Up advocate Shandre Delaney said the firing "doesn't surprise me, because most of the time when these things are occurring, it goes all the way up the ladder." She has protested local jail conditions and noted, "[t]here is abuse going on."

Donis was charged in federal court with various offenses on November 2, 2011, including violating Barbour's civil rights by assaulting him and making false statements to the FBI. He was released on \$50,000 unsecured bond.

On October 5, 2012, the U.S. District Court denied the defendants' motion to dismiss Barbour's lawsuit, finding that he had presented sufficient evidence of violation of his rights for the case to proceed. See: *Barbour v. Allegheny County*, U.S.D.C. (W.D. Penn.), Case No. 2:11-cv-01291-LPL.

Ten days later, Donis pleaded guilty to federal charges of falsifying reports

by creating an addendum to his original report that falsely claimed Barbour had "refused to comply with commands" and was "combative" when he was caught during the escape attempt. Charges of deprivation of civil rights and making false statements to the FBI were dropped

as part of a plea bargain; Donis is scheduled to be sentenced on February 20, 2013. See: *United States v. Donis*, U.S.D.C. (W.D. Penn.), Case No. 2:11-cr-00251. ■

Sources: *Pittsburgh Post-Gazette*, *Pittsburgh Tribune-Review*

## Pennsylvania Guards Charged with Physical, Sexual Abuse of Prisoners

A Pennsylvania state prison guard was arrested on September 27, 2011 and charged with 89 counts of physically and sexually abusing prisoners at State Correctional Institution (SCI) Pittsburgh. Seven other guards were initially suspended, and three face related charges.

Before his arrest, Harry F. Nicoletti, Jr., 60, had worked at SCI for 10 years. The charges against him, stemming from his conduct in F Block, the prison's intake unit, include institutional sexual assault, involuntary deviate sexual intercourse and official oppression.

A federal lawsuit filed five days before the Allegheny County Grand Jury indicted Nicoletti shed some light on the facts of the case. The suit claims that eight prison officials and the Pennsylvania Department of Corrections (PDOC) had a "common plan and conspiracy to sexually abuse, physically abuse, and mentally abuse inmates who were homosexual," as well as those who were transgender or convicted of sex crimes. The abuse allegedly included the rape of a transsexual prisoner.

The unidentified plaintiff who filed the lawsuit claimed that Nicoletti had victimized him by threatening to anally rape him, make him perform oral sex or touch his genitals, or he would be subjected to physical abuse and false misconduct reports. [See: *PLN*, April 2012, p.1].

Nicoletti, who was released on \$75,000 bail, denied the allegations in the suit and the 89 criminal charges. "There is no truth to this whatsoever," he said. "It makes me sick to my stomach that someone can make accusations like that. It's totally false, and there's eight [guards] out on the street with no pay, no benefits."

The lawyer who filed the lawsuit believes the abuse at SCI Pittsburgh was known by other prison staff. "Everybody knew what was going on," said attorney Steven M. Barth.

At least one expert agreed there are no secrets in prison. "You can't tell me every guard, inmate and secretary [didn't] know what was going on," stated Tracy Barnhart, who worked as a prison guard in Ohio for 12 years. "Officers are just as much big blabbers."

Martin Horn, former secretary of the PDOC and now a criminology professor in New York, said a sense of brotherhood among guards – also known as a code of silence – can create an "us against them" attitude. "They have to watch each other's backs," he said. "There's a sense of loyalty, and sometimes it blinds people to their ethical obligations."

The abuse at SCI Pittsburgh sends a negative message to prisoners, Barth noted. "The reason these guys are in prison is because they broke rules," he said. "Now, [prisoners are] in an environment where rules don't count. There's a slippery slope to becoming exactly what you're incarcerating."

In May 2011, Pennsylvania prison officials removed SCI Pittsburgh superintendent Melvin S. Lockett and top deputies Janis Niemiec and Martin A. Kovacs, and ordered a full review of the facility. "They did not have any indications of any incidents happening anywhere else," said PDOC spokeswoman Susan Bensinger. "It was not a rampant thing. 'Isolated' is a good term. It was not systemic. It was not widespread at [SCI] Pittsburgh."

Nonetheless, several other guards were charged with participating in the physical and sexual abuse or knowing about but not reporting it, including Tory D. Kelly, 40, who faces 19 counts that include assault and witness intimidation; Jerome J. Lynch, 36, who faces 7 counts; and Bruce S. Lowther, 34, who faces 2 counts. Three other guards, Kevin Friess, Brian Olinger and Sean Storey, were initially charged but later cleared of wrongdoing. Former SCI Pittsburgh Sgt.



John Michaels was suspended and then fired in connection with the investigation, but not criminally charged.

State lawmakers have also weighed in – but on the side of the prison guards accused of misconduct, not the prisoners they are accused of abusing. A bill introduced in July 2012, known as the Corrections Officers' Bill of Rights, would require higher standards for internal prison investigations, give guards 24-hour notice before an internal affairs interview except in cases of an emergency, prohibit guards from being required to take polygraph tests, let accused PDOC employees retain their medical benefits during pending investigations, and allow guards to sue people who file frivolous complaints against them, including prisoners and the PDOC.

“There is an obvious need for such legislation based on what recently happened to a group of corrections officers employed at SCI Pittsburgh,” said state Rep. Mike Fleck, who introduced the legislation. “The eight officers were suspended without pay and benefits for almost a year following allegations of abuse made by prisoners. They were not given the opportunity to ask questions regarding the allegations or to defend themselves and were never even given the benefit

of a hearing. An arbitrator later ordered that they be reinstated to their positions with full back pay and benefits.”

The bill, HB 2549, failed to pass during the 2012 legislative session but Fleck said it would be reintroduced next year. It has 24 co-sponsors.

Meanwhile, the lawsuit against Nicoletti and other prison staff remains pending, though on September 28, 2012 a federal magistrate judge dismissed claims against the PDOC, finding the state was immune for any acts the guards committed as part of their official duties. See: *Doe v. Nicoletti*, U.S.D.C. (W.D. Penn.), Case No. 2:11-cv-01221-LPL. Five other federal lawsuits have been filed over abuse committed by Nicoletti and other staff at SCI Pittsburgh.

Lockett, Niemiec and Kovacs have also filed suit against the state, claiming the manner in which they were fired “left a defama-

tory impression of serious mismanagement, as well as participation and/or acquiescence in alleged sexual abuse misconduct,” which made them “unable to secure employment in their fields, despite having actively sought employment opportunities.” Their suit was dismissed in July 2012 and is currently on appeal. See: *Lockett v. Penn. Dept. of Corrections*, U.S.D.C. (W.D. Penn.), Case No. 2:11-cv-01314-JFC. ■

Sources: *Pittsburgh Post-Gazette*, [www.repflex.com](http://www.repflex.com), [www.philly.com](http://www.philly.com), [www.sfgate.com](http://www.sfgate.com)

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# BOP Supermax Lawsuit Claims Horrific Abuse of Mentally Ill at ADX

by Alan Prendergast

**“A Clean Version of Hell”** – that’s what a 2007 segment of *60 Minutes* called the U.S. Penitentiary Administrative Maximum facility in Florence, Colorado, or ADX, home to some of the world’s most notorious murderers and terrorists. But according to a grimly detailed lawsuit filed in Denver on June 18, 2012 that alleges systemic mistreatment of mentally ill prisoners, the federal supermax is actually a filthy version of hell – a place where untreated psychotic men mutilate themselves, have delusional conversations with ghosts and live in feces-caked isolation cells for months with little monitoring.

Filed on behalf of five ADX prisoners and another half-dozen “interested parties” who are also prisoners there, the suit claims that the U.S. Bureau of Prisons (BOP) ignores its own regulations in shifting dangerous or hard-to-control prisoners to ADX regardless of their mental status, and fails to monitor them properly after they arrive – even to the point of denying them medication or ignoring diagnoses made by other BOP medical staff.

“Many prisoners at ADX interminably wail, scream, and bang on the walls of their cells,” the complaint alleges. “Some mutilate their bodies with razors, shards of glass, sharpened chicken bones, writing utensils, and whatever other objects

they can obtain. A number swallow razor blades, nail clippers, parts of radios and televisions ... still others spread feces and other human waste and body fluids throughout their cells, throw it at the correctional staff and otherwise create health hazards at ADX. Suicide attempts are common.” [See: *PLN*, Oct. 2011, p.10].

One of the interested parties, Jack Powers, had no history of mental illness before his 1990 conviction for bank robbery. He witnessed a prisoner-on-prisoner killing, testified in the case, tried to escape – and ended up in isolation at ADX for ten years. While there he bit off a finger, amputated a testicle, tattooed his body with a razor blade, tried to inject bacteria in his brain, mutilated his genitals and repeatedly attempted suicide. All of these incidents happened after the BOP had diagnosed Powers as mentally ill and was supposedly monitoring him.

Several of the parties associated with the suit have committed ghastly crimes – including William Sablan, who joined with a cousin in disemboweling another prisoner in the SHU at USP Florence in 1999. Sablan is now doing a life sentence for that murder. But the suit points out that other severely mentally ill prisoners at ADX are eligible for release soon despite their lack of treatment.

At least six prisoners have committed suicide at ADX since it opened in 1994.

The complaint contains descriptions of staff allegedly goading prisoners to kill themselves, abusing them and denying them food – including a lunchbag “prank” that involves making a videotaped record of staffers handing the prisoner a sack lunch, then leaving the prisoner to discover the sack is empty. Prisoners the staff want to punish are sometimes transferred to cells already caked with feces from the previous occupant, the suit claims.

“They do what they do because they can,” says Ed Aro, an attorney with Arnold and Porter, which filed the suit in collaboration with the Washington Lawyers Committee for Civil Rights. “There’s a pervasive philosophy at ADX that approves of using punitive methods to deal with aberrant behavior – that if you’ve got someone who’s suicidal, punishing them and putting them in the hole will keep them from killing themselves.”

Aro says he’s interviewed more than 100 prisoners at the supermax. Some are schizophrenic, deeply delusional or raving psychotics; some are severely retarded. The complaint makes numerous allegations about correctional staff interfering with prisoner mail and contact with attorneys, and acts of retaliation against the plaintiffs. “The guys who have agreed to be the plaintiffs in this case have more guts than anybody I’ve ever met,” he says.



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While the prison ostensibly has a process for prisoners to complain of mistreatment, the complaint notes that the SIA, or special investigative agent, who's supposed to handle reports of officer misconduct, is Dianna Krist – the wife of ADX Captain Russell Krist, who oversees the correctional staff. In other words, “the watchdog is married to the person whose staff the watchdog is responsible for investigating.”

As first reported in *Westword* in 2007, supermax officials have cited “security concerns” as a reason for banning all face-

to-face press interviews with prisoners at the facility since 2001. A BOP spokesman declined to respond to questions about the lawsuit, saying the agency would not comment on pending litigation. [See: *Bacote v. Federal Bureau of Prisons*, U.S.D.C. (D. Col.), Case No. 1:12-cv-01570].

*This article was originally published in Westword, a Colorado-based alternative publication (www.westword.com). It is reprinted with permission from the author. More information about the ADX lawsuit is available at www.supermaxlawsuit.com.*

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# Vietnam Pardons 10,244 Prisoners but Few Dissidents

by Derek Gilna

Two Vietnamese activists jailed for advocating democracy were among more than 10,000 prisoners granted amnesty by Vietnam's government on August 25, 2011 in celebration of National Day. Nguyen Van Tinh and Tran Duc Thach had been sentenced in 2009 to three-and-a-half and three years in jail, respectively – Tinh for hanging pro-democracy banners and Thach for “propaganda against the state.”

A total of 10,244 prisoners arrested for crimes ranging from murder and drug trafficking to trafficking women and bribery were released due to the mass amnesty – around 10 percent of the country's entire prison population. Approximately 17,000 prisoners had been pardoned in 2010 and about 5,000 were released in 2009 as part of

Vietnam's annual National Day amnesty.

According to Giang Son, Vice-Chairman of the President's office, “This once again demonstrates the clemency policy of the Party and State and the humane traditions of the Vietnamese people.”

International prison watchdog groups, however, painted a different picture. Human Rights Watch said Thachs' poetry and other “dissident” writings “condemn corruption, injustice, and human rights abuses,” and noted that he had been arrested more than 10 times since 1978.

Amnesty International expressed concern that dozens of political critics and dissidents jailed since late 2009 had not yet been released and were not included in the amnesty. For example, activist Pham Minh Hoang received a three-year

sentence for pro-democracy activities and another prominent dissident, Cu Huy Ha Vu, was sentenced to seven years.

Of the 10,244 Vietnamese prisoners who received amnesty only five, including Tinh and Thach, had been charged with “national security crimes.” More than 10,000 prisoners were pardoned in September 2012 for National Day, including 11 foreigners. Whether the most recent amnesty included any political prisoners was not reported. Of course, compared to the United States which rarely pardons its political dissidents and shows no mercy to its prisoners, especially in the form of mass releases, the contrast is striking. ■

Sources: [www.channelnewsasia.com](http://www.channelnewsasia.com), [www.thanhniennews.com](http://www.thanhniennews.com)

## Nebraska Refuses to Return Execution Drug to Swiss Company

In its desperation to obtain a supply of sodium thiopental, one of the three drugs commonly used to carry out executions by lethal injection, the State of Nebraska circumvented the manufacturer, which does not sell the drug for use in capital punishment, and instead bought it from an Indian middleman.

Swiss pharmaceutical company Naari AG cried foul and asked Nebraska to return the sodium thiopental. State officials coun-

tered that they had legally obtained the lethal injection drug and would move forward to execute prisoner Michael Ryan. Ryan was scheduled to be put to death in March 2012 but received a stay of execution.

Naari AG said it gave samples of sodium thiopental, which was produced at its plant in India, to Chris Harris with Harris Pharma LLP, a Calcutta broker, who claimed he wanted to sell it as an anesthetic in Zambia, according to a November 18, 2011 letter from Naari AG CEO Prithi Kochhar to Nebraska Supreme Court Chief Justice Michael Heavican. Instead, Harris sold the samples to Nebraska officials for \$5,411.

“I am shocked and appalled by this news,” wrote Kochhar. “I am writing to request that the thiopental which was

wrongfully diverted ... to the Nebraska Department of Correctional Services be returned to its rightful owners, that is, that it be returned to us at Naari.”

A two-sentence statement from the Nebraska Attorney General's office said the drug “was approved for legal export by the government of India and approved for legal import by the regulatory federal agencies of the United States (DEA and customs).”

The Nebraska Department of Correctional Services (NDCS) stated it had no plans to return the sodium thiopental. “From our perspective, we obtained that legally,” said NDCS spokeswoman Dawn-Renee Smith. “I'm not sure there really are any next steps at this point. We would, obviously, work with the Attorney General's office as necessary.”

Sodium thiopental is no longer manufactured in the United States, and European countries have outlawed selling the drug to the U.S. because it is used in executions (the death penalty is banned in Europe). That restriction has led states to scramble to find alternative sources for the drug or other drugs to carry out death sentences. [See: *PLN*, June 2011, p.1].

On March 27, 2012, a U.S. District Court in the District of Columbia held that the Food and Drug Administration (FDA) should not have allowed unapproved foreign-manufactured sodium thiopental to be imported into the U.S., as it was a “misbranded drug and an unapproved new

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drug” under federal law. The FDA was ordered to instruct state agencies to surrender their supplies of foreign-made sodium thiopental, and the FDA was “permanently enjoined from permitting the entry of, or releasing any future shipments of, foreign manufactured thiopental into interstate commerce.” See: *Beatty v. FDA*, U.S.D.C. (D. DC), Case No. 1:11-cv-00289-RJL.

Nebraska refused to comply with the FDA’s request to give up the state’s sodium thiopental, however, arguing that it had obtained its supply of the drug from a different source than the one at issue in the case involving the FDA, which has since appealed the district court’s ruling.

“Other than the court’s erroneous order, we are unaware of any evidence or reasons why the Department of Correctional Services should be required to return any thiopental in its possession,” said Nebraska Assistant Attorney General James Smith.

The questionable method by which the state obtained its supply of sodium thiopental provided ammunition for opponents of the death penalty, including state Senator Brenda Council, who introduced legislation (LB 276) to replace capital punishment in Nebraska with life

without parole.

“I don’t think the state should be involved in utilizing a product that the manufacturer has maintained was obtained under false pretenses,” Council said. “If you know the manufacturer had no intention that the drug be shipped to the United States – let alone to be used in lethal injection – that obliges you to step back.”

In September 2012, another European company, Germany-based Fresenius Kabi, announced that it would not sell propofol, a sedative, for use in executions in the U.S. Several states, including Missouri, had switched to propofol due to difficulties in obtaining other drugs used in lethal injections, such as thiopental.

“Fresenius Kabi objects to the use of its products in any manner that is not in full accordance with the medical indications for which they have been approved by health authorities,” the company stated. “Consequently, the company does not accept orders for propofol from any departments of correction in the United States. Nor will it do so.”

Sources: *The Lincoln Star Journal*, [www.correctionsone.com](http://www.correctionsone.com), [www.ketv.com](http://www.ketv.com), *Associated Press*

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# Iowa Reconsidering Costs, Benefits of Sex Offender Supervision Law

by Joe Watson

Over the past decade more than 20 states have created “special sentences” that require community supervision for sex offenders after their release, even if they expire their prison terms. But Iowa is currently re-evaluating whether the millions in taxpayer dollars spent on such post-release supervision is justified in light of the questionable results.

A January 2012 report by the Iowa Sex Offender Research Council indicates that the additional cost of monitoring an estimated 2,651 sex offenders serving special sentences will total at least \$34.5 million by 2021, thanks to a strict state law.

That law, passed in 2005, requires sex offenders to be supervised and monitored with GPS tracking technology for 10 years to life after their release from prison, depending on the seriousness of their crimes.

“The special sentence, particularly lifetime supervision,” the report stated, “will increase the parole caseload by 78 percent in 10 years.”

According to Iowa’s Legislative Services Agency, the cost of treating, supervising and monitoring sex offenders cost the state \$11.5 million in 2010 alone.

The report concluded that “[t]here is sufficient evidence that sex offenders and the public benefit from a period of supervision and treatment/relapse prevention support in the community, particularly after incarceration. However, the current policy of set terms of post-sentence parole is not supported by research, is not the most effective use of limited resources, and does not contribute to increased public safety.”

Iowa’s law was passed in response to public outrage over the 2005 death of Jetseta Gage, a 10-year-old Cedar Rapids girl who was murdered by a sex offender. But members of the Iowa Sex Offender Research Council want state leaders to find more effective and less expensive methods of dealing with released sex offenders.

“We’re trying to figure out policy-wise what makes the most sense to do now,” said Sally Kreamer, who heads the Fifth Judicial District’s correctional services. “Caseloads are only going to get larger and larger. If we don’t figure out some

strategy soon, I’ll have to come back to my board and say, ‘What is it that you don’t want us to do anymore?’”

Kreamer noted that Iowa has been more successful than other states in monitoring sex offenders who pose the highest risk to public safety, which has resulted in lower recidivism. The risk assessments, she added, have saved thousands of dollars without increasing public safety issues.

There were 542 sex offenders in Iowa prisons in 2011, up from 507 in 2007. And those who violated parole and were returned to prison last year totaled 68, compared with only four in 2007. The state also has around 300 juvenile sex offenders.

According to state Senator Bob Dvorsky, a member of the Iowa Sex Offender Research Council, lawmakers would be wise to examine research that suggests savings can be found by treating

and assessing juvenile offenders, who are becoming a larger part of Iowa’s sex offender population.

“There is more latitude in the juvenile area because they respond more easily to treatment,” Dvorsky said. “There are ways that maybe we can work with them and get them out of the system if they are identified quickly.”

In its January 2012 report, the Iowa Sex Offender Research Council recommended reforms that include a minimum number of years of post-release supervision for sex offenders, a required review of each offender’s progress and risk level after a specified number of years, and proof that an offender poses a risk of committing sexual or violent crimes before supervision is extended beyond the review date. ■

Sources: *Des Moines Register*, [www.globe-gazette.com](http://www.globe-gazette.com)

## Los Angeles Jail Pays \$161,000 Settlement for Juvenile Injured Due to Negligent Supervision

The County of Los Angeles has agreed to pay \$161,000 to settle a civil rights action that claimed a juvenile offender was seriously injured while held at the Los Angeles County Probation Department’s Central Juvenile Hall (CJH), due to improper supervision.

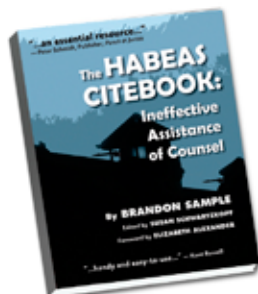
The plaintiff, 17-year-old Alyssia Frenzel, was detained on an assault with a deadly weapon charge. While at CJH she continuously experienced hallucinations. Concerned that she might injure herself, an intervention plan required staff to keep her hands, wrists and arms in sight and to actively intervene before a situation escalated to self-harm. Her enhanced supervision level required staff to remain in close proximity.

Frenzel was in the coed gymnasium at CJH on May 23, 2008 when she ran out the door for a ball. Staff pursued her, but she ran across the yard, went up a unit’s steps and jumped from the second level. She sustained injuries to both arms and her left elbow, and burst the orbital capillaries in her eyes. Her lawsuit, filed on March 3, 2010,

alleged constitutional rights violations, negligent hiring, failure to train and supervise, and general negligence by Probation Department staff.

The Los Angeles County Counsel Office recommended settling the lawsuit for \$161,000 on May 14, 2012. It noted that the county had already spent \$32,737 in attorney’s fees and \$2,541 in costs, and the risks and uncertainties of litigation made settlement the best option.

The recommendation said that disciplinary action – a notice of suspension – was being taken against a CJH employee for not being in close proximity and for being inattentive to Frenzel during her recreational activity. It also noted that action was taken to enhance policies to define close proximity and to ensure that only experienced staff members provide enhanced supervision of juveniles. The County Board of Supervisors subsequently approved the settlement. See: *Frenzel v. County of Los Angeles*, Los Angeles Superior Court (CA), Case No. BC 432895. ■



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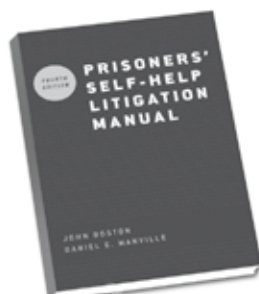


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## LEGAL NOTICE

# IF YOU WERE CONFINED IN A HOLDING CELL AT LAKE COUNTY JAIL IN INDIANA FOR A PERIOD OF 24 HOURS OR MORE AT ANY TIME BETWEEN MAY 13, 2006 AND FEBRUARY 1, 2012, YOU MAY BE A MEMBER OF A CLASS ACTION WHO IS ENTITLED TO MONEY.

There is a proposed settlement with defendants (Lake County Sheriff's Department, Roy Dominguez, Caren Jones and Bennie Freeman) in the class action lawsuit, *Flood, et al. v. Dominguez, et al.*, case no. 2:08-CV-153, pending in the U.S. District Court for the Northern District of Indiana. This notice is provided as a summary of your rights. For more information, visit [www.LakeCountyJailSettlement.com](http://www.LakeCountyJailSettlement.com) or call 800-332-6198.

## What Is This Lawsuit About?

The lawsuit involves the alleged conditions in the holding cells at the Lake County Jail in Indiana. Those alleged conditions include overcrowding, long detentions, and the lack of adequate food, showers, clothing, sanitation, or provisions for sleeping. Defendants deny the allegations. No court has determined that the class is entitled to win or that defendants are entitled to win.

After years of litigation, both sides agreed to the proposed settlement to resolve the case and avoid the risk of loss associated with a trial. The class representatives and lawyers for the class think the proposed settlement is in the best interests of the class members.

## Who Is a Class Member?

You are a class member if you were confined in the Lake County Jail's holding cells for a period of at least 24 hours at any time from **May 13, 2006** to **February 1, 2012**.

## What Does the Proposed Settlement Provide?

Defendants have agreed to pay a total of \$7.2 million. This \$7.2 million will be used to cover payments to class members as well as the attorneys' fees and costs advanced by the attorneys, incentive awards for the named plaintiffs and certain class members who assisted in the litigation, and the costs of notice and claims administration as the Court will allow.

## Who Represents Me?

The Court has appointed Loevy & Loevy as class counsel to represent the class. The settlement includes money to compensate class counsel for representing the class. Under the proposed settlement, class counsel may petition the Court for the greater of 40% of the fund (\$2.88 million) or the dollar value of the significant amount of professional time they invested in this case increased by a 2-times multiplier to account for the risk of nonpayment class counsel undertook when representing the class. To provide the class certainty on the amount of the fee petition, class counsel decided to limit their fee petition to 40% of the fund.

## What Are My Legal Rights?

- If you do not want to be included in the proposed settlement, you must exclude yourself in writing, postmarked by December 3, 2012, and sent to Lake County Jail Class Action, EXCLUSIONS, Claims Administrator, c/o A.B. Data, Ltd., PO Box 170500, Milwaukee, WI 53217. Your exclusion request must state your name, date of birth, address and telephone number (if any); a statement that you do not want to be part of the Lake County class action settlement; and your signature.
- If you stay in the class and would like to receive payment, you may file a claim. Filing a claim is the only way to be eligible for settlement payment. Your claim must be postmarked by December 3, 2012.
- You may object to any aspect of the proposed settlement. Your written objection must be postmarked by December 3, 2012, and filed and mailed as set out in the notice of class action and proposed settlement referred to below. You also may request in writing to appear at the fairness hearing.
- If you choose to do nothing, you will receive no payment and will give up the right to sue defendants for the same claims in this case.

## Will the Court Approve the Proposed Settlement?

The Court will hold a fairness hearing on **December 14, 2012 at 9:30 a.m.** before the Honorable Philip P. Simon at the United States District Court for the Northern District of Indiana, located at 5400 Federal Plaza, Hammond, IN 46320, to consider whether to approve the proposed settlement and petitions for attorneys' fees, costs, and named plaintiff and class member incentive awards. Everyone has the right to observe this hearing. You do not have to attend. If you want to speak at the hearing, you must request to do so when you file an objection (see the additional information on objecting in the notice, which is available at [www.LakeCountyJailSettlement.com](http://www.LakeCountyJailSettlement.com) or by calling 800-332-6198). Incarcerated people do not have a right to be brought from a jail or prison to the hearing; however, all written objections will be considered by the Court.

## How Do I Obtain Further Information?

This is only a summary of the proposed settlement. For a more detailed notice of class action and proposed settlement, additional information on the proposed settlement, a copy of the Settlement Agreement, and information about how to file a claim please visit [www.LakeCountyJailSettlement.com](http://www.LakeCountyJailSettlement.com), call toll free 800-332-6198, or write to the claims administrator:

**Lake County Jail Class Action, Claims Administrator,  
c/o A.B. Data, Ltd., PO Box 170500, Milwaukee, WI 53217.**

**Please do not contact the Court or the Court Clerk's Office for information.**

All inquiries should be directed to the claims administrator at the number and/or address above.

**QUESTIONS? CALL 800-332-6198 TOLL FREE  
OR VISIT [WWW.LAKECOUNTYJAILSETTLEMENT.COM](http://WWW.LAKECOUNTYJAILSETTLEMENT.COM)**



**LAKE COUNTY JAIL SETTLEMENT CLAIM FORM**

*Flood, et al. v. Dominguez, et al., 2:08 CV 153 (N.D. Ind.)*

**RESPONSE DEADLINE:**  
**Postmarked no later than**  
**December 3, 2012.**

Keep a copy of the completed claim form and proof of mailing, such as a post office receipt.

**Complete, sign, and mail this claim form postmarked by**  
**December 3, 2012 to:**

Lake County Jail Class Action  
Claims Administrator, c/o A.B. Data Ltd.  
PO Box 170500  
Milwaukee, WI 53217

For Official Use Only

Please read the enclosed notice packet before filling out this claim form. If you have questions about the settlement or how to complete the claim form, contact the administrator of this class action at 800-332-6198.

**Last Name:**

**First Name:**

**Middle Name (if any):**

**Address where you currently live:**

Street Address:

City:

State:

Zip Code:

Phone No.:

If you reside at a correction facility, please list it here, and provide your inmate D.O.C. ID number:

**Date of Birth (Month/Day/Year):**

 /  / 

**Social Security Number/I-TIN:**

 -  - 

**Note:** If you do not provide a valid Social Security number or I-TIN, 28% of your payment may be withheld and paid to the IRS.

**If you want mail about this settlement sent to a different address from above, please complete this section:**

Street Address:

City:

State:

Zip Code:

Phone No.:

Name of correction facility and inmate D.O.C. ID number (if applicable):

This settlement applies only to people who were confined in a holding cell at Lake County Jail in Indiana **for a period of 24 hours or more** at any time between **May 13, 2006** and **February 1, 2012**. Please submit this claim form only if you believe you fit this description.

By submitting this form, you are requesting the administrator to check the class action database to see if you are eligible for payment. If you believe the jail's records contain different information about you than what you provide above (*i.e.*, a different name, birth date, Social Security number or I-TIN, or address), please clearly print that information in the box below. If your address changed multiple times, print the most recent address given to the jail before **February 1, 2012**.

I declare under penalty of perjury under the laws of the United States that the information provided on this form is mine and is true and correct to the best of my knowledge.

**Signature:**

**Date:**

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## News in Brief

**Indiana:** On June 21, 2012, former state prison guard Benjamin Hankins, 37, was sentenced to 64 years for killing his estranged wife, Lisa, in June 2011. Hankins shot his wife three times when she dropped off their children at his home, then waited several minutes before calling the authorities. Hankins, who was also a Gaston police reserve officer, worked at the Pendleton Correctional Facility at the time. He claimed he was the victim of a police conspiracy.

**Nevada:** Former Southern Desert Correctional Center guard Michael Ford, 31, pleaded guilty on June 17, 2012 to felony misconduct charges. Ford was prosecuted for trying to smuggle tobacco to prisoners in a large duffle bag. "Our office takes seriously any allegations of corruption by public employees," said Nevada Attorney General Catherine Cortez Masto.

**New Jersey:** Two former prison guards, Ardones V. Livingston, 55, and

Latasha Y. Walker, 44, were convicted on June 20, 2012 of accepting \$500 to smuggle a cell phone to a prisoner at the Adult Diagnostic and Treatment Center in Avenel. Both received five-year sentences and were barred from public employment; Livingston also forfeited his state pension. The prisoner who bribed the two guards, Frank Rodriguez, 52, was charged with conspiracy, bribery and possession of a cell phone. He pleaded guilty and was sentenced to 10 years, to run consecutive to his current sentence. Rodriguez's girlfriend, Traci C. Baio, 45, who mailed the phone to Walker to smuggle into the prison, received a five-year sentence.

**Ohio:** Josh Adkins, 34, a former deputy with the Miami County Sheriff's Office, was sentenced to six months in prison on July 9, 2012. Adkins, who pleaded guilty to seven felony counts of using deception to obtain prescription painkillers, had

previously worked as a corrections officer at the county jail. "You need to learn that you can't do this any more," said Judge Robert Lindeman, who noted that Adkins had also been arrested on a drug-related domestic violence charge. According to Adkins' attorney, his client's drug problem was the result of "an injury he suffered on duty. It simply spiraled out of control."

**Oklahoma:** On June 7, 2012, six prisoners at the Grady County jail were charged with murder in connection with the May 2012 beating death of Anthony John Mollman. Mollman, a federal prisoner, was being held at the jail while awaiting sentencing; he had reportedly agreed to cooperate with federal prosecutors and was granted immunity for his testimony before a federal grand jury. "Hell, yeah, they didn't kill him because they just didn't like him," said Irven Box, an attorney hired by Mollman's widow. "They killed him

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because he was an informant.” Charged with first-degree murder were Grant Curry, 30; Matthew Eugene Jackson, 26; Cody Sitlington, 31; Steven Nidey, 28; Joseph Patrick Hill, 50; and Jerry Gonzales, 33. The fatal attack on Mollman was caught on surveillance video.

**Oregon:** Shawn Spevacek, 45, employed as a corrections deputy with the Benton County Sheriff’s Office until he resigned last May, was charged on June 19, 2012 with one count of fourth-degree assault and two counts of first-degree official misconduct, all misdemeanors. He is accused of using excessive force on a jail prisoner. Spevacek, who had served 21 years with the Sheriff’s Office and was named “Supervisor of the Year” in 2007, pleaded not guilty to the charges. He was turned in by another deputy.

**Pennsylvania:** On June 12, 2012, former Beaver County assistant public defender

Michael F. Yagercik was charged with trying to smuggle tobacco, marijuana and rolling papers into the Allegheny County Jail. According to an informant he was paid \$500 to deliver the contraband, and is suspected of smuggling marijuana to other prisoners at a jail in Ohio. Yagercik, 32, turned himself in and was released on \$3,000 bail; he was also previously employed as an assistant district attorney for Beaver County.

**Pennsylvania:** Federal prison guard Richard Spisak, 33, employed at FDC Philadelphia, was sentenced to 32 months in prison on June 28, 2012 for having male prisoners perform oral sex on him. According to federal prosecutors, Spisak had rearranged the furniture in his office and placed paper on the windows – including prison rules and policies – to block the view of people on the outside in order to facilitate his sexual misconduct. He pleaded guilty to one count of engaging

in a sexual act, and the court found he had also had sexual contact with two other male prisoners. DNA on the shirt of one of the victims was matched with Spisak.

**South Carolina:** According to a June 7, 2012 news report, the state Department of Corrections is having a difficult time dealing with contraband cell phones. Prisoners who participated in a June 2012 riot at the Lee Correctional Institution in which a guard was held hostage reportedly used cell phones to issue demands to prison officials. Around 2,500 cell phones are found each year in the state’s 27 prisons, which are smuggled in by prison employees and by prisoners’ friends and visitors.

**South Carolina:** Saluda County Sheriff Jason Booth was indicted on June 14, 2012 on one count of misconduct in office, and resigned the same day. He was accused of using a state prisoner “on loan” from the Department of Corrections to perform

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## News in Brief (cont.)

work on his private property. In exchange for building a gate, digging a pond and constructing a "party shed" for Booth, the prisoner was allowed to spend nights outside the jail, eat at restaurants and attend parties on Booth's property. The former sheriff pleaded guilty to the misconduct charge on August 6, 2012; he was sentenced to one year in prison (suspended to five months probation) plus a \$1,000 fine.

**Texas:** On July 7, 2012, a TDCJ prison transport bus was involved in a head-on

collision with a wrecker from Drake's Towing & Recovery Service. Both drivers in the Drake's vehicle were hospitalized, one in critical condition; six prisoners and three TDCJ guards received medical treatment at a local hospital. The bus was en route to the Alfred D. Hughes unit in Gatesville when the accident occurred on Interstate 45.

**Washington:** A female prisoner at the Kent city jail has been cited for indecent exposure for flashing her breasts at a male prisoner, who complained to jail staff because he was offended and "did not like it." Jail officials then notified the police, as the male prisoner said he wanted to file charges. The

female prisoner admitted to the June 18, 2012 incident, saying she was just trying to fit in with other women held at the jail. Neither prisoner was identified in news reports.

**Washington:** On July 16, 2012, an unexpected visitor made an appearance at the Monroe Correctional Complex: a bobcat. The feline made it through the perimeter fence and then climbed on the roof of the special offender unit after it was spotted by guards. Prison officials contacted a local vet, who shot the bobcat with a tranquilizer gun. It was then captured and removed; after the cat receives treatment for an injured paw and hindquarters, it will be released. 🐾

## Criminal Justice Resources

### ***ACLU National Prison Project***

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### ***Amnesty International***

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***The Exoneration Project***

The Exoneration Project is a non-profit organization dedicated to working to free prisoners who were wrongfully convicted. The Project represents innocent individuals in post-conviction legal proceedings; typical cases involve DNA testing, coerced confessions, police misconduct, the use of faulty evidence, junk science and faulty eyewitness testimony, and ineffective assistance of counsel claims. Contact: The Exoneration Project, 312 North

May Street, Suite 100, Chicago, Illinois 60607 (312) 789-4955. [www.exonerationproject.org](http://www.exonerationproject.org)

### ***Family & Corrections Network***

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) publishes the FAMMgram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

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# PRISON

## Legal News

VOL. 23 No. 12

ISSN 1075-7678

*Dedicated to Protecting Human Rights*

December 2012

### Momentum Builds to End Prison-Based Gerrymandering

*by Peter Wagner*

Four states and hundreds of local governments are standing up to reject one of the most repugnant aspects of the prison industrial complex: Legislators with prisons located in their districts who claim the people incarcerated there – who cannot vote – as their “constituents,” then use their newfound political clout to further expand the prison system.

The problem originates with the U.S. Census Bureau, which has, for hundreds of years, counted incarcerated people as residents of the location where they are imprisoned rather than their pre-incarceration address. With the first census in 1790, this didn’t matter at all. Few people were in prison, they weren’t locked up that

far from home and, most importantly, the data wasn’t used for anything other than determining a state’s number of Congressional seats. So long as the Census Bureau could figure out that New York had 10 seats in Congress and New Jersey had 5, it didn’t matter whether someone was a resident of rural Attica or urban Brooklyn, just that they were counted in New York State.

Today, however, we incarcerate far more people and use census data far differently. Since a series of voting rights cases in the 1960s, the Supreme Court has required state and local governments to redraw their legislative districts every 10 years to ensure equal representation. When each district contains the same population, each member of the community is afforded equal representation. This undertaking, however, is vulnerable to flaws in the data on which the redistricting relies. When district census counts include incarcerated populations (who can’t vote in all but two states), people who live close to the prison have more of a say in government than everyone else because the district’s population is artificially inflated. The practice of using prison populations to dilute the votes of residents in other districts is referred to as “prison-based gerrymandering.”

Of course, when incarceration was not as widespread as it is today, prison populations were, at worst, minimal blips in the redistricting data. The U.S. currently incarcerates 1% of its adult population, a rate far higher than anywhere else on the planet. This forced mass migration of 2.3 million people from their homes to prisons and jails is accompanied by a significant

transfer of political power.

And the political effects of prison-based gerrymandering, like those of incarceration generally, are not evenly distributed – with some significant winners and losers by region as well as by race and ethnicity. When prison population counts are used in the redistricting context, the impact on state legislative districts can be dramatic. To use some of the historical examples that inspired two states to pass the first laws to end prison-based gerrymandering:

- In Maryland, one state house district drawn after the 2000 Census drew 18% of its population from a large prison complex. As a result, every four voting residents in the district were granted as much political influence as five residents elsewhere in the state.

- Seven New York state senate districts drawn after the 2000 Census met minimum population requirements only because they included prison populations.

- Virtually all – 98% – of New York’s state prisons are located in state senate districts that are disproportionately white, which dilutes the votes of African-American and Latino voters.

- Of the seven New York state senate districts mentioned above, four of the senators sat on the powerful Codes Committee where they opposed reforming the state’s draconian Rockefeller Drug Laws that boosted New York’s prison population. The inflated populations of those senators’ districts gave them little incentive to pursue policies that might reduce the number of people sent to prison or the length of time they served. Republican New York state

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## **Prison-based Gerrymandering (cont.)**

Senator Dale Volker boasted that he was glad the almost 9,000 people confined in his district couldn't vote, because "they would never vote for me."<sup>1</sup>

The impact of prison-based gerrymandering on state legislative districting gets the most attention from policymakers, but the problem is even more significant in rural counties and cities that contain prisons. County board districts and city council districts are smaller than state legislative districts, so a single prison can have a massive effect.

The most well-known example occurred in Anamosa, Iowa, where the state's largest prison constituted 96% of the population for the city's second ward. In 2005 there were no second ward candidates for city election, and the winner prevailed with two write-in votes – one cast by his wife and another by a neighbor. Public outrage about the unfairness of granting some residents twenty-five times as much political influence as other voters led Anamosa to change its form of city government.

The example of Anamosa, while extreme, is far from unique. Several other local governments have fallen into the same prison-based gerrymandering trap:

- Lake County, Tennessee drew a district after the 2010 Census in which 87% of the population in County Commissioner District 1 was composed not of local residents, but of people incarcerated at the Northwest Correctional Complex. The result is that there are only 344 non-incarcerated people in the district compared to about 2,500 in the county's other districts. Four other counties in Tennessee – Wayne, Hardeman, Lauderdale and Morgan – each have a district in which the incarcerated population accounts for over 60% of the district's "residents."

- Wisconsin also has a number of county and municipal districts where prison populations constitute the majority of district residents. The Waupun City Council drew a district after the 2010 Census that was 76% incarcerated, and Juneau County drew a district that was 80% incarcerated.

- In the city of McAlester, Oklahoma, more than half of one city ward is incarcerated. Robert Karr, the City Councilor representing the ward where the prison is located, objected, telling the *McAlester News-Capital*: "It seems this wouldn't be

fair. Prisoners can't vote so I can't really represent them."<sup>2</sup> City officials had previously refused to engage in prison-based gerrymandering, but the city's new charter had an unexpected provision that required the use of the "total city population" reported by the Census Bureau.

- The most troubling example may be from Somerset County, Maryland, where prison-based gerrymandering made it impossible to elect an African-American candidate. The county, which until 2010 had never elected an African-American to county government, agreed to create one district where African-Americans could elect the candidate of their choice in order to settle a Voting Rights Act lawsuit. Unfortunately a prison was built in the district, resulting in a small African-American vote-eligible population. This made it difficult for residents to field strong candidates and for voters to elect an African-American commissioner. An effective African-American district could have been drawn had the prison not been included in the population count.<sup>3</sup>

## **The "Usual Residence Rule"**

The Census Bureau traces the prison-based gerrymandering problem back to the "usual residence rule," which was first developed for the census of 1790. Determining where to count people for census purposes is simple for most groups, but for highly mobile populations and people in special types of non-traditional housing – such as those in "group quarters," which include prisons<sup>4</sup> – there was a need for some standardized guidance. As the National Research Council put it, the goal of the residence rule is to ensure that everyone is counted "Once, Only Once, and in the Right Place." But what the Census Bureau is not eager to admit in discussions about the usual residence rule is that the rule has evolved over time and that the Bureau itself is responsible for writing it.

Once we set aside the myth that the usual residence rule is set in stone, we can see just how far out of step it is with the rest of the nation. In a nutshell, the Census Bureau is the only organization that considers a prison cell to be a residence. Outside of the Bureau, everyone agrees that incarcerated people do not choose to live in prison.

In general, "residence" is a place where someone voluntarily chooses to reside without a current intention of going elsewhere. Incarceration meets neither the

## Prison-based Gerrymandering (cont.)

voluntary nor the intent to remain requirements for determining residence.

In the voting context, most states have explicit constitutional provisions or statutes that declare a prison cell is not a residence.<sup>5</sup> The application of these provisions has been most frequently debated in the context of voting. While 48 states currently bar people incarcerated for felonies from voting, in most states people who are detained awaiting trial or serving time for misdemeanors may still vote. For those individuals, the rules of most states require incarcerated people who can vote to vote absentee based on their pre-incarceration addresses.

And in other contexts like divorce, research has found that the communities that surround prisons do not view the incarcerated population as a part of their community. For example, people in prison who seek to get divorced are generally referred to the courts in their pre-incarceration home counties. Time and again, courts have observed that incarcerated people are not willing residents of the community where the prison

is located – though some elected officials may opportunistically try to claim them as their constituents.

### Federal Law Does Not Require Reliance on the Census Bureau

While state and local governments are required by federal law to redistrict each decade, federal law does not in fact require that Census Bureau data be used.<sup>6</sup> Most governments rely on the Bureau for redistricting because the data is high quality and free. But the Supreme Court has said that states, and local governments by extension, can use other sources of data.<sup>7</sup>

One Supreme Court case, *Burns v. Richardson*, implicitly approved the type of census adjustments for prison populations discussed in this article:

*Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include ... persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*<sup>8</sup>

When states draw their congressional districts they are required to use the “best population data available,” and, although as a general matter Census Bureau data is the best available,<sup>9</sup> states are not required to use data they know to be flawed simply

because it comes from the Bureau.<sup>10</sup>

Similarly, the Supreme Court in *Mahan v. Howell*<sup>11</sup> rejected Virginia’s argument that it was compelled to use Census Bureau assignments of residences of military personnel in its state legislative redistricting, and suggested that a state may not use census data it knows to be incorrect.

State and local governments are therefore free, at least under federal law, to create their own census data from scratch, or to simply correct how the federal census counts people in prison. Recently, a federal three-judge panel specifically rejected claims that it is unconstitutional to adjust census data to count people in prison as residents of their pre-incarceration addresses for redistricting purposes.<sup>12</sup>

As the unadjusted census data fails to meet redistricting needs, many states – some of which had self-imposed requirements to use census data – have relaxed their statutes. For example, Virginia had required all counties to use federal census data for redistricting without any modifications. The law was amended in 2001 to give a handful of counties the choice to remove prison populations from their redistricting data, and in 2012 state lawmakers passed HB 13, which changed the law to basically triple the number of eligible counties.

The Census Bureau is taking note of redistricting officials’ demands to avoid prison-based gerrymandering and is helping them access more accurate data. For the 2010 Census, the Bureau made a critical change in how it publishes its data to make it easier for states and municipalities to draw districts without including prison populations. The Advance Group Quarters Summary file was produced for the first time after the 2010 Census for the explicit purpose of helping governments address



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the problem of prison-based gerrymandering. As the Census Bureau explained:

*This early release of data on the group quarters population may be beneficial to many data users including those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries.... It will permit state and local redistricting officials to overlay this file with the 2010 Census Redistricting Data (Public Law 94-171) Summary File data.<sup>13</sup>*

For this redistricting cycle, Maryland and New York both relied on the Advanced Group Quarters Summary file in conjunction with state corrections department data to reallocate prison populations to their pre-incarceration residences. Courts in both states have approved the laws requiring such adjustments in order to count incarcerated people at their home addresses for redistricting purposes.<sup>14</sup>

### Legislative and Other Reforms

Four states have recently passed legislation to count people in prison at their pre-incarceration residences. Maryland and New York enacted legislation effective for the 2010 round of redistricting. Delaware passed similar legislation, though the

state subsequently postponed implementation until 2020.<sup>15</sup> Similarly, California passed a bill that will take effect in 2020 after the next federal census.<sup>16</sup>

The New York law applies to state legislative, county and municipal governmental redistricting.<sup>17</sup> Maryland's legislation is similar but also applies to Congressional redistricting,<sup>18</sup> while the Delaware law applies only to state legislative districting.<sup>19</sup> Amendments to California's state constitution in 2008 transferred redistricting authority to the Citizens Redistricting Commission, so the California law asks the Commission to "deem each incarcerated person as residing at his or her last known place of residence, rather than at the institution of his or her incarceration" when drawing future districts, and requires the Department of Corrections and Rehabilitation to provide necessary data to the Commission.<sup>20</sup>

While state legislation has received the most attention in the press, the greatest impact of prison-based gerrymandering is on county and municipal governments, where a single prison's population can easily constitute the majority of a local government district. More than 185 counties and municipalities independently

chose to reject the Census Bureau's data after the 2010 Census, and drew districts without including prison populations. Additionally, in several states, including Michigan,<sup>21</sup> Colorado<sup>22</sup> and New Jersey,<sup>23</sup> exclusion of incarcerated populations is mandatory according to state statutes, while in Mississippi the Attorney General has instructed counties to exclude prison populations when redistricting:

*[I]nmates under the jurisdiction of the Mississippi Department of Corrections as well as inmates of local jurisdictions in local jails are not deemed "residents" of that county or locality, as incarceration cannot be viewed as a voluntary abandonment of residency in one locale in favor of residency in the facility or jail.... Such inmates should not be used ... for redistricting purposes by virtue of their temporary presence in a detention facility or jail in the county, unless their actual place of residence is also in the county.<sup>24</sup>*

### Impediments to Reform

The most significant impediments to prison-based gerrymandering reform are policy inertia and basic misunderstandings about the mechanics of the criminal justice system and how federal and state

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## Prison-based Gerrymandering (cont.)

funding formulas operate.

In short, the Census Bureau counts incarcerated people as residents of the prison location because that is where they have always been counted. Thankfully, Census Bureau policies are not immutable and as the country, its population and its needs have evolved, so too has the Bureau's methodology. The problem of the Census Bureau's method for counting prison populations and the prison-based gerrymandering that results is one new to the era of mass incarceration, and the Bureau's policies and protocols need to be modernized to address this issue.

Former Census Bureau Director Kenneth Prewitt neatly summarized the problem with the Bureau's outdated methodology: "Current census residency rules ignore the reality of prison life. Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration."<sup>25</sup>

The reality noted by Director Prewitt is the fact that, while the prison buildings

themselves may exude permanence, the people inside are in fact quite transient. Indeed, in New York State, for example, the median length of stay for incarcerated people at any one prison is only 7.1 months, not the decades that the public often assumes.<sup>26</sup>

Another common obstacle to prison-based gerrymandering reform is an unsupported fear of negative changes to federal or state funding. Research has found that many people rely on an oversimplification of how census data is used to distribute such funds, which overstates the impact of prison population counts on funding formulas. In general, prison populations have very little impact on the distribution of federal and state funds, and the prison-based gerrymandering reforms discussed in this article would have no impact whatsoever because there are no funding formulas tied to redistricting data.

The confusion about funding arises in part because the Census Bureau encourages participation in the census by appealing to the important use of census data in funding formulas.<sup>27</sup> This leads to a misunderstanding relative to how the population data is actually used. Most large federal and state funding formulas

— particularly those targeted to individual municipalities or school districts — do not use "total population" for their population component. Instead they use more targeted factors, such as people in poverty (which does not include people in prison or other people not in households), the number of school-age children, or non-census data such as the number of children enrolled in school. As a result, the impact of prison populations on funding formulas tends to be quite small.

This logical conclusion is confirmed by the experience of the more than 100 counties and cities that removed prison population data when redistricting after the 2000 Census, with no ill financial effect.

## Reform has been Refreshingly Bipartisan

Not only is there nothing to lose by abolishing prison-based gerrymandering, but everybody who does not live immediately adjacent to the state's largest prison complex benefits if the practice is ended. At the state level, everyone who lives outside the state legislative district with the largest prison benefits, plus the majority of the people living within that state district benefit at the local level due

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to more equitable county and municipal redistricting. The successful reform efforts to date have all been structured to maintain a broad coalition of stakeholders that would benefit from reform.

In New York, where a bill to end prison-based gerrymandering ultimately passed on a narrow partisan vote, a Quinnipiac University poll showed it was supported by a majority in the state, both urban and rural, Democrat and Republican, and the bill received editorial support from urban and rural upstate newspapers. Once the law passed, rural supporters fought to keep the legislation in place, resisting pushback from New York lawmakers responsible for drawing the new district lines. When a lawsuit was filed challenging the new law, residents from every area of the state intervened to defend the statute. [Ed. Note: See *PLN*, Oct. 2012, p.26; Oct. 2010, p.18].

In Delaware, a bipartisan prison-based gerrymandering reform bill passed unanimously in the House. In Maryland, too, the legislation passed with bipartisan, urban and rural support. One white Republican state senator spoke from the floor about why he was voting for the bill, and both lead sponsors had large prisons

in their districts. As Delegate Joseline A. Peña-Melnik explained, "It doesn't matter. To me, it is just a fair way to count."<sup>28</sup> Senator Catherine E. Pugh agreed, stating, "It was the right thing to do."<sup>29</sup>

### Solutions and Best Practices

The ideal solution is for the Census Bureau to count incarcerated people as residents of their home communities rather than of the prisons where they are currently held. This federal fix would solve all of the problems that lead to prison-based gerrymandering, but state and local governments that don't want to wait for the Bureau to act must find their own solutions.

Most state constitutions are silent on the data source to be used for redistricting, leaving the states free to pass legislation to improve the federal census data. A notable exception is Massachusetts, where restrictive language requires the use of the federal census for redistricting, leaving the state with the larger task of amending its constitution or lobbying the Census Bureau for change – the latter being a more speculative effort.<sup>30</sup>

Model legislation,<sup>31</sup> prepared by a coalition of civil rights, voting rights and criminal justice reform organizations,

offers a basis for ending prison-based gerrymandering in states that have the constitutional ability to pass laws which require people in prison to be counted based on their pre-incarceration residences. Various political and practical realities may dictate other choices, but the model bill recommends three, somewhat subtle, best practices:

1. The legislation should grant a specific non-legislative agency the task of receiving data from the state Department of Corrections and performing the prison population reallocation process,

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## Prison-based Gerrymandering (cont.)

and there should be specific deadlines for this work to be completed. In many states the Secretary of State is an ideal choice, particularly where the Secretary plays an active non-partisan role in elections administration and has the necessary technical skills. Experience has shown that the question of who is responsible for the reallocation can have a major impact on the process. In Maryland, for example, the statute did not specify which agency would do the reallocation, but the Maryland Department of Planning took the initia-

tive and did an impressive job. New York's bill gave this task to LATFOR, the state's partisan redistricting taskforce, but did not specify a deadline. Partisan wrangling over technical implementation delayed the completion of the process, leading to a federal lawsuit alleging that the legislature was unable or unwilling to implement the statute. Tasking an independent agency with implementation would not remove the risk of the law being later repealed by the legislature, but it would separate the minor technical issues from the larger policy ones.

2. The legislation should apply to county, municipal and other local districts

as well as to state legislative districts. While most county and municipal governments already avoid prison-based gerrymandering when redistricting, the exceptions are dramatically negative and the entire process is inconsistent and cumbersome. Politically speaking, proposing one consistent data set for state and local redistricting is a proven way to build urban and rural coalitions to improve democracy for everyone.

3. The legislation should specify that when the proper residential address of an incarcerated person is unknown or in another state, the redistricting data should reflect that individual as being counted at

# MOMENTUM IS BUILDING

No longer hidden, the problem of prison-based gerrymandering is on the national agenda.

- State law prohibits prison-based gerrymandering in state and local governments. Law implemented and upheld.
- State law prohibits prison-based gerrymandering in state government. To be implemented after 2020 Census.
- Counties and cites confirmed to have avoided prison-based gerrymandering.
- State law prohibits or discourages local governments from engaging in prison-based gerrymandering.
- States have introduced legislation abolishing prison-based gerrymandering.
- States considering resolution calling on Census Bureau to change where incarcerated people are counted.



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an “unknown geographic location within the state.” People at “unknown geographic locations” should not be included in the calculations for district size or population deviations. This method is similar to the way overseas military personnel are counted as at-large residents of a state for congressional apportionment but not included in specific districts.<sup>32</sup> Notably, this specific aspect of the model bill was endorsed by the NAACP in a 2010 Convention resolution.<sup>33</sup>

In addition to the issues addressed by the above best practices, there is tremen-

dous variation at the county, municipal and other local levels in how governments adjust the census data and in the level of detail given to documenting the rationale for such adjustments.

Some municipalities and counties adjust the census figures, some cut a hole in their map where the prison is located and some “overpopulate” the district that contains the prison by the exact size of the prison population. To the agency that draws the district lines, these methods are very different but the outcome is the same, and the redistricting professional’s conve-

nience should dictate the methodology.

The justifications for and documentation of the redistricting process are more important. In some cases municipalities and counties note the adjustment on their redistricting map, but the best practice is illustrated in New York’s Essex County, where the county explained its rationale for excluding the prison population in Local Law Number 1 of 2003:

*Persons incarcerated in state and federal correctional institutions live in a separate environment, do not participate in the life of Essex County, and do not affect*

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## Prison-based Gerrymandering (cont.)

*the social and economic character of the towns in which ... the correctional facilities where they are incarcerated are located.*

*The inclusion of these federal and state correctional facility inmates unfairly dilutes the votes or voting weight of persons residing in other towns within Essex County. This is particularly so if the 1,898 inmates in the town of North Elba are included in its population total of 8,661 since those inmates would then represent 21.914% of the town of North Elba's population.*

*The Board of Supervisors finds that the population base to be utilized in and by the plan apportioning the Essex County Board of Supervisors should exclude state and federal inmates.*

Putting this rationale into the public record demonstrates the basis for the adjustment to any court that looks at the redistricting, and makes it more likely a decade later, following the next federal census, that the government will recall and repeat its previous decision. There are many examples where municipalities and counties were unaware of the basis of their previous districting maps due to a lack of documentation.

As noted above, the ideal solution is for the Census Bureau to count incarcerated people as residents of their home communities, not of the facilities where they are housed. The Bureau has the legal discretion to determine where to count people in prison. Fortunately, now-former Census Bureau Director Robert M. Groves has given reason to be hopeful, writing in

his blog: "Counting members of all group quarters is complicated; we re-evaluate our 'residence rules' after each census, to keep pace with changes in the society. We'll do that again after the 2010 Census."<sup>34</sup>

The challenge for advocates seeking change at the Census Bureau is that the public and policymakers tend to pay attention to census issues only every ten years or so, when the data is being gathered and published. The critical policy decisions – and the scientific research to support those decisions – naturally take place between the decennial censuses, when public interest is less intense. We must ensure that the Census Bureau asks the right questions to inform its decisions about improving where incarcerated people are counted. If this opportunity is lost, state and local governments will be forced to continue to develop their own solutions.

The problem of prison-based gerrymandering is a historical accident. Neither the framers of the Constitution nor the Census Bureau ever intended for the electorate's voting strength to depend in large part on whether or not they live next to a large prison.<sup>35</sup> The combination of an old methodology, an unprecedented change in incarceration patterns and a modern constitutional mandate to draw districts on the basis of equal representation has created an undeniable problem for our democracy.

Of course if mass incarceration in the United States ended tomorrow, the need for the Census Bureau to update its prison population counting methodology would evaporate. Until then, we need to make sure that criminal justice policy decisions

– like all policy decisions – are made by the willing majority and are not the result of the Census Bureau counting 2.3 million incarcerated people in the wrong place, for the wrong reasons. ■

*Peter Wagner is Executive Director of the Massachusetts-based Prison Policy Initiative ([www.prisonpolicy.org](http://www.prisonpolicy.org)). For the past decade he has been leading a national movement to end prison-based gerrymandering. This article is based on one originally published as "Breaking the Census: Redistricting in an Era of Mass Incarceration" in the Spring 2012 issue of the William Mitchell Law Review.*

## ENDNOTES

1 See <http://prospect.org/article/making-prisoners-count>.

2 See [www.prisonersofthecensus.org/news/2011/10/25/mcalester-city-okla-councilor-continues-to-question-necessity-of-prison-based-gerrymandering](http://www.prisonersofthecensus.org/news/2011/10/25/mcalester-city-okla-councilor-continues-to-question-necessity-of-prison-based-gerrymandering).

3 See Brief of the Howard University School of Law Civil Rights Clinic, et al. as Amici Curiae Supporting Respondents at 8-9, *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D.Md. 2011), *aff'd*, or "Maryland Bill" Podcast Episode #2 at [www.prisonersofthecensus.org/news/2010/05/27/podcast2](http://www.prisonersofthecensus.org/news/2010/05/27/podcast2).

4 See [www.census.gov/compendia/statab/2012/tables/12s0073.pdf](http://www.census.gov/compendia/statab/2012/tables/12s0073.pdf).

5 British common law and virtually all states define residence as the place a person chooses to be without a current intention to go elsewhere. In most states, constitutions and statutes go even further, explicitly declaring that incarceration does not change a residence. See, e.g., Ariz. Const. Art. VII, § 3; Colo. Const. Art. VII, § 4; Minn. Const. Art. VII, § 2; Mo. Const. Art. VIII, § 6; Nev. Const. Art. II,



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6 *E.g., Burns v. Richardson*, 384 U.S. 73, 92 (1966).

7 As the Third Circuit has explained, “Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature.” *Borough of Bethel Park v. Stans*, 449 F.2d 575, 583 n.4 (3d Cir. 1971).

8 *Burns*, 384 U.S. at 92.

9 *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969)).

10 *See, e.g., City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993); *Assembly of the State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 919 n.1 (9th Cir. 1992); *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981).

11 *Mahan v. Howell*, 410 U.S. 315, 330-332 (1973).

12 *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D.Md. 2011), *aff’d*.

13 “Redistricting Data: 2010 Census Advance Group Quarters Summary File,” U.S. Census Bureau (Jan. 12, 2012), [www.census.gov/rdo/data/2010\\_census\\_advance\\_group\\_quarters\\_summary\\_file.html](http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html).

14 *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D.Md. 2011), *aff’d*; *Little v. New York State Task Force on Demographic Research and Reapportionment*, Case No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011).

15 Del. Code Ann. tit. 29, § 804A (2011).

16 Cal. Elec. Code § 21003 (2012).

17 N.Y. Correct. Law § 71(8) (2012).

18 Md. Code Ann., Elec. Law § 8-701(a) (2011).

19 Del. Code Ann. tit. 29, § 804A(a) (2011).

20 Cal. Elec. Code § 21003 (2012).

21 Mich. Comp. Laws § 46.404 (2011); Mich. Comp. Laws § 117.27a (2011).

22 Colo. Rev. Stat. § 30-10-306.7(5)(a) (2011).

23 N.J. Rev. Stat. § 18A:13-8 (2011); *Bd. of Educ. v. N.J. State Bd. of Educ.*, 858 A.2d 576 (N.J. 2004) (applying to school board districts).

24 Inmate Population in County Redistricting, Op. Att’y Gen. Miss. No. 2002-0060 (2002).

25 Kenneth Prewitt, forward to Patricia Allard & Kirsten D. Livingston, *Accuracy Counts: Incarcerated People and the Census*, at i (2004), available at [http://brennan.3cdn.net/d685e539baf1034ce1\\_w2m6iixeo.pdf](http://brennan.3cdn.net/d685e539baf1034ce1_w2m6iixeo.pdf).

26 State of N.Y. Dep’t of Corr. Servs., *The Hub System: Profile of Inmate Population Under Custody on January 1, 2008*, at 38 (2008), available at [www.doccs.ny.gov/Research/Reports/2008/Hub\\_Report\\_2008.pdf](http://www.doccs.ny.gov/Research/Reports/2008/Hub_Report_2008.pdf). The median time to the earliest potential release date was only 15 months. *Id.* at 18.

27 On average, each person in the Census is worth about \$1,300 a year in federal funds, but the funds are not distributed on an average. Very little of this money goes directly to municipalities on the basis of population. The largest federal funding formulas are block grants to states, and population plays only one part in most of the formulas. *See* Aleks Kajstura, “Census Bureau’s Prison Count Won’t Mean Funding Windfall,” Prisoners of the Census (Apr. 2, 2010), [www.prisonersofthecensus.org/news/2010/04/02/census-bureau-prison-count-wont-mean-funding-windfall](http://www.prisonersofthecensus.org/news/2010/04/02/census-bureau-prison-count-wont-mean-funding-windfall).

28 Liam Farrell, “Inmates to Play New Redistricting Role,” *The Capital* (Annapolis MD), April 27, 2010, at A5, available at [www.prisonpolicy.org/news/The\\_Capital\\_Annapolis\\_MD\\_April\\_27\\_2010.pdf](http://www.prisonpolicy.org/news/The_Capital_Annapolis_MD_April_27_2010.pdf).

29 *Id.*

30 *See* Peter Wagner and Brenda Wright, Testimony before the Special Joint Comm. on Redistricting of the Mass. Gen. Court (June 27, 2012), available at [www.prisonersofthecensus.org/testimony/PPI\\_Demos\\_Testimony\\_MA-2012-Jun-27.pdf](http://www.prisonersofthecensus.org/testimony/PPI_Demos_Testimony_MA-2012-Jun-27.pdf).

31 *See* [www.prisonersofthecensus.org/models/example.html](http://www.prisonersofthecensus.org/models/example.html).

32 *See* “Address Unknown” Podcast Episode #1 (May 20, 2010), available at [www.prisonersofthecensus.org/news/2010/05/20/podcast1](http://www.prisonersofthecensus.org/news/2010/05/20/podcast1).

33 Crossroads Correctional Center (MO) Branch & San Jose/Silicon Valley (CA) Branch, End “Prison-Based Gerrymandering” Resolution, ratified by the NAACP at the 101st Convention (July 13, 2010), available at [www.prisonersofthecensus.org/resolutions/NAACP\\_2010.html](http://www.prisonersofthecensus.org/resolutions/NAACP_2010.html) (“Be it Further Resolved, that the NAACP concludes that until the Census Bureau counts incarcerated people as residents of their homes, the fundamental principle of ‘one person one vote’ would be best satisfied if redistricting committees refused to use prison counts to mask population shortfalls in districts that contain prisons...”).

34 Robert M. Groves, “So, How Do You Handle Prisons?,” U.S. Census Bureau Director’s blog (Mar. 1, 2010), <http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html>.

35 In fact, the Bureau explicitly disclaims any responsibility for uses of the data. “As a nonpartisan scientific organization, the Census Bureau is not involved in redistricting.” *Id.*

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# From the Editor

by Paul Wright

This is the last issue of *PLN* for 2012. By now, all *PLN* subscribers should have received our annual fundraising appeal; if you have not yet donated, and can afford to do so, then please do. This year we are asking our readers for donations to help support the Campaign for Prison Phone Justice. For almost a decade the Federal Communications Commission has been sitting on the Martha Wright petition, which asks the FCC to cap the cost of interstate phone calls made by prisoners.

We have put an enormous amount of resources and effort into the national campaign, along with our partner organizations, the Center for Media Justice and Working Narratives, to pressure the FCC to act. In October 2012 the Human Rights Defense Center (HRDC), the parent organization of *PLN*, submitted a letter to the FCC supported by 60 other criminal justice organizations asking that they take action on the Wright petition. In November, a coalition of 110 immigration rights groups and academic professionals submitted a similar letter.

In addition to making a donation so we can keep up the pressure with the Campaign for Prison Phone Justice, we are also asking our readers to write to the FCC and tell them how high phone rates have impacted both prisoners and their families. In mid-November 2012, the FCC posted hundreds of letters from prisoners on the public docket for the Wright petition. This is something that everyone can do, and it is critical that the people most affected by this issue – prisoners and their families – tell the FCC about the real-world impact of exorbitant prison phone rates. See page 13 for details on how to contact the FCC.

On November 15 there was a rally in front of the FCC's office in Washington, D.C., urging them to act on the Wright petition. Representatives from HRDC, the Center for Media Justice and Working Narratives met with FCC commissioners to express our concerns, encourage them to act and tell them that ten years is far too long to ignore this issue. Tellingly, the only comments on the docket for the Wright petition that support the status quo of kickbacks and price gouging are from the telecom industry and prison and jail officials.

The Campaign for Prison Phone Justice has received extensive media coverage, which is building every week. If you want to make a donation, however big or small, it will definitely have an impact. Your tax deductible contribution will go to support our work on the campaign and keep pressure on the FCC until they act on the Wright petition. Your donation, and letters to the FCC, can make a real difference.

We are doing a large sample mailing of the December issue of *PLN*. If you are not a *PLN* subscriber and have received this issue, we hope you will read it and consider subscribing. If our content doesn't interest you, please pass it along to others who might be interested. For *PLN*

subscribers, the address label on the back of the magazine has an expiration date above your name; if there is no expiration date, this is a sample copy. We seek new subscribers in order to inform more people both in and out of prison about developments in the criminal justice system, and the more subscribers we have the easier it is for us to keep our costs down. A subscription to *PLN* and/or the books we distribute also make ideal holiday gifts.

As 2012 draws to a close, I would like to thank everyone who has supported HRDC and *PLN*. Our entire staff wishes our subscribers, supporters and readers a happy holiday season and best wishes for the new year. ■

## Oregon DOC Gets Tiny Cut of \$3.34 Million Pfizer Settlement

The Oregon Department of Corrections (ODOC) was duped by Pfizer, Inc.'s misleading statements and studies used to market an antibiotic, according to the Oregon Department of Justice (DOJ). As such, the ODOC received part of a \$3.34 million settlement between the State of Oregon and the pharmaceutical giant – albeit a very small part.

Following a 2009 multi-state lawsuit and settlement involving several drugs, including Zyvox, an antibiotic used to treat pneumonia and bacterial skin infections, the Oregon DOJ launched an independent investigation into the marketing of Zyvox.

The investigation found that Pfizer used “unreliable and unsubstantiated claims” to market Zyvox as a superior choice over vancomycin, a cheaper generic antibiotic. Pfizer's sales representatives distributed copies of flawed clinical studies to support the spurious marketing claims, according to the DOJ.

“Our investigation was aggressive, detailed, went places that the federal settlement didn't and provided additional settlement to the state of Oregon,” said David Hart, a senior assistant attorney general who supervised the case.

Pfizer denied the allegations but agreed to pay \$3.34 million to settle the two-year DOJ probe. “Pfizer is pleased to resolve this investigation and avoid

the further time and cost of litigation,” said Pfizer senior vice president and associate general counsel Bradley Lerman. “Pfizer is committed to conducting its business with the highest degree of ethics and integrity and providing patients, physicians and the public with accurate, science-based information regarding our medicines.”

The settlement was announced on March 20, 2012, and an Assurance of Voluntary Compliance was filed in Marion County Circuit Court. This was the largest, independently negotiated consumer drug settlement in Oregon's history.

The ODOC's cut of the settlement to reimburse the department for previous Zyvox purchases was a mere \$7,280.11, with the bulk of the rest of the money going to the DOJ and to fund a Consumer Education and Antimicrobial Stewardship Program. Pfizer also agreed to “disclose payments made to authors of Zyvox studies, reports, and clinical guidelines...” and to submit historical clinical trial results for “Pfizer-sponsored trials of Zyvox [] that were initiated after April 1, 2003” as part of the settlement. See: *In the Matter of Pfizer, Inc.*, Circuit Court of Marion County (OR), Case No. 12C13481. ■

Additional sources: *The Oregonian*, [www.lawyersandsettlements.com](http://www.lawyersandsettlements.com)





## CAMPAIGN FOR PRISON PHONE JUSTICE



WORKING  
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### JOIN THE CAMPAIGN FOR PRISON PHONE JUSTICE!

A national coalition of media and criminal justice activists, led by the Human Rights Defense Center, Working Narratives and the Center for Media Justice, invite you to join a campaign to fight the high cost of prison phone calls.

We need those inside our nation's jails, prisons and detention centers to speak up about the impact of the cost of prison phone calls on you and your family. With your support we will advance a state-by-state legislative challenge, while also pushing the Federal Communications Commission (FCC) to take action.

#### WHAT YOU CAN DO

Send a brief letter to the Federal Communications Commission explaining the impact the high costs of prison phone calls have had on you and your family. Address the letter "Dear Chairman Genachowski," and please speak from your own personal experience. You must state the following at the top of the letter: "This is a public comment for the Wright Petition (CC Docket #96-128)." Your letters will be made part of the public docket in the case.

##### Write to:

Chairman Julius Genachowski  
Federal Communications Commission  
Public Comments  
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Our goal is to gather thousands of powerful stories. The prison facility which registers the most letters will be highlighted on the campaign website and will get a co-producer credit on our national radio program addressing the high cost of prison phone calls.

We also need your help organizing on the outside. Ask your family members to sign up for the campaign at [www.phonejustice.org](http://www.phonejustice.org) and invite them to share their story about the high costs of prison phone calls. They can also register their comments online, directly with the FCC, at: <http://apps.fcc.gov/ecfs/upload/display.action?z=whn8> (enter docket #96-128).

Only with your support will we end the abusive cost of prison phone calls. Encourage others to join us in this struggle!

**For more information: [www.prisonphonejustice.org](http://www.prisonphonejustice.org) and [www.phonejustice.org](http://www.phonejustice.org)**

# CCA Ceases Operations at Mississippi Prison, County Jail

On November 10, 2011, Mississippi Department of Corrections Commissioner Chris Epps announced the closure of the privately-operated 1,172-bed Delta Correctional Facility in Leflore County. He said closing the prison was a mutual decision by state officials and Corrections Corporation of America (CCA).

CCA was being paid \$31.15 per prisoner per day to manage the Delta facility when it reportedly had daily costs of \$34.15 for each medium-security prisoner. State law requires private prisons to operate for 10 percent less than state facilities.

Epps said about 800 of the prisoners housed at Delta would be transferred to existing beds in state prisons, and the rest moved to regional jails. This will result in an estimated \$10.2 million in annual savings, as the only additional expenses will be for the prisoners' food, clothing and health care. With over 4,000 empty beds in the state's prison system, it was impossible to justify the additional expense of maintaining the CCA-run facility.

"Since [CCA] came and wanted out of the contract, I said we really don't need the prison," said Epps. "I have to look at what is best for Mississippi."

Commissioner Epps has also been pushing alternatives to incarceration as a cost-cutting measure. With 21,500 state prisoners, Mississippi has the second-highest rate of incarceration in the U.S., which creates a huge drain on the state's budget.

Under former Governor Ronnie Musgrove, a previous attempt to downsize Mississippi's prison system resulted in the closure of Delta in 2002. The following year, Republican Haley Barbour ran against Musgrove and pledged to reopen the facility. Less than three months after Barbour took office in 2004, Delta was again open for business.

The Delta facility had a history of serious security-related incidents, including a July 2011 fight involving six prisoners that resulted in one death and two prisoners being hospitalized. Also, in June 2009, Delta prisoner Joseph Jackson, Jr. escaped from CCA guards while at an off-site doctor's appointment with the help of his cousin, Courtney Logan. They fled to Tennessee, where they shot Nashville police Sgt. Mark Chesnut five times after Chesnut stopped their vehicle because Logan wasn't wearing a seatbelt.

Sgt. Chesnut filed a lawsuit against CCA, and the company settled the case

for an undisclosed amount in August 2011. [See: *PLN*, Nov. 2011, p.34]. Jackson was subsequently sentenced to 25 years in Mississippi and 45 years in Tennessee as a result of the escape and shooting, while Logan was sentenced to 31 years.

CCA employed a staff of 218 to operate the Delta facility, and all lost their jobs when the prison closed on January 15, 2012. CCA also decided to cease operations at the nearby 125-bed Leflore County Jail, which has since been run by the county.

In August 2012, Leflore County officials announced that private prison company MTC was bidding on a proposal

to re-open the Delta facility and use it to house federal prisoners.

CCA currently operates three other prisons in Mississippi, including the Adams County Correctional Center, which holds federal prisoners; the Tallahatchie County Correctional Facility, which houses California prisoners; and the Wilkinson County Correctional Facility, housing Mississippi state prisoners. ■

Sources: *Associated Press*, [www.heraldextra.com](http://www.heraldextra.com), [www.certops.com](http://www.certops.com), [www.knoxnews.com](http://www.knoxnews.com), [www.clarionledger.com](http://www.clarionledger.com), [www.mdoc.state.ms.us](http://www.mdoc.state.ms.us)

## Florida DOC Program Targets Incarcerated Veterans

The Florida Department of Corrections (FDOC) has implemented a program for military veterans that includes special housing and counseling services. While some see the program as providing preferential treatment, FDOC officials view it as a way to meet the special needs of incarcerated veterans in hopes of rehabilitating them.

Of the approximately 101,000 FDOC prisoners, around 6,700 are veterans. As the wars in Iraq and Afghanistan stretched past ten years, the number of military veterans has increased, including the number entering the prison system. Critics have long complained that the government has failed to help veterans integrate back into society after their tours of duty in war zones.

"I think we are going to see a lot of the things we saw after Vietnam," said FDOC Secretary Ken Tucker. "PTSD [post traumatic stress disorder] is real and we have a lot of Iraq and Afghanistan vets returning right now who don't always want to talk about that."

FDOC prisoners who were honorably discharged and are within three years of their release date may volunteer for the program, which houses them in units that hold about 400 prisoners each at the Gulf, Lowell, Martin, Santa Rosa and Sumter Correctional Institutions.

The veterans units are different from those for the rest of the prison population. "They are having to live up to higher standards, military standards with clean language and in the condition they keep their dormitories," said Tucker.

Prisoners are required to maintain their clothes, bunks and living standards at the same level as required by the military; they take part in a flag rising and retiring ceremony at the beginning and end of each day. The guards in the units also have military experience.

One of the main purposes of the program is to "congregate as many inmates as possible in one area where the [Veterans Administration] could meet with them and discuss the programs available to them," said FDOC spokeswoman Jo Elynn Rackleff.

The program also provides incarcerated veterans with educational and vocational opportunities, as well as counseling for PTSD.

"The military emphasizes pride, character, and integrity," Tucker stated. "By having veteran inmates in the same dorm before their release from prison, they can work together to recapture some of those qualities while also learning about programs and benefits available specifically for veterans." ■

Sources: *New York Times*, *Daily Mail*, *Orlando Sentinel*

### Actual Innocence

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# Washington Jail Prisoner Settles Retaliation Claim for \$10,000

Washington State's Pierce County has agreed to pay \$10,000 to settle a federal lawsuit that claimed a prisoner was subjected to retaliation in the form of solitary confinement for exercising his First Amendment right of access to the courts.

Neil Grenning filed suit under 42 U.S.C. § 1983 for events that transpired at the Pierce County Detention and Corrections Center (PCDCC) between April 3, 2002 and October 26, 2004. His problems began when he started to log and report PCDCC's failure to comply with a class-action consent decree related to the jail's operations and prisoners' rights. [See: *PLN*, March 1997, p.18].

Grenning's concerns related to religious access, legal access, medical care, laundry and outdoor exercise. Shortly after he wrote letters to the ACLU and filed grievances with PCDCC staff, the mailroom began opening and reviewing his legal mail. He was also subject to several cell searches that resulted in his "legal materials [being] strewn all over the bed and floor, and specific papers disposed of."

After Grenning witnessed two PCDCC guards severely beat prisoner Gary Brateng, Grenning experienced additional retaliation when he wrote an affidavit about the July 11, 2003 beating for an FBI investigation into the incident.

Several "violent" searches of Grenning's cell followed, and on November 18, 2003 he was moved to solitary confinement with 24-hour illumination, which also resulted in confiscation of his legal materials. He was returned to his old cell block 12 days later.

On January 2, 2004, Grenning was again placed in solitary confinement. He remained there until he was sent to prison on October 26, 2004. During that period he made several attempts to be removed from solitary. PCDCC officials, he said, were violating their Objective Classification System by claiming he was a security threat because he had a \$10 million bond.

PCDCC filed a motion for summary judgment after Grenning filed suit, and the district court granted the motion. The Ninth Circuit Court of Appeals affirmed with respect to Grenning's claims related to dental care and the constant illumination in his confinement cell, but reversed on the retaliation claim. See: *Grenning v. Bisson*,

382 Fed.Appx. 574 (9<sup>th</sup> Cir. 2010).

Up to that point, Grenning had litigated the case pro se. Following remand he was represented by Seattle attorney Harry Williams, who helped reach a settlement on October 17, 2011. The terms of

the agreement required Pierce County to pay \$7,500 to Human Rights Watch and \$2,500 to Grenning "for his costs and filing fees." See: *Grenning v. Bisson*, U.S.D.C. (W.D. Wash.), Case No. 3:06-cv-05298-RJB. ■

## PLN Settles Public Records Suit Against PHS in Vermont, Obtains Settlement Payout Information

by Alex Friedmann

On February 21, 2012, Prison Legal News settled a public records lawsuit filed in Vermont state court against Prison Health Services (PHS, now operating as Corizon Health, Inc.). As part of the settlement PHS agreed to produce records related to its resolution of legal claims against the company in Vermont, which included a total of \$1.8 million in six cases.

PLN had filed suit against PHS on August 26, 2010 after the for-profit company, which provided medical care for Vermont state prisoners until the end of 2009, refused to produce documents pursuant to a public records request.

PLN requested copies of PHS's contracts with government agencies in Vermont, records related to settlements and judgments that PHS had paid as a result of lawsuits and civil claims, and documents concerning costs incurred by PHS to defend against claims or lawsuits.

One of those claims involved the August 16, 2009 death of Ashley Ellis, 23, a Vermont prisoner who died at the Northwest State Correctional Facility just three days into a 30-day sentence. PHS employees had failed to give her potassium despite her repeated pleas for medical care and an order from her doctor. The medical examiner cited "denial of access to medication" as a contributing cause of her death. [See: *PLN*, April 2010, p.32].

Although PHS is a private company, PLN argued it was the functional equivalent of a public agency because it provided health care to prisoners – a function that public employees would have to provide if the state did not contract with PHS – and thus was subject to Vermont's public records law. The "functional equivalency" test has been applied to private companies that perform public duties in at least

eight states, including Florida, Tennessee, Maryland, North Carolina, Oregon, Kansas, Ohio and Connecticut.

PHS denied PLN's public records request, claiming that as "a private corporation" the company "does not qualify as a 'public agency'" within the meaning of Vermont's public records statute.

"The state can outsource public functions and services such as health care for prisoners," said PLN editor Paul Wright, "but it cannot contract out the public's fundamental right to know how their tax dollars are being spent and the quality of services the public is getting for its money." He also questioned "why PHS refuses to release records that state agencies would have to produce if the state were providing prison medical care."

PLN's public records lawsuit contended that "Prison Health Services, by virtue of its contractual relationship with the Vermont Department of Corrections, was a public agency subject to Vermont's public records statute" because it was an "instrumentality" and functional equivalent of a government agency. Further, PHS's funding for its Vermont contract came "exclusively from the Vermont DOC, and hence, the taxpayers."

In settling the case in February 2012, PHS agreed to produce unredacted copies of "the general releases it secured to settle claims or potential claims arising out of PHS's provision of medical care to inmates in the custody of the Vermont Department of Corrections" in six cases responsive to PLN's records request, including the Ashley Ellis case. The company further agreed to pay \$5,350 in attorney fees to the ACLU of Vermont but did not admit liability or wrongdoing.

According to the records produced by PHS, the company paid \$700,000 in



February 2010 in a pre-litigation settlement to resolve claims related to the death of Ashley Ellis. Ellis' estate, represented by Rutland attorney Shannon A. Bertrand, is also pursuing a separate lawsuit against the State of Vermont, the Vermont DOC and various state employees. See: *Gipe v. State of Vermont*, Vermont Superior Court, Rutland Unit, Case No. 515-7-11.

Additionally, in October 2010, PHS agreed to pay \$950,000 to settle a federal lawsuit filed by Christopher Barrett, a state prison guard who was attacked and injured by a prisoner in 2005 at the Northern State Correctional Facility; PHS allegedly did not give the prisoner his prescribed medication for a mental health condition, which resulted in the assault. Barrett was represented by attorney David J. Williams. See: *Barrett v. Prison Health Services*, U.S.D.C. (D. VT), Case No. 5:08-cv-00203-cr-jmc.

PHS paid \$47,500 in December 2010 to settle the negligence and medical malpractice claims of Agim and Fexhrije Sulejmani, related to Agim's health care while he was incarcerated in 2006. Despite repeatedly seeking treatment for a preexisting throat condition, PHS staff failed to provide adequate medical care or diagnose Agim's laryngeal cancer, which required him to have an emergency tracheotomy and surgery after he was released from prison. The Sulejmanis were represented by Hinesburg attorney Beth A. Danon. See: *Sulejmani v. Prison Health Services*, Vermont Superior Court, Chittenden Unit, Case No. S1237-09.

In October 2011, PHS paid \$45,000 to settle a lawsuit filed by Vermont prisoner Edward Truszkowski, Jr., who claimed that PHS had failed to provide prescribed medication for his Gastroesophageal Reflux Disease while he served a 30-day sentence at the Southern State Correctional Facility. Truszkowski was represented by attorney Brian R. Marsicovetere. See: *Truszkowski v. Hofman*, U.S.D.C. (D. VT), Case No. 5:11-cv-00006-cr-jmc.

PHS agreed in November 2007 to pay \$32,500 to the estate of Robert C. Nichols due to Nichol's 2004 death at the Chittenden Regional Correctional Facility. Although he was suffering from heroin withdrawal and had ingested 80 bags of heroin soon after he was incarcerated, Nichols was "not given immediate medical attention," according to a lawsuit filed by his estate, which led to his death. Nichols' estate was represented by Peter F. Langrock with the law firm

of Langrock Sperry & Wool, LLP. See: *Nichols v. State of Vermont*, Vermont Superior Court, Rutland Unit, Case No. 546-10-06.

Lastly, on June 1, 2007, PHS paid \$25,000 to settle a pro se federal lawsuit filed by Vermont state prisoner Peter Goodnow, who alleged inadequate medical care for a broken hand and painful tooth while he was housed at the CCA-operated Lee Adjustment Center in Kentucky. See: *Goodnow v. Hofman*, U.S.D.C. (D. VT), Case No. 1:06-cv-00124-jgm-jjn.

The settlements in the six cases totaled \$1.8 million. This was the first known time that PHS had produced

records related to its resolution of legal claims against the company, which typically include confidentiality provisions. PHS's defense counsel in Vermont includes the Burlington law firm of Dinse, Knapp & McAndrew, P.C. One of the firm's attorneys, Shapleigh Smith, Jr., is the current Speaker of the state's House of Representatives.

PLN was initially represented in its public records lawsuit by attorney David C. Sleigh with the law firm of Sleigh & Williams, P.C., and subsequently by Dan Barrett with the ACLU of Vermont. See: *Prison Legal News v. Prison Health Services*, Vermont Superior Court, Washington Unit, Case No. 622-8-10. ■

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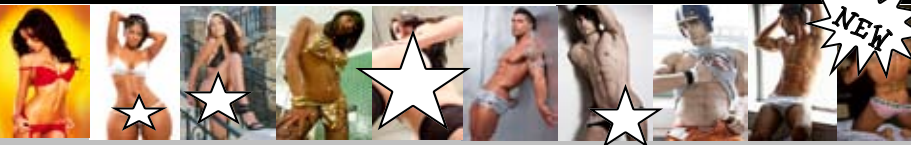
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# Transgender Prisoner's Lawsuit Sparks BOP Policy Change

by Derek Gilna

A lawsuit filed by a transgender federal prisoner in Massachusetts has resulted in the Bureau of Prisons (BOP) making appropriate medical care available “to [prisoners] who believe they are the wrong gender,” according to a May 31, 2011 memo issued to all BOP wardens. Previous BOP policy limited treatment of transgender prisoners to medical care that maintained them “at the level of [gender] change which existed when they were incarcerated.”

The prisoner who filed suit, Vanessa Adams, whose legal name is Nicholas Adams, had been diagnosed with Gender Identity Disorder (GID) in 2005 by medical professionals at the U.S. Medical Center for Federal Prisoners (USMCFP) in Springfield, Missouri. Adams sought declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

Her lawsuit noted that GID is a “recognized diagnosable and treatable medical condition listed in the American Psychiatric Association’s Manual of Mental Disorders (DSM-IV-TR).” Medically appropriate GID treatment options include providing patients with 1) hormones of the desired gender; 2) the “real life experience,” i.e. living full-time as the new gender; and 3) surgery to change the patient’s sex characteristics – often collectively referred to as “triadic therapy.”

According to her complaint, Adams “believed she was assigned the wrong gender,” which caused her “much emotional turmoil.” Those feelings intensified during her incarceration; she amputated her penis and attempted to castrate herself.

Adams’ lawsuit alleged that the BOP’s medical protocol for transgender prisoners violated the Eighth Amendment because it inflicted cruel and unusual punishment by failing to provide necessary care for a serious medical condition.

The new BOP guidelines mean that treatment plans for transgender prisoners “may include elements or services that were, or were not, provided prior to incarceration, including, but not limited to: those elements of real life experience consistent with the prison environment, hormone therapy and counseling.” Additionally, transgender prisoners will be informed of the policy change and BOP doctors will receive training to recognize and treat GID.

BOP spokesman Ed Ross said 48 federal prisoners had been diagnosed with GID. Jennifer Levi, director of the Transgender Rights Project at Gay and Lesbian Advocates and Defenders (GLAD), noted that prison officials have typically been hostile to transgender prisoners and additional legal action may be needed to ensure the BOP’s new policy is put into practice. “This should have a very significant effect on the lives of transgender [prisoners],” she said. “It means people will be receiving appropriate medical care.”

While the BOP guidelines do not mention sex reassignment surgery as a treatment option, it may still be available. “There is no reason why an incarcerated person should be excluded from receiving

surgery if it turned out to be medically necessary for that individual,” Levi stated.

In addition to the policy changes, the BOP agreed to provide specific medical treatment for Adams and pay her attorney fees and costs. The amount of fees and costs was not disclosed, and PLN has filed a Freedom of Information Act (FOIA) request seeking that information. Adams was represented by Florida Institutional Legal Services, GLAD, the law firms of Bingham McCutche LLP and Kurker Law Group LLC, and the National Center for Lesbian Rights. See: *Adams v. Federal Bureau of Prisons*, U.S.D.C. (D. Mass.), Case No. 1:09-cv-10272-JLT. ■

Additional source: *Associated Press*

## Fifth Circuit Upholds Former Texas State Judge’s Bribery-Related Convictions

The Fifth Circuit Court of Appeals upheld the conviction of a former Texas state judge on two counts of wire fraud and one count of making false statements related to bribes he received while in office.

After he was elected but before being sworn in as a state district judge, Manuel Barraza met with Diana Rivas Valencia, who was facing drug charges in another state court in El Paso. Rivas had asked to see Barraza because she was unhappy with her court-appointed attorney and wanted him replaced. Barraza suggested that he could “get rid of the charges” once he took office. “In exchange, Barraza wanted money and a ‘buffet’ of women.”

Rivas contacted the FBI, which recruited her sister, Sarai Valencia, to assist with the investigation. Valencia and an undercover FBI agent, posing as the woman who would provide sexual gratification, met with Barraza several times. Barraza outlined his plan to replace Rivas’ court-appointed attorney with someone he trusted after getting the case transferred to his court.

After receiving \$1,300, Barraza filed a judicial order to transfer the case. However, a court coordinator stopped the transfer after noticing that Rivas had formerly been Barraza’s client when he was a criminal defense attorney. Barraza continued seeking money and sex to have the case dismissed, receiving an additional

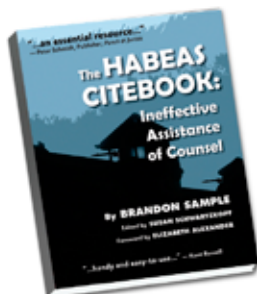
\$3,800. The transaction was videotaped.

When the FBI interviewed Barraza he denied having met with Rivas after he became a judge. He was then arrested for wire fraud and making a false statement. A federal jury convicted him in February 2010, and he was sentenced to concurrent terms of 60 months in federal prison and three years of supervised release. Barraza appealed.

The Fifth Circuit made short work of Barraza’s claims that he was prejudiced by a juror’s improper statement (her own experience with workplace sexual harassment), by the government withholding impeachment evidence, by a witness’ prejudicial comment on the stand and by the prosecution’s allegedly unconstitutional theory of the case, essentially holding that such claims were not error or were harmless.

The appellate court also found the evidence against Barraza to be sufficient and the district court’s application of the Sentencing Guidelines, in which the offense level was increased because Barraza was a public official, to be proper. “None of Barraza’s several challenges require a new trial, reversal of his conviction, or resentencing,” the Fifth Circuit concluded. See: *United States v. Barraza*, 655 F.3d 375 (5th Cir. 2011), cert. denied. ■

Additional source: *El Paso Times*



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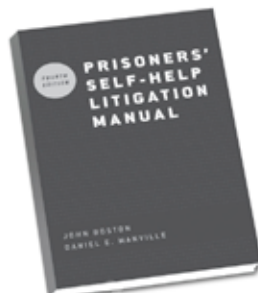


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# States Create Special Commissions to Study Flat-Fee Indigent Defense

by Joe Watson

Some states may soon be doing more to guarantee the Sixth Amendment right to counsel for indigent criminal defendants.

Special commissions have been convened in Nevada, Idaho, Michigan and Pennsylvania to investigate how flat-fee contracts with private defense attorneys are failing defendants who can't afford to hire counsel. Meanwhile, some courts are weighing whether the practice of flat-fee indigent defense is unconstitutional.

According to *Stateline*, the news service of The Pew Center on the States, more than a dozen states use flat-fee contract attorneys to represent indigent defendants in order to save money and provide relief to swamped public defenders' offices. However, critics argue that such "contract counsel" tend to be young, inexperienced, penurious and overwhelmed by their own caseloads; thus, the supposed savings effectively subsidize backlogged appellate courts and state prisons filled with poorly-represented defendants.

"This type of contract creates a direct financial conflict of interest between the attorney and the client," said David Carroll, research director at the National Legal Aid and Defender Association. "Because the lawyer will be paid the same amount, no matter how much or how little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case."

In Jackson County, Michigan, for example, contract attorneys are paid a paltry \$600 flat fee per case to defend indigent clients accused of second-degree and Class A through D felonies, and only \$350 per case for lesser felonies. In Lyon County, Nevada, 200 indigent defense felony cases and 400 misdemeanor cases were contracted out to a first-year lawyer who had passed his bar exam only a few weeks earlier.

One of the most egregious examples cited by *Stateline* occurred in Washoe County, Nevada. Washoe Legal Services, a nonprofit law firm, agreed in August 2011 to a six-month \$80,000 contract to handle all cases adjudicated through the county's early resolution program. County officials estimated there were as many as 1,000 such cases, meaning the firm was being paid as little as \$80 to handle each case.

States and counties that utilize flat-fee contracts for indigent defense have been accused by critics of running "plea mills" – and those critics include members of the American Bar Association (ABA).

In February 2002 the ABA issued a report titled "Ten Principles of a Public Defense Delivery System," which set forth basic standards for indigent defense systems. The report recommended that "Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services."

Michael A. Cherry, associate chief justice of Nevada's Supreme Court and chair of the state's Indigent Defense Commission, argued that the criminal justice system will remain inequitable so long as flat-fee attorney contracts are used. But poor rural counties, he acknowledged, aren't willing to spend more on indigent defense.

"With the economic times, there's no money to get counties to do anything different," Cherry said. "Flat-fee contracts may have to be a reality."

Nevada set up a state public defender's office in 1971 after the U.S. Supreme Court's landmark *Gideon v. Wainwright* decision that requires the appointment of free counsel to represent indigent criminal defendants. The state covered 80% of the costs and the counties paid the rest. However, the budget for the public defender's office was cut considerably over the years, and in order to get more return for their indigent defense dollars, counties began awarding contracts to lawyers willing to accept a flat fee.

The Nevada Supreme Court's Indigent Defense Commission issued a final report on November 20, 2007 based on a "statewide survey of indigent defense services." The Commission made a number of suggestions for improvements, including establishing caseload standards and ensuring the "independence from the judiciary of the court appointed public defense system," as the role of judges in appointing counsel "creates an appearance of impropriety

and the opportunity for abuse."

*PLN* previously reported criticism of Alabama's indigent defense system, which operated with little oversight in terms of judges appointing contract counsel – including attorneys who had donated to the judges' election campaigns. [See: *PLN*, Sept 2010, p.28]. On June 9, 2011, Alabama created a state-wide Office of Indigent Defense Services to oversee criminal defense systems on the county level and to set caseload standards, attorney qualification standards, and standards for the "performance of appointed counsel, contract counsel, and public defenders."

Michigan is one of only a few states that provide little or no state funding for criminal defense services on the county level; consequently, most counties use contract attorneys rather than public defender offices.

Michigan ACLU legal director Mike J. Steinberg noted that contract counsel "have to encourage their clients to plead guilty and keep the docket moving in order to generate the volume that they can make a living. So the incentive is to get your client to plead guilty as quickly as possible doing the least amount of work as possible."

Criticism of Michigan's indigent defense system came to a head in March 2012, when the U.S. Supreme Court decided *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), which alleged the quality of plea advice given by contract counsel to an indigent defendant was legally ineffective. The Court held that defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. [See: *PLN*, Sept. 2012, p.18].

The petitioners in another case, *Duncan v. Michigan*, 780 N.W.2d 843 (Mich. 2010), are seeking injunctive relief from what they allege are practices that violate their rights as indigent defendants; the suit seeks to compel the state to provide funding for indigent defense services.

These cases prompted Michigan Governor Rick Snyder to issue an executive order on October 13, 2011 that established an Indigent Defense Advisory Commission. The Commission issued its final report on June 22, 2012; among numerous findings, it noted that the state's indigent defense system consists of "an



uncoordinated, 83-county patchwork quilt of service delivery systems, with each county's 'system' dependent on its own interpretation of what is adequate and on its own funding availability."

The Commission further found "that Michigan's current system of providing legal representation for indigent criminal defendants lacks procedural safeguards to ensure effective public criminal defense services." Recommendations in the report included ensuring that "Each local system must take affirmative steps to avoid the creation of economic disincentives or incentives that threaten to impair the provision of effective assistance of counsel."

In Pennsylvania, the Task Force and Advisory Committee on Services to Indigent Criminal Defendants issued a report in December 2011 that examined indigent defense systems in a number of states; the Committee wrote that "Pennsylvania [is] the *only state* that does not appropriate or provide for so much as a penny toward assisting the counties in complying with *Gideon's* mandate."

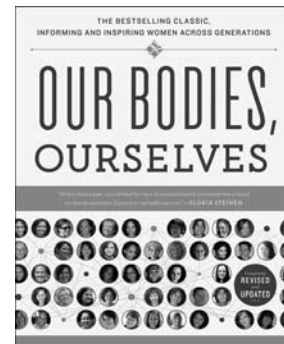
Quoting from a 2003 report that reached similar conclusions, the Committee noted that "Most counties pay assigned counsel a flat fee (per year in most counties and per case in Philadelphia), creating a disincentive for counsel to devote time to a particular case. As a result, attorneys are not taking the time to visit clients in jail, file motions, conduct effective investigations, or respond to mail from clients."

"It is really penny-wise and pound-foolish to use a flat-fee compensation

system that doesn't pay lawyers what they need for investigations and casework," noted Virginia Sloan, president of the Constitution Project, a Washington, D.C.-based right-to-counsel organization. "You end up with a trial that is not done right, which can lead to potentially costly appeals, and you may have to retry the case, which is bad for the victims and very expensive."

A small contingent of states are moving in a different direction from flat-fee indigent defense contracting and its inherent flaws, according to the Constitution Project. Iowa and Washington State have banned contract counsel altogether. Oregon enforces limits on its flat-fee system at the state level, and reevaluates caseloads for contract counsel every six months. And in Tennessee, both the Tennessee Bar Association and the Chattanooga Area Criminal Defense Lawyers vocally resisted a 2011 proposal that would have allowed flat-fee contract counsel in that state. ■

Sources: [www.stateline.org](http://www.stateline.org), [www.jsg.legis.state.pa.us](http://www.jsg.legis.state.pa.us), *Report of the Michigan Advisory Commission on Indigent Defense* (June 22, 2012), [www.nlada.net](http://www.nlada.net), [www.law.umich.edu](http://www.law.umich.edu), [www.npr.org](http://www.npr.org), [www.aclu.org](http://www.aclu.org), [www.sixthamendment.org](http://www.sixthamendment.org)



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# GAO Report Examines Contraband Cell Phone Use in BOP Facilities

by Derek Gilna and Brandon Sample

A September 2011 report by the U.S. Government Accountability Office (GAO), which reviewed the use of cell phones by federal prisoners, recommended various options to reduce the recent spike in such contraband devices. According to the federal Bureau of Prisons (BOP), “a number of reports have demonstrated that inmates are smuggling in cell phones to coordinate criminal activity, such as drug sales, assault, and murder.”

Possession of a cell phone by federal prisoners now brings possible criminal charges under the Cell Phone Contraband Act of 2010 (Public Law No 111-225), codified at 18 U.S.C. § 1791, plus institutional discipline such as loss of privileges, loss of good time credits and transfer to a higher-security facility.

Although the GAO report included charts and graphs purporting to show that contraband cell phone possession is increasing, there is no discussion or analysis as to the *rate* of recovered cell phones per number of prisoners, which is a statistic of greater significance due to the steadily growing BOP population.

Second, there is no discussion in the report about the number of minutes of phone time that BOP prisoners are allotted – 300 per month and 400 in November and December, with 15-minute maximum calls – and the demand that meager amount of phone time creates for alternative means of contact with friends and family, such as cell phones. If, in fact, the BOP’s goal in providing telephone services to prisoners is to “facilitate their contact with family and friends and to help maintain inmates’ ties to the community,” which will help them succeed following their release, then

the issue of limited phone time availability needs to be addressed.

Third, if one compares the statistics for seizures of contraband cell phones in BOP facilities with those of state departments of corrections, it is clear the states have a much more serious problem. According to the BOP’s own data, 3,684 cell phones were confiscated from prisoners in 2010, including 1,161 from low, medium and high-security facilities and 2,523 from prison camps, many of which have no fences. This number is dwarfed by the number of cell phones seized by the State of California in the same time period – 10,700, or almost three times the BOP’s total, despite California having a smaller prison population. In South Carolina and Mississippi, the number of cell phone confiscations from state prisoners was 3,241 and 4,300, respectively.

No data was provided as to the method by which contraband cell phones entered BOP facilities, and whether or not the problem stemmed solely from illegal activity on the part of prisoners or their third-party accomplices. It is common knowledge that employees smuggle cell phones at both state and federal prisons in exchange for bribes, and the GAO report noted that staff must pass through metal detectors when entering BOP facilities.

Finally, there is no reliable data, other than anecdotal incidents and unsupported statements by BOP and law enforcement officials, that a large percentage of contraband cell phones are used to plan or execute crimes. According to BOP statistics, 77 percent of all cell phones were found at prison camps where only non-violent offenders nearing release are housed.

The report also noted that revenue from the prison telephone system goes to the BOP’s “Trust Fund,” which is the primary source of funding for prisoner wages; recreational activities including movies, books and cable TV; microwave ovens; washers and dryers; and modest amounts for other programs for prisoners. According to the GAO report, revenue from prison phone calls has dropped, possibly due to less expensive third-party phone services that bypass the BOP system’s long-distance charges, as well as the implementation of an email system (TRULINCS) at federal prisons.

Despite that trend, the report found that the “BOP’s telephone system gener-

ated more than \$34 million in profits in fiscal year 2010.” BOP officials still voiced concern over the modest decline in revenue. They are apparently worried that Congress, in an era of budget-tightening, would not appropriate money for prisoner amenities if the Trust Fund was unable to cover those expenses. The Trust Fund’s existence helps insulate the BOP from claims by some critics that it “coddles” prisoners, because no taxpayer money is spent for such amenities.

The GAO report noted that “Some prisoner advocates believe that inmates are increasingly using contraband cell phones because of the rates correctional institutions charge for telephone service.” The BOP’s phone rates are lower than those in many state prison systems, at \$.06 per minute for local calls and \$.23 per minute for long distance. If the rates were reduced, “inmates would benefit from the ability to make less expensive phone calls. However, lower rates also could result in less revenue, lower profits, and therefore fewer funds available for inmate wages and other amenities, unless BOP recovers these funds through other sources,” the GAO observed.

The report further discussed various methods of contraband cell phone detection, including large-scale (and expensive) options such as sensor systems, jamming and managed access systems, as well as less expensive hand-held detection devices. Although the BOP has studied the issue for years, viable short-term solutions do not appear to be feasible due to cost and legal restrictions. The GAO accused the BOP of lacking “a sound evaluation plan that includes ... criteria or standards for determining how well the [cell phone detection] technology works.”

The issue of contraband cell phones in prisons is just one part of the larger issue of balancing institutional security needs with providing meaningful and affordable means for prisoners to communicate with their families and friends – the latter being something that the BOP at least professes to be concerned about.

The GAO report is available on PLN’s website or at [www.gao.gov](http://www.gao.gov). ■

Source: “Bureau of Prisons: Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection,” GAO (Sept. 2011)



# Annual PLN Fundraiser

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Your donation can make a big difference in this campaign. Please donate whatever amount you can afford; no amount is too small and every little bit helps. Whether or not you can donate to support our work and the Campaign for Prison Phone Justice, please encourage others you know who are either interested in this topic or have the resources to make a donation to do so. Your opinion counts and is valued.

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# Texas Slashes Prison Education Budget

by Matt Clarke

Faced with a \$23 billion biennial state budget deficit, the Texas legislature has radically cut education programs in state prisons. Such short-term savings will undoubtedly result in long-term expenses, as education has been proven to reduce recidivism.

Jorge Renaud, 55, is an example of a prison education success story. On the path to becoming a career criminal, he was first incarcerated for burglary of a habitation and later for a pair of aggravated robberies.

During his second stint in prison, Renaud began taking college courses with financial assistance from the Texas Department of Criminal Justice's (TDCJ) education system. The post-secondary classes helped him break the cycle of prison, release and re-incarceration.

"Why does anybody commit a crime? Stupidity, ignorance, irresponsibility. I thought I needed material possessions," Renaud stated. But the college-level education he received while in prison helped him stop his self-destructive behavior.

Despite positive outcomes like Renaud's, the Texas legislature slashed the 2011-2012 budget for the Windham School District to \$95 million – a more than 25 percent cut from the district's 2010-2011 budget, according to spokeswoman Bambi Kiser. She predicted the budget cuts will cause the 77,500 incarcerated students taking Windham GED and vocational classes to drop by about 16,750.

The Windham School District was created in 1969 to administer educational programs in Texas prisons. It is funded by the Texas Education Agency but overseen by the TDCJ. The budget cuts are forcing Windham to close some schools – primarily those with students averaging 40 years or older whose recidivism rates are less likely to be affected by education than those of younger prisoners. Other cost-cutting measures include reducing school administration expenses by sharing employees such as principals between various prisons, and laying off 271 full-time staff members. The budget for consumables, such as paper, toner cartridges and other school supplies, was reduced by half.

"Public education is important in the prison system because it does help when it comes to recidivism. But Windham has gotten very expensive per [student] com-

pletion," said State Senator Kel Seliger, vice chairman of the Senate Criminal Justice Committee. "It doesn't mean we've turned our backs on prisoner education. We just need to do it as effectively and economically as possible."

Only around 7 percent of prisoners enrolled in Windham classes obtained a GED in 2010, leading some lawmakers to question the cost effectiveness of prison education programs. "It's really outrageous," remarked state Senator John Whitmire.

Higher education classes in Texas prisons also have been reduced due to the budget crunch. Windham did not renew contracts it had with seven colleges for both academic and vocational training courses. A program in which students can defer tuition payments until after they are released was reduced by 42%.

"Despite all changes, [Windham]

remains committed to providing the best possible programming with allocated funding," Kiser stated.

Although prison education programs have been proven to reduce recidivism by instilling self-discipline in prisoners and teaching them the skills they need to obtain and keep jobs once they return to the community, Texas has clearly decided to pawn these future benefits for short-term budgetary gains.

The Texas prison system is cutting costs in other ways, too, including reducing meals to twice daily on weekends [see: *PLN*, Oct. 2012, p.28], and imposing a \$100 annual co-pay on prisoners who request medical care [see: *PLN*, Oct. 2012, p.42]. ■

Sources: *Amarillo Globe-News*, *Texas Tribune*, *Dallas Morning News*

## Former New York DOCS Food Director Pleads Guilty to Grand Larceny

by Joe Watson

Howard Dean, the state employee who ran New York's prison food services for 17 years, was treated like a big cheese by private vendors. In return, according to investigators, he gave them the secret ingredient for the cheese sauce served at prisons throughout the state.

The New York Department of Correctional Services (NYDOCS) ended up purchasing \$300,000 worth of cheese sauce annually from Global Food Industries. And Dean, 66, who retired in 2008 as director of the prison system's food production center in Oneida County, ate free steak dinners while his staff enjoyed free Christmas parties and picnics courtesy of the food vendors, according to reports released in April and August 2010 by New York's Comptroller and Inspector General.

Overall, Dean allegedly steered \$2.5 million in contracts to favored food vendors, including Global Food Industries and Good Source, Inc. He was also accused of faking travel records, falsifying hotel invoices and submitting fraudulent timesheets to sucker the state out of approximately \$500,000 while employed with NYDOCS. [See: *PLN*, Nov. 2010, p.25].

"It's ironic that Dean, as head of a criminal justice system, was no less a law violator than the prison population he was charged with feeding," New York Inspector General Joseph Fisch said. He added that Dean's schemes were so blatant, "the only thing missing from advertising his misbehavior was neon lights."

To position Global Food for NYDOCS's cheese-sauce contract, Dean and his staff provided the company with a formula that would preserve the sauce's consistency throughout the so-called "cook-chill" process, which is claimed to have lowered costs, improved food quality and reduced prisoners' complaints. In exchange, Global Food and Good Source bought Dean and his staff free dinners at a local steakhouse in Verona, New York. The dinners ranged from \$25 to \$55 per person, according to investigators.

Additionally, two hundred prison employees regularly gathered at annual summer picnics at the Tagasoke Campground in Sylvan Beach, where they enjoyed free wine coolers, hot dogs, campground entry fees and parking, all paid for by the food vendors. Any leftover money from the picnics and annual Christmas parties was deposited



in an employee benefit fund.

Investigators also alleged that Dean directed Sysco Food Services, which has been the primary food vendor for New York state agencies since 1995, to purchase products from the vendors that were providing him with free dinners and other perks.

Comptroller Thomas P. DiNapoli said Dean created a culture among his subordinates in which they cast a "blind eye" to what their boss was doing. For example, investigators said Dean had submitted timesheets for five-day work weeks even though he admitted he hadn't worked a single Friday in 17 years.

Dean was charged with grand larceny in September 2010 – although the statute of limitations prevented him from being charged with thefts and misconduct over his entire tenure as NYDOCS's food director.

"The actions for which Mr. Dean was charged took place prior to the current administration, which corrected the lack of oversight that allowed this behavior to occur," said NYDOCS spokesman Erik Kriss. "Although Mr. Dean helped build a cost-effective food operation that continues to save money for the state prison

system and for many counties, we do not condone any actions by him or any other employee that fall outside the boundaries of acceptable conduct."

Dean's attorney, Dennis Sedor, remained optimistic and indicated that blame might be spread elsewhere. "I'm confident he is not the only person involved," Sedor remarked. "There are others, both above and below him. This wasn't done in a vacuum, in isolation."

Ultimately, though, Dean was the only one convicted, after pleading guilty in March 2011 to second-degree grand larceny related to submitting false attendance and travel vouchers. He was sentenced to six months in jail, five years of probation and ordered to pay \$100,000 in restitution. Yet more than 18 months later, as of October 2012, he had not reported to serve his jail time, citing heart surgery and other medical issues.

"To incarcerate him could constitute a death sentence, and I don't think anyone wants that," said Sedor. "I think everybody is looking to protect his health at this time." ■

Sources: *Associated Press*, [www.syracuse.com](http://www.syracuse.com), [www.uticaod.com](http://www.uticaod.com), <http://wibx950.com>



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# Misconduct at U.S. Army Lab Taints Hundreds of Military Prosecutions

by Derek Gilna

Pentagon investigators are looking into allegations that an analyst at the U.S. Army Criminal Investigation Laboratory (USACIL) botched hundreds of DNA tests, casting doubt about lab results in hundreds of prosecutions. An accused soldier who was forced to resign over allegations of sexual misconduct that were allegedly verified by USACIL is just one case where the lab's questionable findings have adversely affected military careers.

Army Staff Sgt. Kirk Holcombe, 31, a decorated veteran who served in Iraq, was forced to take a discharge under less than honorable conditions, which barred him from receiving veterans' medical benefits. According to his attorney, Duane Kees, "I think USACIL intentionally withholds, I don't want to say their bad laundry, but their bad paperwork ... [they know] exactly what's going to happen when they turn it over. It automatically calls into question their findings."

After returning home from Iraq, Holcombe was stationed at Fort Knox in Kentucky in 2010 when an 11-year-old friend of his stepdaughter said that he tried to unzip her shorts while she was sleeping – a charge that Holcombe denied. While child protective services noted inconsistencies in the girl's story and held the allegation was unsubstantiated, USACIL claimed it found DNA on the girl's zipper.

The girl had been sleeping on the Holcombe family's sofa for hours, providing an alternative explanation as to the origin of the DNA. No blood or semen was detected.

Several months later a technical reviewer at the Army lab found "several discrepancies" related to USACIL analyst Alejandro Vara, and a lab supervisor noted "there does seem to be an issue with [Vara's] attention to detail." This, however, came after an attorney representing the lab had assured Holcombe's lawyers that "neither the USACIL nor I am in possession of any derogatory information or materials relating to Mr. Vara." Vara was issued a corrective action plan to "address his lack of attention to detail," while the case against Holcombe proceeded.

USACIL's website states that the lab, which is located near Atlanta, Georgia, "is

the only full service forensic laboratory in the [Department of Defense] and trains special agents and investigators from the Army, Air Force, Navy and Marines...." The lab handles over 3,000 cases annually, conducting forensics tests related to DNA, firearms evidence and more. Previously accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the Army lab is currently accredited by Forensic Quality Services – International.

Although military officials defended the work of USACIL, concerns persisted over prior investigations that called into question the accuracy of the lab's test results. McClatchy Newspapers, which ran an extensive series of investigative articles about USACIL from March 2011 to May 2012, discovered that a lab analyst had botched a fingerprint proficiency test, which had not been revealed to defense counsel in a double murder prosecution. The judge in that case instructed the jury to disregard the analyst's testimony as being unreliable.

In another criminal case, Navy Lt. Robert A. House was forced to resign in 2003 after he and two other defendants were accused of raping a junior enlisted woman – an allegation rejected by a court-martial panel, though House was convicted of several other charges. He later learned that USACIL forensic examiner Phillip Mills had "falsified and contaminated DNA test results in a different case." A 2006 retest of the DNA evidence cleared House, but he was not notified of the results until 2009.

U.S. Court of Federal Claims Judge Francis M. Allegra noted in a July 8, 2011 decision that "For reasons unexplained, this exculpatory information was provided neither to plaintiff nor to his counsel at or around the time it was discovered." House's convictions were later set aside. See: *House v. United States*, 99 Fed.Cl. 342 (Fed.Cl. 2011), *rehearing and rehearing en banc denied*.

According to a McClatchy article, "Military and civilian judges agree that defendants deserve to know potentially exculpatory information, or information that undermines the credibility of government witnesses." The Supreme Court

addressed this issue in its landmark *Brady* decision (*Brady v. Maryland*, 373 U.S. 83 (1963)), but apparently not all military prosecutors have gotten the message.

Investigators working for the Department of Defense's Office of Inspector General identified other discrepancies in Mills' work, and asked military judge advocates to provide proof that criminal defendants had "received notice concerning the discredited lab work, or the reason such notice was not [given]," according to Assistant Inspector General John Crane. Not all defendants or their attorneys had been notified.

In 2005, two USACIL memos cited various problems with Mills' lab work, including incidents in which he "had cross-contaminated and/or switched samples within and between several cases, made a false data entry and altered documentary evidence, falsely stated the results of an examination which he had not performed, and misrepresented work he had performed." See: *United States v. Luke*, 69 M.J. 309, 325 (U.S. Armed Forces 2011), *cert. denied*.

Mills, who had previously failed a hair-analysis proficiency test, was suspended and later resigned in November 2005. The U.S. Army Criminal Investigation Command then began examining 465 cases involving Mills' work at the lab from 1995 to 2005, and hired two independent DNA contactors to conduct the review. The investigation, which concluded in September 2008 at a cost of \$1.4 million, found problems with 25 percent of Mills' cases in which evidence was retested. Evidence was no longer available for retesting in over 80% of the cases.

Chief Judge Andrew Effron of the U.S. Court of Appeals for the Armed Forces observed in his dissent in the *Luke* ruling that "The Government subsequently destroyed the physical evidence at issue, thereby precluding the type of retesting that might have restored some level of confidence in the process."

The certiorari petition filed in *Luke* stated that "USACIL's internal investigation classified Mr. Mills's misconduct as a Class I violation of the lab's procedures. Such a violation, according to USACIL, 'raise[s] immediate concerns regarding the

integrity of the laboratory's work product and would be likely to 'unfairly jeopardize the rights of an individual.'"

While charges were reversed in at least two cases involving Navy personnel as a result of the review of Mills' lab work, military officials said in a statement that there "was never a 'USACIL integrity' question per se, but an issue with an employee's integrity." They also noted that "more than 100 extensive changes and modifications" had been made at the Army lab.

Yet in April 2008, a large amount of misplaced evidence from Mills' cases was found; it was determined that USACIL supervisor Clement Smetana had known about the evidence, which included specimen slides, but failed to give it to investigators. Smetana resigned in July 2008 after he was found to be "derelict" in his job duties.

Despite Mills' documented misconduct at the lab, the defendant's conviction in *Luke* was upheld, as was the conviction in another case involving a Marine Gunner Sgt. sentenced to 15 years for forcible sodomy. See: *United States v. Carlson*, 67 M.J. 693 (N.M.Ct.Crim.App. 2009), review denied.

In the latter case, the U.S. Navy-Marine Corps Court of Criminal Appeals wrote that it shared "the second military judge's concern that USACIL personnel were less than forthcoming, and were not promptly compliant with the rulings of this court or the military judges, all of whom directed disclosure of certain information." The court concluded, however, "that USACIL had substantial motives to properly investigate this matter, and ultimately suc-

ceeded in doing so in good faith."

Mills was not the only Army lab employee found to have engaged in misconduct. Another USACIL analyst, Michael Brooks, who was responsible for evaluating firearm evidence, was fired in 2006 "for making a false statement and destroying evidence. The lab subsequently had to review 541 firearms cases to make sure they were thorough, properly conducted and met legal requirements. Ultimately, officials determined that none of them needed full retesting," according to the McClatchy investigation.

And in 2007, Allen L. Southmayd, a handwriting expert, resigned from USACIL. He pleaded guilty to federal embezzlement charges and was sentenced in January 2008 to three years of probation, six months of community service, six months on home confinement and payment of \$73,068.64 in restitution. Southmayd had been stealing money from the American Board of Forensic Document Examiners, where he served as treasurer, and spent the funds on his gambling addiction. See: *United States v. Southmayd*, U.S.D.C. (N.D. Ga.), Case No. 1:07-cr-00275-JOF-GGB.

More recently, in April 2012 the Office of Special Counsel indicated it would investigate claims that USACIL officials had retaliated against Donald Mikko, the lab's former firearms branch director, after he cooperated with a misconduct investigation and a racial discrimination complaint. Mikko resigned due to "escalating harassment and retaliation," according to his attorney; he had worked at USACIL for over two decades. Military

officials suspected Mikko had provided information to McClatchy Newspapers that led to news articles about problems at the lab.

"The Army is looking for a scapegoat to blame for the recent adverse media reports," said attorney Peter Lown, who represents Mikko. "My experience with the lab overwhelmingly tells me that the primary mode is to cover up any misfeasance."

The director of USACIL, Larry Chelko, coincidentally announced his retirement in April 2012, though military officials stated they "strongly reject any suggestion that his retirement is connected to anything beyond normal career progression and a well-deserved retirement."

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## **Oregon DOC Did Not Report 78 Prisoner Deaths in 2010-2011**

During Chelko's tenure as director at least seven internal investigations were conducted and eight complaints filed against lab managers within a four-year period, including claims of racial bias, sexual harassment, fraud and assault. USACIL's former attorney, Lisa Kreeger, settled claims against the lab alleging she had faced retaliation for cooperating in a racial discrimination complaint.

The Department of Defense's Office of Inspector General has indicated that it is currently conducting an inquiry into problems at USACIL, following a request by U.S. Senators Patrick Leahy and Charles Grassley.

"Falsified lab tests could have contributed to criminals remaining free and innocent people being wrongfully convicted," the Senators wrote. "The failure to address these issues in a timely manner could damage the nation's trust in the military justice system."

Sadly, revelations about misconduct at USACIL came too late to help Staff Sgt. Holcombe. Despite the questionable lab results, the Army continued to proceed against him. Although he steadfastly denied his guilt, he reluctantly decided to accept a general discharge in lieu of a court-martial, based upon the testimony of the alleged victim. His captain supported a general discharge under honorable conditions, which would have preserved Holcombe's veterans' healthcare benefits, but the brigade colonel, David E. Thompson, downgraded his discharge to under less than honorable conditions. Holcombe said he "just wants my name cleared, and to get the [medical] help I need..." for injuries he suffered from roadside bomb explosions while serving in Iraq.

The official logo for USACIL is a picture of Mickey Mouse wearing a Sherlock Holmes-type cap and holding a magnifying glass. It seems, however, that given the many problems at the lab, a more appropriate Disney character would be Goofy.

*PLN* has previously reported on problems at the FBI crime lab and state crime labs across the country, which in some cases have led to exonerations and lab closures. [See, e.g.: *PLN*, March 2012, p.17; Jan. 2012, p.26; Oct. 2010, p.1; Jan. 2010, p.32]. ■

Sources: [www.mcclatchydc.com](http://www.mcclatchydc.com), [www.cid.army.mil/usacil.html](http://www.cid.army.mil/usacil.html), [www.caaflog.com](http://www.caaflog.com)

Seventy-nine Oregon state prisoners died in 2010 and 2011, but the Oregon Department of Corrections (ODOC) publicly disclosed just one of those deaths.

The 79 deaths occurred in nine of the ODOC's 14 prisons, with three facilities reporting double-digit fatalities: 31 deaths at the Oregon State Penitentiary (OSP) in Salem, 23 at the Snake River Correctional Institution (SRCI), 11 at the Two Rivers Correctional Institution (TRCI), 5 at the Eastern Oregon Correctional Institution, 4 at the Oregon State Correctional Institution (OSCI), 2 at the Coffee Creek Correctional Facility (CCCF) and 1 each at the Columbia River Correctional Institution, South Fork Forest Camp and Deer Ridge Correctional Institution.

"Yes, there was only one media release for inmate deaths issued in 2010 and 2011," admitted ODOC spokeswoman Jennifer Black. "When an inmate dies in DOC custody, the Department notifies the inmate's family members or other designated emergency contact, the Oregon State Police, and as necessary, the local District Attorney and the State Medical Examiner."

Legislative leaders also receive quarterly ODOC death reports, according to Black, which include the prisoner's age, cause of death and disposition of their remains. Occasionally, the ODOC submits prisoner-death data to the U.S. Department of Justice's Bureau of Justice Statistics.

"The Department believes that its reporting of inmate deaths due to natural causes to the above-listed government entities and officials is appropriate," Black stated. "The Department does not routinely issue a press release to notify the media when an inmate dies of natural causes."

Many of the 79 deaths in 2010-2011 were due to "natural causes" such as cancer, liver failure, heart disease and other chronic illnesses, in hospices or local hospitals. Others, however, were not so natural – including homicides, suicides and drug overdoses.

As previously reported in *PLN*, one of the unreported deaths was the May 2011 beating death of prisoner Chris Lange, 62, at SRCI. [See: *PLN*, Oct. 2012, p.50].

Another involved Thomas Campau, 56, who died in the OSP infirmary on June 19, 2011 after cutting his left wrist and repeatedly beating his head on a radiator. An ODOC captain recommended that

Campau be treated at a hospital, according to staff reports; however, a prison doctor and health services manager overruled that recommendation and Campau was instead placed on suicide watch.

On July 6, 2011, prisoner David Wayne, 68, was found slumped on the toilet in his cell at OSP from an apparent drug overdose. Guards discovered a half-loaded syringe and a baggie containing "an unknown brown substance" in the cell.

On November 27, 2011, six days after attempting to commit suicide, OSCI prisoner Michael Halvorson, 50, died at a local hospital.

Another non-natural death occurred on May 5, 2010, when 22-year-old autistic prisoner Richard Gifford died in an OSP segregation cell, ten days before his scheduled release date. Gifford apparently committed suicide by injecting himself with an "undetermined drug or toxin," according to the autopsy report.

His mother filed a federal lawsuit against prison officials on December 19, 2011, claiming they failed to provide adequate medical treatment, take suicide precautions or provide proper supervision, resulting in Gifford's death. The defendants' motion to dismiss was denied on July 10, 2012, and the case remains pending. See: *Gifford v. State of Oregon*, U.S.D.C. (D. Ore.), Case No. 6:11-cv-06417-TC.

The May 31, 2011 hanging death of CCCF prisoner Shelly Resnick, 41, was the only death publicly reported by the ODOC in 2010 and 2011, Black acknowledged. "We posted the passing of Shelly Resnick because her crime and conviction was covered by the media and we thought it would be of particular interest."

Historically, news releases are issued "to notify the media of the deaths of certain high-profile or notorious inmates," according to Black. "The Department intends to continue this historical practice."

In the first ten months of 2012, the ODOC issued news releases for just three prisoner deaths, including the February 3, 2012 death of Michael Clarence Hagen at SRCI; the August 30, 2012 suicide of Scott Villegas at OSP; and the September 29, 2012 death of Antonio Ruiz at TRCI. ■

Sources: *Statesman Journal*, *Oregonian*, *The Bend Bulletin*, [www.oregon.gov](http://www.oregon.gov)





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# Virginia Prison Policy Prohibiting Secular, Non-Religious CDs Held Unconstitutional

On February 7, 2012, a U.S. District Court held that a Virginia Department of Corrections (VDOC) policy prohibiting prisoners from purchasing or possessing secular spoken-word compact discs was unconstitutional. The court invalidated the policy but also granted qualified immunity to the defendant prison officials.

Owen North, a friend of Virginia prisoner Shawn Goode, filed suit challenging the policy. As a 2010 Christmas gift, North had attempted to send Goode an 11-disc CD set entitled "Dylan Thomas: The Caedmon Collection." Thomas is a "renowned poet and bard of the twentieth century."

Prison officials informed North that he could not order and send the collection directly to Goode, but could send money to Goode so he could purchase the collection himself. North then provided funds to Goode to buy the CD set. However, citing VDOC policy 803.2, which prohibited the purchase or possession of CDs with non-music or non-religious content, the VDOC refused to let Goode buy the collection.

North filed a civil rights complaint alleging violation of his rights under the First and Fourteenth Amendments. His first claim argued the VDOC policy lacked penological justification and violated the First Amendment. The district court agreed, holding the policy "bears no rational relationship to the stated governmental interests ... [of] security and rehabilitation of the inmates."

The court said the VDOC may legitimately promulgate regulations that restrict the total amount of information that enters its prisons, but the policy at issue was suspect and not neutral as to the content of the information. If prison officials had prohibited all CDs based on some substantial governmental interest, the policy may have satisfied the neutrality standard.

The VDOC argued that allowing secular, non-music CDs would increase the amount of resources required to review CDs as a whole, and that it was trying to reduce "the volume of items coming into prisons." The court, however, found that "a policy that favors the written format instead of the audio version of the same work militates against the goal of reducing the volume of items that enter the facilities." As such, "a better policy" may be to favor CDs over more voluminous written works.

Having found that the first factor of *Turner v. Safley*, 482 U.S. 78 (1987) had not been satisfied, the district court found the policy unreasonable. As to the second *Turner* factor, the court wrote that Thomas' "poems are nearly inconceivable without [his] voice," and having Thomas' voice read the poems, rather than Goode reading them aloud himself, was the form of expression in which North chose to communicate; thus, there was no alternative means. The court held that allowing secular, non-religious CDs would be

more efficient due to the VDOC's review process, since prison officials examine and approve CDs system-wide rather than publication-by-publication and prison-by-prison for books.

The district court concluded the VDOC policy violated both the First and Fourteenth Amendments. The court said that while it "may agree that religious, non-music CDs are consistent with the [VDOC's] rehabilitation objectives, there are also a vast number of secular, non-music CDs consistent with rehabilitative goals."

Although the court held the VDOC's policy was unconstitutional and entered summary judgment in favor of North, qualified immunity protected the defendants from monetary damages. The court wrote that "in promulgating the challenged regulations, Defendants took only budgetary constraints into consideration and not necessarily the justifications of security and rehabilitation," and while this "infringed on North's right to communicate with Goode ... it does not appear that Defendants engaged in this course of action in knowing violation of clearly established law."

On February 17, 2012, the district court awarded \$47,159.56 to North in attorney fees and costs; he was represented by Charlottesville, Virginia attorneys Jeffrey E. Fogel and Steven D. Rosenfield. See: *North v. Clarke*, U.S.D.C. (E.D. Vir.), Case No. 3:11-cv-00211-JRS.



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# America Eats its Young: Arizona Communities Embrace Use of Private Prison Employees in Drug Raids at Public Schools

by Beau Hodai

In Arizona an unsettling trend appears to be underway: the use of private prison employees in law enforcement operations.

The state has graced headlines in recent years as the result of its cozy relationship with for-profit prison companies – for the role of the private prison industry in assisting in the dissemination of constitutionally-questionable immigration enforcement laws based on Arizona’s controversial SB 1070, for a private prison escape that resulted in the death of an elderly couple and a nationwide manhunt, and for a failed attempt to privatize almost the entire state prison system.

And now, recent events in the central Arizona town of Casa Grande show the hand of private prison corporations reaching into the classroom, assisting local law enforcement agencies in drug raids at public schools.

## Trick or Treat

At 9 a.m. on the morning of October 31, 2012, students at Vista Grande High School in Casa Grande were settling in to their daily routine when something unusual occurred.

Vista Grande High School Principal Tim Hamilton ordered the school – with a student population of 1,776 – on “lock down,” kicking off the first “drug sweep” in the school’s four-year history. According to Hamilton, “lock down” is a state in which, “everybody is locked in the room they are in, and nobody leaves – nobody leaves the school, nobody comes into the school.

“Everybody is locked in, and then they bring the dogs in, and they are teamed with an administrator and go in and out of classrooms. They go to a classroom and they have the kids come out and line up against a wall. The dog goes in

and they close the door behind, and then the dog does its thing, and if it gets a hit, it sits on a bag and won’t move.”

While such “drug sweeps” have become a routine matter in many of the nation’s schools, along with the use of metal detectors and zero-tolerance policies, one feature of this raid was unusual. According to Casa Grande Police Department (CGPD) Public Information Officer Thomas Anderson, four “law enforcement” agencies took part in the operation: CGPD (which served as the lead agency and operation coordinator), the Arizona Department of Public Safety, the Gila River Indian Community Police Department, and Corrections Corporation of America (CCA).

It is the involvement of CCA – a private, for-profit prison corporation – that causes this high school “drug sweep” to stand out; CCA is not, despite CGPD’s evident opinion to the contrary, a law enforcement agency.

“To invite for-profit prison guards to conduct law enforcement actions in a high school is perhaps the most direct expression of the ‘schools-to-prison pipeline’ I’ve ever seen,” said Caroline Isaacs, program director of the Tucson office of the American Friends Service Committee, a Quaker social justice organization that advocates for criminal justice reform.

## Welcome to Prison Town, U.S.A.

CCA, the nation’s largest for-profit prison/immigrant detention center operator, with more than 92,000 prison and immigrant detention “beds” in 20 states and the District of Columbia, reported \$1.7 billion in gross revenue last year. This revenue is derived almost exclusively from taxpayer-funded government (county, state and federal) contracts for the warehousing of prisoners and im-

migrant detainees.

CCA has a substantial presence in Casa Grande and throughout Arizona’s Pinal County (Casa Grande is the largest town in the county). The corporation owns and operates a total of six correctional/detention facilities in Pinal County, distributed through the towns of Florence and Eloy.

In 2009, the Central Arizona Regional Economic Development Foundation listed CCA as the largest non-governmental employer in Pinal County. To boot, CCA is a “Board Level” member of the Arizona Chamber of Commerce and Industry, a powerful trade/lobby organization, and is active in the Eloy, Florence and Casa Grande chambers of commerce.

And in September 2012, CCA was awarded a contract with the Arizona Department of Corrections (ADC) to house 1,000 medium-security prisoners at the corporation’s Red Rock Correctional Center in Eloy.

This strong CCA presence, coupled with the location of two correctional facilities operated by GEO Group (the nation’s second-largest for-profit prison/immigrant detention center contractor) in the county, as well as two ADC-run prison complexes, makes Pinal County – which once cited mining and agriculture as its economic bedrock – a *de facto* prison industry community.

Despite the obvious differences between CCA and actual law enforcement agencies, those involved in the Vista Grande High School drug sweep seem unable to differentiate between CCA employees and law enforcement officers.

“CCA is like a skip and a hop away from us – as far as the one in Florence,” said Anderson. “We work pretty closely with all surrounding agencies, whatever kind of law enforcement they are – be they

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police, or immigration and naturalization, or the prison systems. So, yeah, this seems pretty regular to me.”

### Questions of Legality

But they are not the same. Aside from the fact that CCA is a private corporation that derives its profits from the incarceration of human beings, the Arizona Administrative Code provides that, in order for any individual to engage in the duties of a “peace officer,” that individual must obtain certification from the Arizona Peace Officer Standards and Training (POST) Board.

And the Arizona Administrative Code is very clear on this point: “[A] person who is not certified by the Board or whose certified status is inactive shall not function as a peace officer or be assigned the duties of a peace officer by an agency....”

According to POST Executive Director Lyle Mann, POST provides two types of certification: standards and training certification for “peace officers,” and standards and training certification for correctional officers. The Arizona Administrative Code mandates that ADC officers be POST certified. However, according to Mann, employees of private prison contractors are exempt from these standards and training requirements. As such, said Mann, no CCA employee is POST certified – as either a “peace officer” or a correctional officer.

It is important to note that the Arizona Administrative Code explicitly states that non-regular “peace officers” – secondary parties engaging in certain limited aspects of law enforcement under the command or supervision of regular peace officers – must also be POST certified.

According to the Code, a “limited-authority peace officer” is defined as “a

peace officer who is certified to perform the duties of a peace officer only in the presence and under the supervision of a full-authority peace officer.” The Code goes on to state that duties which may be performed by a “limited-authority peace officer” in the presence of a “full-authority peace officer” include: “investigative activities performed to detect, prevent, or suppress crime, or to enforce criminal or traffic laws of the state, county, or municipality.”

This definition seems to fit the description of what occurred at Vista Grande High School on the morning of October 31, 2012 – with the exception that the CCA employees aiding CGPD “peace officers” are not POST certified.

According to Anderson, CCA provided two canine units consisting of handlers and dogs to aid in the high school “drug sweep.”

As to the general role canine units play in school drug raids, Anderson stated that the dogs and their handlers are typically utilized to detect the presence of illicit materials in classrooms and school parking lots.

The use of the CCA canine teams would seem to fall squarely under the Arizona Administrative Code description of duties performed by “limited-authority peace officers” – officers who may perform “investigative activities” for the purpose of detecting, preventing, or suppressing criminal activity, and who are only authorized to do so while in the presence of “full-authority peace officers,” such as CGPD. Such “limited-authority peace officers” are required to be POST certified.

According to Anderson, a similar “drug sweep” utilizing CCA canine units was conducted at Casa Grande’s Union High School in 2011. He was unable to provide further details related

to that event.

CCA did not respond to multiple requests for comment regarding their involvement in law enforcement operations at public schools in Pinal County.

### Conflict of Interest: From the Cradle to the Cell

According to Anderson, three students were arrested as a result of the October 31 Vista Grande raid: two female students, ages 15 and 17, as well as one 15-year-old male. He said the 15-year-old female was found in possession of .10 grams of marijuana; the 15-year-old male student was found in possession of .50 grams of marijuana; and the 17-year-old female was found in possession of 10 ounces of marijuana that was “individually packaged.”

Under Arizona law, individuals arrested for illicit activity/possession of illicit substances on or near school grounds may face “drug-free school zone” sentencing enhancements. Those convicted of drug offenses (including marijuana), and sentenced under “drug-free school zone” sentencing enhancements, lose the possibility of sentence suspension, parole or probation. The sentencing enhancement also adds a year to any prison term handed down by the court.

While the 1,000 Arizona prison beds recently contracted to CCA have yet to come online, it is exactly this kind of low-risk, minimum- to medium-security drug offender that corporations such as CCA derive much of their profit from.

Furthermore, according to Anderson, the Vista Grande High School marijuana arrests have sparked a broader, ongoing investigation. Given the fact that such high school raids may serve as the foundation for larger narcotics investigations which may net adult offenders, concerned

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## Public School Drug Raids (cont.)

citizens say that CCA's involvement in such raids constitutes a clear conflict of interest.

"They're [CCA] not the criminal justice system. They are benefactors of the criminal justice system," said correctional specialist and prison reform advocate Carl Toersbijns.

Toersbijns, now retired, served as a deputy warden of operations at ADC-operated Arizona State Prison (ASP) Eyeman, deputy warden of operations at ASP Safford, deputy warden of operations at the New Mexico Department of Corrections-operated Western New Mexico Correctional Facility (in Grants, New Mexico), and associate warden at the Central New Mexico Correctional Facility (in Los Lunas, New Mexico). Collectively, Toersbijns' career in corrections has spanned over 25 years in both Arizona and New Mexico. Such work, he said, has entailed everything from details with prison canine units to prison gang units.

"They [CCA] use the criminal justice system as a means of making income – for profit," added Toersbijns. "So, their interest in the criminal justice system is totally opposite of the police officer. The police officer is public safety. The primary interest for CCA and associated entities is profit. So, there most definitely is a conflict of interest."

### Introducing the "War on Drugs" to the Classroom

As some opponents of prison privatization attest, CCA embodies the worst pitfalls of public-private partnerships, in that the corporation has worked in the past to advance criminal justice legislation that has contributed to both a swell in U.S. prison/detention center populations and, consequently, CCA's bottom line.

For example, CCA was active (both as a co-chair and member) in the American Legislative Exchange Council's (ALEC) Public Safety and Elections Task Force, formerly the ALEC Criminal Justice Task Force, through the 1990s to the end of 2010.

ALEC is a public-private legislative partnership whose membership is overwhelmingly comprised of Republican state lawmakers, over 300 of the nation's largest corporations and influential law/lobbying firms. ALEC's primary objective is to adopt and disseminate "model legis-

lation," much of which is drafted entirely by its private sector members.

ALEC's Public Safety and Elections Task Force was instrumental, during the years of CCA's membership and leadership, in proliferating such tough-on-crime legislation as "three strikes," "truth in sentencing" and "mandatory minimum" sentencing laws.

Largely as a result of such harsh sentencing laws advanced by ALEC, the U.S. experienced a boom in its prison and jail population – from just over 1.1 million people incarcerated in 1990 to nearly 2.3 million in 2010.

During the years of CCA's Criminal Justice/Public Safety and Elections Task Force involvement, ALEC also advanced "model legislation" for greater law enforcement presence in public schools. ALEC's "Drug-Free Schools Act," for example, called for "enhanced apprehension, prevention and education efforts" in joint cooperation between law enforcement agencies and school districts.

In April 2012, following widespread criticism and loss of corporate sponsorship due to such pieces of "model legislation"

disseminated by the Public Safety and Elections Task Force as the "Stand Your Ground Act," "Voter ID Act" and "No More Sanctuary Cities for Illegal Immigrants Act," ALEC announced that it would disband the task force.

And in the wake of reporting on CCA's involvement with ALEC and the spread of immigration laws based on Arizona's SB 1070, CCA told the *Arizona Republic* in September 2011 that the corporation left ALEC in 2010.

Unfortunately, as the October 31 Vista Grande High School drug raid illustrates, the purported discontinuation of the ALEC task force, and CCA's exit from ALEC, came only after the damage of two decades of private prison industry influence has taken its toll. ■

*Thanks to Alex Friedmann, associate editor of Prison Legal News, for his contribution to this article. Center for Media and Democracy staff researchers Rebekah Wilce and Alex Oberley also contributed to this article. A longer version of this article was originally published on dbapress.com and www.prwatch.org.*

## Report Criticizes New Hampshire's Treatment of Female Prisoners; Lawsuit Filed

by Joe Watson

A two-year investigation has concluded that the New Hampshire Department of Corrections is guilty of "inexcusable neglect" of female prisoners, according to a report released on October 17, 2011.

The New Hampshire State Advisory Committee to the U.S. Commission on Civil Rights said the 103 prisoners incarcerated at the State Prison for Women in Goffstown lack adequate educational and vocational programs, mental health and substance abuse treatment, outdoor recreation and private space for family visits.

"The failure of the state to provide comparable programs and services ... seriously affects the ability of women offenders to maintain appropriate family relationships, impairs their mental and physical health, and inhibits their ability to prepare for productive and self-supporting work upon their eventual release from prison," the Advisory Committee noted in its report.

The Committee wrote that disparate conditions at the women's prison could

amount to a denial of their equal protection rights under the U.S. Constitution, and likely contribute to New Hampshire's dubious distinction as one of the few states where women prisoners have higher recidivism rates than men.

"Constitutional requirements, sound public policy and basic human decency all dictate what the state must surely understand already," said outgoing Committee Chairman Jordan C. Budd. "It is past time for New Hampshire to take immediate steps to close the Goffstown prison and transfer the women there to another facility that can accommodate the provision of minimally comparable services and programs."

Over the past six years the state legislature has turned down repeated requests for up to \$37 million to build a 300-bed facility to replace Goffstown, despite similar findings of neglect in seven reports since 2003. In 2007, for example, the *Concord Monitor* described Goffstown as being severely overcrowded, without sufficient toilets and showers for the

prison population, and where prisoners couldn't sleep because lights were kept on 24 hours a day.

Goffstown was originally intended to be a temporary facility after a federal court held in 1987 that the state couldn't ship its female prisoners out-of-state. See: *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987).

"In a tough economy, it's easy to understand why politicians are reluctant to spend money in general – and on inmates in particular," the *Monitor* wrote in an editorial. "But their penny-pinching may be costing the state in the long run."

The Advisory Committee report stated that the only industry program for women prisoners at Goffstown consisted of "a handful of sewing machines," while male prisoners at the State Prison for Men in Concord have work space for upholstery, license-plate making and bulk-mail preparation, plus six vocational programs such as auto mechanics and culinary arts.

In addition to being overcrowded, Goffstown was cited for having a loud and chaotic environment. "I was struck by the sheer noise, the constant noise that was there from the moment we walked in

to the moment we left," said Committee Chairwoman JerriAnne E. Boggis.

The report noted that New Hampshire's failure "to address the deficient conditions facing incarcerated women reflects on the state's acquiescence in the kind of sex stereotyping that has long consigned women to an inferior place in the American workplace and economy."

State prison officials reportedly agreed with the Advisory Committee's findings.

On August 14, 2012, four female prisoners filed a class-action lawsuit in Merrimack County Superior Court, claiming the New Hampshire Department of Corrections had failed to provide services and programs comparable to those provided to male prisoners.

The plaintiffs, Danielle Woods, Janice Hutt, Martha Thibodeau and Michelle Vanagel, argued in their complaint that female prisoners are subjected to unequal treatment in areas that include educational and vocational programs, work assignments, substance abuse and mental health treatment, and housing. They are represented by New Hampshire Legal Assistance and the law firm of Devine Millimet.

"We just think there are fundamental

differences in the program services and facilities [available] to female inmates and male inmates," said New Hampshire Legal Assistance attorney Elliott Berry.

"I strongly believe that these kinds of vocational and work programs and mental health programs that men have certainly give people a leg up in living a productive life after they get out of prison," he added. "We want to make sure all inmates have those opportunities, male or female." The lawsuit remains pending. See: *Woods v. Commissioner of the NH DOC*, Merrimack County Superior Court (NH), Case No. 217-2012-cv-559. ■

Sources: *Nashua Telegraph*; [www.concord-monitor.com](http://www.concord-monitor.com); *Associated Press*; "Unequal Treatment: Women Incarcerated in New Hampshire's State Prison System," *New Hampshire State Advisory Committee to the U.S. Commission on Civil Rights* (Sept. 2011)

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# Fifth Circuit Reverses \$250,000 Award to Mississippi Prisoner Held too Long

by Matt Clarke

The Fifth Circuit Court of Appeals held that Christopher B. Epps, the Commissioner of the Mississippi Department of Corrections (MDOC), was entitled to qualified immunity after a prisoner was held beyond the date he was supposed to be released.

Will Terrance Porter, a former Mississippi state prisoner, was convicted of breaking into a car and sentenced to five years. The trial court suspended four years of the sentence and ordered that he serve one year in an Intensive Supervision Program (ISP) run by the MDOC, which included house arrest.

While under house arrest Porter was arrested on suspicion of a misdemeanor. As a result, an ISP officer issued a Rule Violation Report and Porter was taken to an MDOC facility, where a disciplinary hearing officer determined he had violated the terms of his ISP. The MDOC's records department decided that, since Porter's ISP had been revoked, he was not entitled to have the last four years of his sentence suspended. After appealing the disciplinary action through the MDOC's three-step grievance procedure, Porter filed a motion for post-conviction relief in state court.

The court found the MDOC had no authority to reinstate a suspended sentence, and ordered Porter, who by then had been incarcerated for 27 months, released immediately.

Porter subsequently filed a civil rights suit in federal court under 42 U.S.C. § 1983 alleging that he had been falsely imprisoned. After all of the defendants except Epps were dismissed, the case went to trial. The jury was instructed on the issue of qualified immunity, but nonetheless found against Epps and awarded Porter \$250,000 in damages. The district court denied Epps' motion for judgment as a matter of law or for a new trial, and he appealed.

The Fifth Circuit noted there was a clearly established right to timely release from prison, but held Epps was entitled to qualified immunity if his actions were not objectively unreasonable. Porter had claimed that Epps was liable for failing to promulgate adequate policies in the MDOC's records department, failing to

train and supervise records department employees and denying Porter's third-step grievance appeal. The appellate court observed that this appeared to be an isolated incident as Porter had not shown any other case of similar delayed release. Therefore, the records department policies were not objectively unreasonable.

Regarding the training and supervision of records department staff, Epps had brought in a lawyer to train the employees in how to interpret sentencing orders and had created a career ladder based, in part, on training. Thus, the error in Porter's case was insufficient to prove objective unreasonableness in training and supervision.

The Fifth Circuit also noted that

although the third-step grievance answer bore Epps' name and signature, trial testimony proved that he had delegated the responsibility for evaluating third-step grievances to a deputy commissioner who signed Epps' name. Since Epps was not personally involved in the denial of Porter's third-step grievance, he could not be held liable in that regard.

Finally, the Court of Appeals found that the MDOC's interpretation of the state court's sentencing order was objectively reasonable, even though "such an interpretation was incorrect." Therefore, Epps was entitled to qualified immunity and the Fifth Circuit reversed the district court and the \$250,000 jury award. See: *Porter v. Epps*, 659 F.3d 440 (5th Cir. 2011). ■

## U.S. Sentencing Commission Calls Federal Mandatory Minimums "Excessively Severe"

by Derek Gilna

In a 645-page report prepared by the U.S. Sentencing Commission for Congress, released in October 2011, the Commission found that federal "mandatory minimum" sentences are harsh and unjust – especially in cases where there is no physical harm or threat of physical harm. The study was the first thorough examination of mandatory minimums on the federal level in two decades.

"While there is a spectrum of views on the Commission regarding mandatory minimum penalties, the Commission unanimously believes that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently across the country," said Commission chairwoman Patti B. Saris, a U.S. District Court Judge in Massachusetts.

The study comprised a review of 73,239 federal criminal cases in fiscal year 2010, of which over one-quarter (27.2%) of the defendants were "convicted of an offense carrying a mandatory minimum penalty." The vast majority of such convictions involved drug offenses (77.4%), while mandatory minimums also apply to certain federal firearm, identity theft and child sex-related crimes.

The Commission's report indicated that black offenders are the demographic least likely to obtain relief from mandatory minimum sentences. This should come as no surprise to those familiar with the racial breakdown in the U.S. Bureau of Prisons (BOP), as a disproportionate number of federal prisoners are black relative to their percentage of the general population in the United States.

Blacks also received the lowest rate of relief under "safety valve" provisions for federal mandatory minimum sentences, either due to their criminal history or the use of a firearm in the commission of a drug offense. Safety valve relief is a method by which low-level, non-violent, first-time offenders can be sentenced below a mandatory minimum; the safety valve provisions were enacted in 1994.

Statistics for defendants who obtained relief from mandatory minimums by cooperating with the government (providing "substantial assistance") were broken down along racial lines as follows: Blacks, 34.9%; whites, 46.5%; Hispanics, 55.7%; and other races, 58.9%. The figures for federal prisoners who obtained relief through safety valve provisions were: Blacks, 11.1%; whites, 26.7%; Hispanics,



42.8%; and other races, 36.6%.

The Sentencing Commission also made other key findings. For example, defendants who received a mandatory minimum sentence received an average sentence of 139 months, compared to an average 63-month sentence for offenders who received relief from mandatory minimums.

Additionally, in fiscal year 2010, federal drug offenders convicted under a statute carrying a mandatory minimum sentence went to trial more than twice as often (4.5%) as drug offenders not convicted of an offense with a mandatory minimum (1.6%). Still, this indicates that the vast majority of cases are resolved through plea bargains, and one contributing factor is that federal prosecutors can use mandatory minimums for leverage to encourage defendants to plead guilty.

Further, although mandatory minimum sentences were intended to punish major drug dealers or kingpins, the study found that often is not the case. "The Commission's analysis of a 15-percent sample of fiscal year 2009 cases indicates that the mandatory minimum penalties for drug offenses sweep more broadly than Congress may have intended." In fact, of federal drug offenders subject to mandatory minimums, 23% were classified as couriers and 17.2% as street-level dealers, while only 10.9% were high-level suppliers or importers.

The Commission's study is just one of many recent reports and public comments that share a common theme: The federal sentencing guidelines are not only too harsh, but are inequitably applied. Most

objective studies have found that drug use in the general population is holding steady across all racial groups; thus, the practice of disproportionately dispensing mandatory minimum sentences to blacks, while disproportionately denying them safety valve relief, is indefensible.

With the BOP's population at a record high of more than 218,900 prisoners as of October 2012, and most BOP facilities operating at 20% or more above their rated capacities, a review of federal sentencing practices is long overdue. But so long as federal prosecutors can hold the threat of excessively long mandatory minimum sentences over defendants if they choose to exercise their constitutional right to a jury trial, the BOP's population will continue to grow.

"The number of federal prisoners has tripled in the last 20 years," noted Chairwoman Saris. "Although the commission recognizes that mandatory minimum penalties are only one of the factors that have contributed to the increased capacity and cost of inmates in federal custody (an increase in immigration cases is another), the commission recommends that Congress request prison impact analyses from the commission as early as possible in the legislative process when Congress considers enacting or amending federal criminal penalties."

The Sentencing Commission's study concluded by making a number of recommendations to Congress, including "possible legislative reforms to strengthen and improve the sentencing guidelines system." Also, should Congress enact additional mandatory minimum sentences,

the Commission stated that such penalties "should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently."

Of course, those caveats should apply to the mandatory minimum sentences that are currently on the books, too. The Sentencing Commission's report is available at [www.usss.gov](http://www.usss.gov) or on PLN's website. ■

Sources: *National Law Journal*; [www.justicefellowship.org](http://www.justicefellowship.org); [www.famm.org](http://www.famm.org); "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System," U.S. Sentencing Commission (October 2011)



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## Arkansas Prison Director Suspended by Board of Corrections

**R**ay Hobbs, director of the Arkansas Department of Correction (ADOC), was suspended without pay for two weeks, starting January 2, 2012, for failing to promptly inform the Board of Corrections about a computer glitch that resulted in hundreds of prisoners being paroled early. A six-month probation period followed his suspension.

According to ADOC spokeswoman Dinah Tyler, the department discovered the problem with its computer system in late 2011.

"The first time we got any inclination that there was a problem was September 28. Then, by October 5, they had a pretty good handle on what was going on with the computer," Tyler stated. She said the glitch allowed prisoners to accumulate more good conduct time than allowed by law. "There's supposed to be a cap in the computer that would kick in any time they got above 50% and say 'no more.' And that cap, though it was there, wasn't being used."

Around 1,123 prisoners were credited for more good conduct time than they were eligible to receive. But for those still in prison and for most of the prisoners released early, that wasn't a problem.

"All we had to do was go in there and take their good time away above 50%. There were about 300 inmates who may have been released [early] with too much good time. But they were covered by the Emergency Powers Act. It was a wash, so it really didn't count," said Tyler.

Correcting the problem was not as easy for 13 former prisoners for whom no amount of manipulation could make them properly eligible for parole at the time they were released. However, 11 became parole eligible after the glitch was discovered, another returned to prison on a parole violation and one, who was paroled out-of-state, was expected to be sent back to Arkansas and re-incarcerated.

The computer error alone did not result in Hobbs' suspension. Rather, it was the ADOC's failure to timely inform the Board of Corrections about the glitch that led to the disciplinary action.

"There is no shame in making a mistake or having a problem. The shame comes when you don't correct it. We corrected it. We just didn't tell everybody about it as fast as we should have and that's it," Tyler remarked.

She said the ADOC waited almost

two months to tell the Board because they wanted to make sure they had correct information before passing it on. A more likely scenario, though, is that they delayed informing the Board about the problem until they could also report they had fixed the computer glitch.

Governor Mike Beebe expressed confidence in Hobbs, but also supported the Board's decision to discipline him.

"I think the Board of Corrections is sending a message that there are certain

things that they want to make sure they are more abreast of in a more timely fashion, and I think they measured their response accordingly," Governor Beebe said. "I can understand why he'd try to see a problem and fix it before anybody finds out about it, but you've got to keep your board informed, and I think that's what their message is." ■

Sources: [www.todaysthv.com](http://www.todaysthv.com), [www.pbcommercial.com](http://www.pbcommercial.com), *KTHV*

## Texas Federal Court Issues Preliminary Injunction Prohibiting Sex Offender Parole Conditions; Case Settles for \$52,000

*by Matt Clarke*

**O**n October 7, 2011, a U.S. District Court issued a preliminary injunction prohibiting the Texas Board of Pardons and Paroles (Board) from enforcing onerous sex offender conditions that had been imposed on a parolee who had not been convicted of a sex offense.

Buddy Jene Yeary, convicted of Possession or Transportation of an Immediate Precursor (Sulfuric Acid and Ethyl Ether), spent four years in prison before he was released on parole. His parole certificate informed him that he would be subjected to an onerous suite of restrictive sex offender conditions known as "Condition X."

The Condition X requirements included but were not limited to: registering as a sex offender; remaining a specified distance from premises where persons under 18 years of age (minors) commonly gather; not supervising or participating in any program involving minors; not having any unsupervised contact (including indirectly, telephonically and electronically) with minors; not dating, marrying or having a platonic relationship with any person with minor children; attending psychological counseling; participating in a sex offender treatment program; not possessing or operating any type of computer, camera or video equipment; not participating in any volunteer activities; not possessing sexually explicit literature; being subject to polygraphs regarding sexual history, and being subject to "penile plethysmographs" in which a pressure-measuring device is attached to the penis and monitored while the subject is shown pictures.

Yeary filed a civil rights complaint against various Texas parole officials in federal court pursuant to 42 U.S.C. § 1983, alleging that his due process rights were violated when he was subjected to Condition X requirements without any hearing or other form of due process. The court granted a temporary restraining order prohibiting the enforcement of Condition X. A hearing was then held as to whether a preliminary injunction should issue prohibiting the defendants from enforcing Condition X requirements until Yeary was afforded due process.

The district court noted that this area of law was well-settled both in the Fifth Circuit and the Texas Court of Criminal Appeals. "The imposition of sex-offender conditions on a defendant who has not been convicted of a sex offense – whether a prisoner or a parolee – without first providing the defendant with certain due-process protections is unconstitutional," the court wrote.

Thus, Condition X cannot be imposed on a prisoner prior to release or on a parolee if they have no sex offense convictions, without a hearing first being held that affords due process protections similar to those in a parole revocation hearing.

The defendants promised not to enforce the sex offender conditions against Yeary until he was provided such a hearing. The court held that was not enough. "So long as the sex offender conditions remain as a condition of Plaintiff's parole, neither Plaintiff nor the Court can be assured that Defendants will not continue

to enforce the sex offender conditions of Plaintiff's parole by threatening future revocation or arrest." Therefore, the district court granted the preliminary injunction and enjoined the defendants from requiring Yeary to comply with Condition X.

The case subsequently settled on August 31, 2012 after the district court granted in part and denied in part the defendants' motions to dismiss. The Board had agreed to remove the Condition X requirements imposed on Yeary prior to the settlement, and the defendants paid a total of \$52,000 to settle the case, inclusive of attorney fees and costs. See: *Yeary v. Owens*, U.S.D.C. (W.D. Tex.), Case No. 1:11-cv-00768-LY.

Previously, the Fifth Circuit Court of Appeals had held that Texas parole officials could not impose sex offender conditions on a parolee who had not been convicted of a sex offense without providing procedural due process in the form

of notice and a hearing. See: *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004) and 409 F.3d 665 (5th Cir. 2005) [*PLN*, July 2006, p.27]. However, parole officials can impose Condition X on parolees who are on parole for a non-sex offense but previously had been convicted of a sex crime. [See: *PLN*, May 2011, p.46].

In November 2011, the Texas Board of Pardons and Paroles removed Condition X requirements for 176 parolees following an adverse ruling by the Texas Court of Criminal Appeals. [See: *PLN*, July 2012, p.46].

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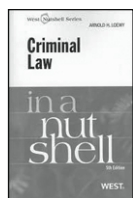
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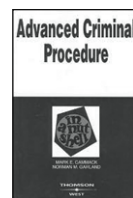
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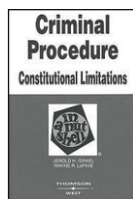
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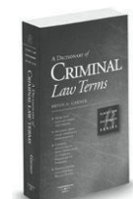
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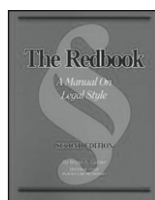
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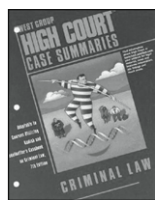
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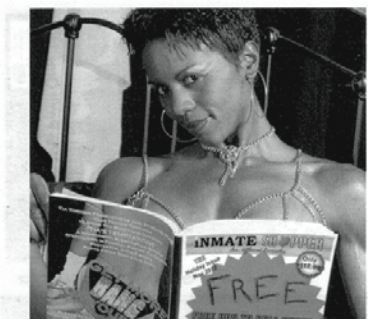


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# Fifth Circuit Holds Mailbox Rule Applies to Legal Mail Rejected Under Bogus Prison Rule

The Fifth Circuit Court of Appeals has held that legal mail rejected by prison officials under a purported rule that does not exist is still entitled to the “mailbox rule.”

Clifford Medley, a Texas state prisoner, tried to mail his federal habeas corpus petition to the U.S. district court about a week before the one-year AEDPA limitations period would have expired in October 2006. Because federal habeas petitions require a \$5.00 filing fee, and because the processing of a withdrawal request from a Texas prisoner’s trust fund account takes several weeks, Medley put a trust fund withdrawal slip in his mailing with a request for prison mail room employees to hold the habeas petition until the trust fund withdrawal was processed so the check could be included.

The mail room instead returned the petition to Medley “with an explanation that the mail room was not permitted to hold the petition pending receipt of the filing fee.” Using Inmate Request Forms, Medley inquired multiple times concerning the proper procedure to have the filing fee sent along with the petition, only to be told that mail may not be sent along with withdrawal slips and that he could have someone outside the prison pay the filing fee. Finally, long after the expiration of the limitations period, Medley’s mother filed the petition and paid the filing fee.

Unsurprisingly, the district court dismissed the petition as untimely. Medley appealed. On appeal, the assistant attorney general (AAG) assigned to the case alleged that Medley had violated a reasonable prison mail rule that resulted in the rejection of his petition, and thus he was not entitled to the benefits of the mailbox rule established in *Houston v. Lack*, 487 U.S. 266 (1988). The Fifth Circuit affirmed, also finding that equitable tolling did not apply.

A few days after he filed his appellate reply brief, Medley received an answer to a grievance he had submitted on the matter. The answer stated there was no prison rule that prohibited mail from being submitted along with withdrawal slips. Medley filed a motion for panel rehearing, which was granted.

On rehearing the AAG admitted there was no such rule and said he had been merely assuming that the lies that prison

officials told to Medley were true. In an October 12, 2011 opinion on rehearing, the Fifth Circuit withdrew its previous opinion and reversed the district court’s judgment, remanding the case for further proceedings.

The Court of Appeals noted “that the mailbox rule ‘constitutes an exception’ to [Habeas] Rule 3’s requirements; thus a pro

se prisoner like Medley need not mail his fee with his petition in order for it to be treated as filed.” However, it has been the experience of many pro se litigators that district court clerks will return habeas petitions that are not accompanied by either a filing fee or a motion to proceed in forma pauperis. See: *Medley v. Thaler*, 660 F.3d 833 (5th Cir. 2011). ■

## Federal Court Upholds Maryland Law that Reclassifies Prisoners for Redistricting

by David M. Reutter

On December 23, 2011, a Maryland federal district court three-judge panel upheld a state law that counts prisoners as residents of their legal home address rather than their prison address for redistricting purposes.

For decades, states have used unadjusted census data to set voting districts. The census counts prisoners as residents of the area where their prison is located, even though they cannot vote. This has diluted the voting power of people in areas without a prison while enhancing the political clout of mostly rural prison communities. [See this issue’s cover story].

Following the 2010 decennial Census, Maryland enacted a new redistricting plan in October 2011 for the state’s eight congressional districts. Nine Maryland African-American residents filed a lawsuit that contended the plan violated their rights under Article I, section 2 of the U.S. Constitution, the Fourteenth and Fifteenth Amendments, and § 2 of the Voting Rights Act of 1965, because the plan diluted African-American voting strength within the state and discriminated against African-Americans. For the same reasons, they also challenged Maryland’s “No Representation Without Population Act” (the Act), 28 U.Md.Code Ann., Art. 24 § 1–111, Election Law (“EL”) § 8–701S.C. § 2284(a), which seeks to correct census data for the distortional effects of the Census Bureau’s practice of counting prisoners as residents of the community where they are incarcerated.

The new redistricting plan, which was passed in an emergency legislative session, created two majority African-American

congressional districts in Maryland. The goal of the Act was to end a particularly distortional effect of the Census on African-American communities that experience disproportionately high incarceration rates.

“These distortional effects stem from the fact that while the majority of the state’s prisoners come from African-American areas, the prisons are located primarily in the majority white first and sixth districts. As a result, residents of districts with prisoners are systematically ‘overrepresented’ compared to other districts,” wrote the three-judge panel. “In other words, residents of districts with prisons are able to elect the same number of representatives despite in reality having comparatively fewer voting-eligible members of their community.”

The Act requires officials who draw local, state and federal legislative districts to count prisoners as residents of their last known address. The 1,321 state prisoners who reported pre-incarceration addresses outside Maryland were excluded by the Maryland Department of Planning (MDP) in making the population count adjustments. The MDP’s analysis resulted in the Sixth District, which is in the western part of the state and has most of the state’s prisons, losing 6,754 individuals. Meanwhile, the Seventh District, which includes the city of Baltimore, gained 4,832 individuals.

The district court relied heavily on the Supreme Court’s ruling in *Karcher v. Daggett*, 462 U.S. 725 (1983). *Karcher* recognized that “the census may systematically undercount population, and the rate



of undercounting may vary from place to place.... If a state does attempt to use a measure other than total population or to 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner." Neither *Karcher* nor the U.S. Constitution requires states or Congress to utilize unadjusted Census data.

It seemed "clear" to the court that Maryland's adjustments to the state's census data were made in the systematic manner demanded by *Karcher*. The MDP followed the multi-step prescribed process of the Act to make the population adjustments. The district court rejected the plaintiffs' position that if Maryland wants to correct for prisoner-related population distortions, it must also make similar adjustments to account for distortionary effects of college students and members of the military in Census counts.


The three-judge panel held that Maryland is not constitutionally required to make any adjustments for purposes of redistricting. It further observed that students and soldiers are not similarly situated to prisoners for census purposes. "College students and members of the military are eligible to vote, while incarcer-

ated persons are not. In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage fully in civic life," the district court wrote. "In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners."

Finally, there was no evidentiary support to the plaintiffs' allegations that intentional racial classifications were the driving force behind the Act. "In fact, the evidence before us points to precisely the opposite conclusion," the court stated. Accordingly, summary judgment was granted to the state defendants.

The Prison Policy Initiative, Howard University School of Law Civil Rights Clinic, ACLU of Maryland, Maryland State Conference of NAACP Branches, Somerset County Branch of the NAACP, NAACP Legal Defense and Education Fund, and Demos filed an amicus brief in support of the Act. The plaintiffs appealed the district court panel decision, and the Supreme Court entered a summary affirmance on June 25, 2012. See: *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D. Md. 2011), *affirmed*. ■

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# Michigan DOC Taser Experiment Touted; Prison Perimeter Patrols to End

Michigan prison officials are proclaiming their experiment to arm guards with Tasers a success. An announced end to round-the-clock patrols of prison perimeters, however, was denounced as a threat to security by the union that represents Michigan Department of Corrections (MDOC) employees.

The Taser experiment began in December 2011 as a pilot program at the Carson City Correctional Facility, Ionia Correctional Facility, Alger Correctional Facility, the Michigan Reformatory and St. Louis Correctional Facility. It prompted the Human Rights Defense Center, the parent organization of *Prison Legal News*, to send a letter to MDOC director Daniel Heyns, warning of potential misuse of Tasers by guards. [See: *PLN*, July 2012, p.40].

Heyns and the Michigan Corrections Organization (MCO), the union that represents over 10,000 state prison employees, have lauded plans to expand the use of Tasers system-wide in the MDOC. In March 2012, Michigan officials ordered 242 Taser X2s, 242 Taser CAM HD recorders and 3,783 Taser cartridges, at an estimated cost of \$800,000.

Heyns described the deployment of Tasers to prison guards as “a game changer” in testimony to state lawmakers. “We’re seeing a dramatic drop in the number of assaults,” he said. Prisoners “are going to think twice before they take on a staff member.”

“Before we had these Tasers to break up an altercation, or assault involved, our corrections officers getting involved in that, they had to get right in there, pull inmates apart and many times they would get injured, hurt, sometimes very seriously,” added MDOC spokesman Russ Marlan.

For example, on October 9, 2012, guards used Tasers to stop a fight involving six prisoners in a medium-security recreation yard at the Earnest C. Brooks Correctional Facility. Several prisoners suffered minor injuries; no staff members were hurt.

Since the pilot program began last year, guards have pulled their Tasers 59 times and fired them 39 times. While the MCO and MDOC tout this as a success that has resulted in a reduction in violence against staff, prisoner advocates have reservations about guards carrying Tasers.

“I believe there are better methods

that can be utilized,” said Lois DeMott, co-founder of the advocacy group Citizens for Prison Reform. She expressed particular concern about Tasers being used on prisoners with disabilities or mental health problems.

Although the MCO pushed for and supported the use of Tasers, it rallied against the MDOC’s plan – which took effect in March 2012 – to save about \$13 million by eliminating 24-hour vehicle patrols around prison perimeters. The MCO said that would result in more escapes and introduction of contraband.

“We know for a fact that folks throw tennis balls, for example, over a fence, filled with dope,” said Mel Grieshaber, MCO’s executive director. “We’ve had guns thrown over the fence.”

The MDOC, however, stated it has technology in place that provides ample monitoring of prison perimeters; the department has spent millions of dollars on cameras, lighting, electrified fences and motion detectors. Despite the MCO’s opposition, Heyns left no doubt about his intentions. “He told us he’s moving forward” with plans to discontinue the perimeter patrols, Grieshaber said, which led to picketing by MCO members outside MDOC facilities statewide.

Although the perimeter patrols are being eliminated, no guards will lose their jobs; rather, they will be transferred to other available positions. ■

Sources: *Detroit Free Press*, [www.mlive.com](http://www.mlive.com), [www.reuters.com](http://www.reuters.com)

## New North Carolina DOC Hospital Promises Better Healthcare for Prisoners

by Joe Watson

With crowded prisons and an increasing percentage of prisoners age 50 and older, the North Carolina Department of Corrections (NCDOC) opened a \$153.7 million medical complex at the Central Prison in Raleigh in November 2011.

The new complex includes a five-story, 167,000-square-foot hospital with 120 inpatient beds and outpatient clinics – making cancer treatment, CT scans and some surgeries available behind prison walls. The complex’s mental health center has an additional 216 inpatient beds, and the entire facility is staffed by more than 550 employees.

NCDOC officials said there was intense pressure to modernize medical care for prisoners due to rising costs, security concerns and overburdened community hospitals.

“We’ll save \$300,000 in the first year on chemo [treatment], and that’s going to grow,” stated Dr. Paula Smith, the NCDOC’s chief of health services.

Prisoners over 50 years old represented 6.2 percent of North Carolina’s growing prison population in 2000. Ten years later that demographic nearly doubled to 12 percent, according to NCDOC figures, and older prisoners are prone to higher rates of cancer, Alzheimer’s disease and heart problems.

Although the NCDOC will continue to use local hospitals for emergencies, major surgeries and treatment for chronic diseases, prison officials said the \$90 million spent in 2010 for outside hospital care is expected to decline by at least 30 percent.

Prison employees drove more than 1,700 state prisoners to outside medical appointments in 2010 at a cost of almost \$11 million, including the wages for guards assigned to keep an eye on prisoners who were hospitalized.

“We do feel like it is in the best interest of the public to have prisoners treated in a more controlled environment,” said Don Dalton, spokesman for the North Carolina Hospital Association.

Plans for the new prison medical complex began more than a decade ago, after the Central Prison infirmary, built in the 1960s, was found to be inadequately staffed and poorly managed, according to a federal report. The report was sparked by the death of a prisoner who died due to dehydration after four days in a mental health cell without water.

Ironically, after investing almost \$155 million into the medical complex at Raleigh’s Central Prison, and another \$48.3 million into a new 3-story, 300-bed medical and mental healthcare facility at the

NC Correctional Institution for Women, in late 2011 the state considered privatizing prison medical services – including “medical, dental, emergency, pharmaceuticals, mental health services, healthcare personnel, program support services and all related support services and expenses for inmates.”

“Privatizing prison healthcare would be a disaster for North Carolina’s taxpayers,” said Dana Cope, Executive Director of the State Employees Association of North Carolina.

The state Department of Public Safety (DPS) issued a request for proposals (RFPs) for contracting out prison medical care in April 2012, but state lawmakers put the plan on hold by passing a bill on May 23, 2012 (SB 797) that barred DPS from issuing RFPs or contracts for prison medical services without legislative approval until June 2013.

The NCDOS spends around \$244 million each year on prison healthcare, according to spokeswoman Pam Walker.

Sources: [www.newsobserver.com](http://www.newsobserver.com), [www.doc.state.nc.us](http://www.doc.state.nc.us), [www.wcnc.com](http://www.wcnc.com), [www.bizjournals.com](http://www.bizjournals.com), [www.businessweek.com](http://www.businessweek.com)

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# Missouri County Ordered to Present Civil Detainees Before Court within 27 Hours; \$75,000 Damages Settlement

A Missouri federal district court has entered a consent decree in a class-action lawsuit that prohibits county officials from holding people detained for more than 27 hours, excluding weekends and holidays, on a civil body attachment or other civil process related to child support unless they have seen a judge within that time period. The lead plaintiff received \$75,000 to settle his individual claims.

The class-action suit was filed on behalf of Michael Bauer, 41, who was arrested on February 18, 2009 when he went to the St. Louis Metropolitan Police Department to obtain a background check for a prospective job.

He was jailed based on a body attachment issued by the Jefferson County Circuit Court related to child support payments. Despite his claims of innocence, Bauer was held in the Madison County Jail for 10 days and in the Jefferson County Jail for 27 days. When he was finally taken before the court on March 27, 2009, an assistant prosecutor discovered the body attachment had been withdrawn and recalled nearly two years earlier.

"What can you do? You sit there and wait it out," Bauer said about the situation he found himself in. As a result of his arrest, Bauer lost his job as a dishwasher, lost his apartment and was homeless for several months.

He filed suit, but the district court granted the defendants' partial motion to dismiss on June 25, 2010, finding that Bauer failed to state an Eighth Amendment claim because he was a pre-trial detainee, and thus his claims fell under the 14<sup>th</sup> Amendment. See: *Bauer v. Jefferson County, Missouri* (E.D. Mo. 2010), 2010 WL 2628380. The claims against Madison County were voluntarily dismissed in January 2011.

The court subsequently issued an order certifying the class and for entry of a proposed consent judgment on July 20, 2011, then entered a final judgment on October 5, 2011. The orders granted injunctive relief, on due process grounds, that prohibit Jefferson County from holding persons on civil body attachments for prolonged periods of time without an appearance before a judge.

In addition to a requirement that people arrested on civil body attachments be brought before a judge within 27 hours,

Jefferson County was ordered to "develop and implement a procedure to verify every sixty days that each outstanding body attachment remains valid." The court further ordered the county to provide class counsel with a list of all persons arrested on a civil body attachment – plus the date and time of their arrest, placement into jail and appearance before a judge – for the next seventeen months. Bauer received \$75,000 to settle his individual claims.

Washington University law professor Peter Joy said that if Bauer could have af-

forded an attorney he most likely would have been released sooner. "If anyone had taken a closer look, they would have determined they didn't have any authority to be holding him," Joy noted.

Bauer was represented by the ACLU of Eastern Missouri and attorney Robert L. King with the law firm of Korein Tillery LLC. See: *Bauer v. Jefferson County, Missouri*, U.S.D.C. (E.D. Mo.), Case No. 4:09-cv-02116-TIA. ■

Additional source: [www.stltoday.com](http://www.stltoday.com)

## Organizations Submit Letters to FCC Urging Action on Prison Phone Rates

by Mel Motel

On October 23, 2012, the Human Rights Defense Center (HRDC), which publishes *Prison Legal News*, submitted a joint letter to the Federal Communications Commission (FCC) urging action on the "Wright Petition," which asks the FCC to place caps on interstate prison phone rates to make them more affordable.

The Wright Petition has been pending before the FCC since 2003. Sixty criminal justice organizations signed on to the joint letter, including the American Friends Service Committee, Correctional Association of New York, National CURE, Southern Center for Human Rights, Justice Policy Institute, Prison Policy Initiative and The Sentencing Project.

The letter described problems with the unregulated prison phone industry and highlighted the "commission" kickback system that drives up the cost of prison telephone calls in most states. According to HRDC's letter, some consumers pay more than \$17.00 for a 15-minute interstate prison phone call; in many cases it costs more to accept a collect call from a prisoner in another state than it does to place a call to China.

On November 5, 2012 the Center for Media Justice (CMJ) submitted another joint letter to the FCC asking for action on the Wright Petition. This time 96 groups concerned with media justice and social justice signed the letter, which described how the increasingly long distances between prisoners and their families mean that phone calls are the only way many prisoners

can communicate with the outside world. Among the signatories to the CMJ letter were the Ella Baker Center for Human Rights, Prison Creative Arts Project, Free Press, Legal Services for Prisoners with Children and the Media Literacy Project.

HRDC assisted the University of California Davis Immigration Law Clinic in submitting a third joint letter to the FCC on November 8, 2012 that was signed by 110 organizations and academic and legal professionals concerned about the rights of immigrant detainees. Professor Holly S. Cooper, Associate Director of the Immigration Law Clinic, coordinated the letter. Signatories included the American Immigration Lawyers Association, Center for Gender & Refugee Studies, Detention Watch Network, Heartland Alliance's National Immigrant Justice Center, National Immigration Project of the National Lawyers Guild, UC Davis Civil Rights Clinic, Amnesty International USA and Enlace (a project of Communities United for People).

The November 8 letter also urged the FCC to pass the Wright Petition, this time highlighting the unique hardships experienced by immigrants in U.S. detention facilities. According to the letter, high phone rates make it difficult for immigrant detainees facing deportation or seeking asylum to contact their families, legal counsel, consulates and human rights organizations. For many immigrants in detention, access to telephones is vital. The letter cited the example of an applicant for political asylum who fears torture



or persecution in her home country and must present evidence to substantiate her claims. Adequate phone access is necessary to secure evidence such as witness statements and human rights reports, and failure to do so can mean deportation to a country where her life is in danger.

“Having reasonable, competitive phone rates for individuals in immigration detention merely enshrines basic human rights protections for immigrants seeking asylum, family unity and freedom – rights that are core to the United States’ democratic principles,” noted Professor Cooper.

A joint letter to the FCC from faith-based organizations and religious leaders in support of lowering the cost of prison phone calls is forthcoming. Additionally, several organizations, including Human Rights Watch and Prison Fellowship, have submitted separate letters.

National groups are not the only ones that have been pushing the FCC to act on the Wright Petition. Since June 2012, more than 370 letters have poured into the FCC’s office from prisoners and their families, many of them *PLN* readers. [See: *PLN*, Nov. 2012, p.20]. If you have not yet done so, please consider writing to the FCC to explain the impact that high prison phone rates have had on you and your family. See p.13 of this issue for details on contacting the FCC.

On November 14, 2012, FCC Chairman Julius Genachowski indicated the FCC would begin the process of considering the Wright Petition, including a public comment period – the first significant action taken by the agency concerning prison phone rates. *PLN* will report on this and other developments in the Campaign for Prison Phone Justice in next month’s issue. 📧

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# West Memphis Three Released, but Justice Not Served and Questions Remain

by Joe Watson

In August 2011, a trio of Arkansas state prisoners, widely known as the West Memphis Three, walked out of prison after serving more than 18 years for a brutal triple homicide they did not commit. They were not exonerated, however, and are still seeking justice.

In May 1993 the bodies of three 8-year-old Cub Scouts, Christopher Byers, Michael Moore and Stevie Branch, were found in a drainage ditch near West Memphis, Arkansas. They had been stripped naked, bound and murdered. Three local teenagers, Michael Wayne “Damien” Echols, 18, Charles Jason Baldwin, 16, and Jessie L. Misskelley, Jr., 17, were arrested for the crime. Echols was considered a suspect because he wore black clothing, liked heavy metal music and had an interest in the occult.

Misskelley, who had a low I.Q., allegedly confessed to participating in the murders and implicated Baldwin and Echols. However, his “confession” was obtained during an almost 12-hour-long police interrogation that included leading and coaching by detectives, and contained obvious inconsistencies. He later recanted and refused to testify against his co-defendants.

Prosecutors alleged the murders were part of a Satanic ritual and claimed that Echols, Baldwin and Misskelley were part of a Satanic cult. Despite a dearth of physical evidence, all three were convicted; Misskelley was sentenced to life plus 40 years, Baldwin received life without parole and Echols was sentenced to death.

Their appeals slowly wound through the courts. DNA testing in 2007 failed to link them to the murders, and they raised allegations of juror misconduct and ineffective legal representation at trial. At one point, Echols came within three weeks of being executed. A series of HBO documentaries called *Paradise Lost* profiled their case, as did a 2002 book titled “Devil’s Knot,” and the West Memphis Three became celebrities among wrongful conviction activists.

“You can have all the evidence in the world that you didn’t do it, but unless there’s outside attention focused on your case, it’ll get swept under the rug,” Echols observed. On November 4, 2010,

the Arkansas Supreme Court remanded their case for a lower court to consider the new DNA evidence.

“While there is a significant dispute in this case as to the legal effects of the DNA test results, it is undisputed that the results conclusively excluded Echols, Baldwin, and Misskelley as the source of the DNA evidence tested,” the Court wrote. See: *Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892 (Ark. 2010).

Rather than trusting the judicial system that had kept them behind bars for over 18 years, on August 19, 2011, Echols, Baldwin and Misskelley accepted Alford pleas, which acknowledged that prosecutors had enough evidence to convict them but allowed them to maintain their innocence. They were immediately released but have to serve ten years on probation and are still convicted felons.

“This was not justice,” said Baldwin. “In the beginning we told nothing but the truth – that we were innocent and they sent us to prison for the rest of our lives for it. We had to come here and the only thing the state would do for us is say, ‘Hey we will let you go only if you admit guilt,’ and that is not justice anyway you look [at] it.”

Baldwin had initially resisted accepting the Alford plea, wanting to hold out for an exoneration, but said he relented so that Echols, who remained on death row, would be freed along with Misskelley as part of the package plea deal. The arrangement also ensured that the West Memphis Three could not pursue a wrongful conviction suit following their release.

In the days and weeks after they were freed, the West Memphis Three celebrated, reacquainted themselves with the comforts of the outside world and recounted what it was like to be condemned for nearly two decades for gruesome crimes they did not commit.

“I was up all morning and most of the night trying to figure how to use those iPhone things,” Echols said the day after he was released. The night before, he was celebrating in Memphis, Tennessee with supporters such as Natalie Maines of the Dixie Chicks and Pearl Jam front man Eddie Vedder, who were among numerous advo-

cates – including Winona Ryder and actor Johnny Depp – who had rallied behind the West Memphis Three over the years.

“I hadn’t seen daylight in almost a decade,” Echols told CNN about his time on death row. “The only thing you can do to maintain your sanity is to not think about the case and not think about what’s happening to you.”

Baldwin said he spent his first few years in prison targeted by other prisoners as a child-killer. He was beaten, suffered a fractured skull and broken collar bone, had teeth knocked out and was left with scars.

Echols said that guards didn’t appreciate the public attention the West Memphis Three received. “They [felt] like I’m bringing attention not to my case but to the prison, and they don’t like that at all, so there was a lot of retaliation and retribution for that,” he stated.

In the year after he was released, Echols has spoken publicly about his ordeal many times, including at the New York Public Library on November 7, 2012, when he described his years on death row as “the most cold, soulless environment you can imagine.”

Echols released a book in September 2012 titled “Life After Death.” Baldwin is currently going to law school, while Misskelley has kept a low profile. “Honestly, we all lived through this horrible time in our own way and got through it differently, so now I guess we all have a different way of healing,” said Baldwin.

On August 30, 2012, a year after the trio was freed in exchange for Alford pleas, their defense attorneys announced that retesting of clothing fibers used to convict them indicated the fibers failed to connect them to the crime scene.

“The sloppiness of the notes, the lack of data and documentation, the erratic nature of the color analysis data all suggest scientists who were poorly trained to do the casework they were responsible for and were operating at the margin of competency, were derelict in their assigned duties, or were otherwise unable to properly conduct this kind of scientific work,” stated Max Houck, a former FBI crime lab analyst who evaluated the fiber evidence along with two other experts.

Another documentary about the West

Memphis Three, co-produced by Echols, was released on January 21, 2012 at the Sundance Film Festival. It focused on Terry Hobbs, the stepfather of one of the three victims, and presented circumstantial evidence linking him to the murders—including DNA test results and witness testimony. The film, *West of Memphis*, is scheduled to be released in select theaters on December 25, 2012, while a movie adaptation of “Devil’s Knot” will be released in 2013.

Meanwhile, Baldwin, Echols and

Misskelley still hope to prove their innocence and be exonerated for the crimes they did not commit. A \$100,000 reward has been offered for information that leads to the conviction of the real killer who murdered the three Cub Scouts in 1993. Separately, the families of two of the slain children have filed a public records lawsuit to obtain access to police evidence in the case.

“This isn’t over,” Echols stated. “We are not going to allow officials to sweep

this under the rug. We will continue to fight this case as long as we have to until the right thing is done. Really that’s what the rest of our lives are gonna be dedicated to until this is finally and completely resolved. This is not gonna go away.”

Sources: *Associated Press*, [www.cnn.com](http://www.cnn.com), [www.foxnews.com](http://www.foxnews.com), [www.wm3.org](http://www.wm3.org), *New York Times*, *Huffington Post*, [www.copblock.org](http://www.copblock.org), [www.cinemablend.com](http://www.cinemablend.com), *Commercial Appeal*, [www.reuters.com](http://www.reuters.com)

## Oregon Re-Sells Unused Execution Drugs

On November 22, 2011, death penalty opponents cheered Oregon Governor John Kitzhaber’s decision to halt the scheduled December 6, 2011 execution of Gary Haugen, and to impose a moratorium on all executions for the duration of his term. Kitzhaber called the death penalty “compromised and inequitable.” [See: *PLN*, June 2012, p.16].

However, opponents of capital punishment later cried foul after Oregon moved to re-sell its execution drugs so they may be used to end another prisoner’s life.

From 2007 until Haugen’s scrubbed execution date, Oregon spent an estimated \$1.3 million trying to put him to death. The largest portion of that amount was the \$853,083.82 cost of his legal defense and appeal, according to the Office of Public Defense Services.

Marion County Deputy District Attorney Don Abar claimed that excluding law enforcement expenses, prosecutors spent \$150,000 to \$200,000 to put Haugen on death row. The Oregon Department of Justice (DOJ) then racked up \$128,050.49 defending his appeal and another \$117,487.19 to advise prison officials, prepare for the execution and on related matters, according

to DOJ spokeswoman Kate Medema.

Of the \$57,573.64 that the Oregon Department of Corrections (ODOC) spent on training, overtime and other expenses, the \$17,953.98 cost of Haugen’s execution drugs proved to be the most controversial.

Expecting to recover most of the money spent on Haugen’s lethal injection drugs, cash-strapped Oregon officials returned them through a federally-licensed reverse wholesaler. Returning the drugs incurred a “restocking fee,” according to ODOC spokeswoman Jeanine Hohn.

She noted that the twenty 50-milliliter vials of pentobarbital sodium, fifty 10-milliliter vials of

pancuronium bromide and fifty 20-milliliter vials of potassium chloride would have expired in three years. As such, the state moved quickly to return the drugs, which will likely be used to execute another prisoner in a different state.

Sources: *Oregonian*, [www.theatlantic.com](http://www.theatlantic.com), *Los Angeles Times*

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## Philadelphia Women Prisoners Sue for Being Housed with a Man

Four women have sued the City and County of Philadelphia, its prison system, several of its divisions and officials, and Prison Health Services (PHS, now known as Corizon) for forcing them to share a jail cell with a man for over a year.

Jovanie Saldana, 23, was taken to the Riverside Correctional Facility (RCF), a women's prison, in June 2010 after being charged with robbery and other offenses. "Saldana's arrest papers clearly stated he was a man," the four women said in their 81-page complaint, filed by Philadelphia attorney Brian F. Humble on November 9, 2011.

Over the next 14 months, prisoners Jabrina Barnett, Yazmin Gonzales, Katrina Chamorro and Maria Cachola claimed they endured sexual harassment and groping. They said Saldana, a male-to-female transsexual, subjected them to "unwanted stares and sexual leering," breast touching and "repeated sexual overtures ... in the form of commenting about the size and color of [the women's] nipples." Barnett alleged that "Saldana physically assaulted her by slamming her into the wall of cell 17 when Ms. Barnett complained about Saldana touching her breasts."

RCF employees had contact with Saldana that included "daily contact for more than 425 days, 19 strip searches, two medical examinations, and, at least, one psychological examination." The women prisoners claimed that a male guard "knew that Saldana was a man and agreed to act in concert with Saldana to conceal his true identity in exchange for sexual favors, including but not limited to oral sex."

The women also alleged that "the day-to-day sexual harassment and the day-to-day invasion of their rights to privacy by a male inmate posing as a female inmate" could have been avoided if prison staff had not "failed to conduct [a] proper strip and body cavity search, inspect and search Saldana's anal and penile areas and to detect Saldana's male genitals."

"This is not a case of medical malpractice; indeed a layperson can determine from a visual examination whether they are looking at male or female genitals," Humble wrote in the complaint, which seeks compensatory and punitive damages. The

lawsuit remains pending. See: *Barnett v. City and County of Philadelphia*, U.S.D.C. (E.D. Penn.), Case No. 2:11-cv-07012-ER.

The fact that Saldana was a transsexual came to light after she accused an RCF guard of sexually assaulting her by forcing her to perform oral sex – an allegation that prison officials said was unfounded following an internal investigation. Saldana has since been transferred to the Philadelphia Detention Center, which houses male prisoners. ■

Sources: [www.courthousenews.com](http://www.courthousenews.com), *Philadelphia Weekly*

## California: Jail Nurse Receives \$703,957 in Retaliation Suit Against County, PHS

On December 15, 2011, following a three-week trial, a federal jury in San Francisco awarded Freddie M. Davis, formerly employed at Alameda County's Santa Rita Jail, \$528,957 in damages stemming from retaliation she experienced after she and other nurses complained about mistreatment from a supervisor.

The jury found former Alameda County Sheriff's Captain James E. Ayala liable for retaliation against Davis, a licensed vocational nurse, but held that Sheriff's Lieutenant Darryl Griffith was not liable. Summary judgment had previously been entered in favor of the county.

In March 2006, Davis joined 34 other jail nurses and employees in signing a petition that protested "intimidating conduct"

by Linda Henson, the Director of Nursing for Prison Health Services (PHS), the company that provided medical care to Santa Rita jail prisoners. According to Davis, who worked for PHS for over 15 years and received consistently positive work performance reviews, Henson "demonstrated a pattern of racist and sexist behavior toward her at work."

Davis' attorney, Pamela Price, said Captain Ayala threatened to revoke Davis' security clearance in retaliation for her complaints; when Davis protested, saying that Ayala could not threaten her in that manner, she was transferred to the mental health unit, which was considered "the worst place to work at the jail."

Davis filed a state court action against



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PHS in 2007; the parties settled that case for \$375,000, and Davis agreed to resign.

Following the jury award in her separate federal suit against Alameda County and various jail officials, on February 9, 2012, \$4,743.06 in costs was assessed against Davis for her losing claims, while \$15,319.30 in costs was assessed against Ayala. The district court entered an order on October 31, 2012 that specified the

\$528,957 jury award had been reduced by an offset of \$200,000 based on Davis' settlement with PHS – resulting in a total recovery of \$703,957, excluding costs and attorney fees. See: *Davis v. Prison Health Services*, U.S.D.C. (N.D. Cal.), Case No. 3:09-cv-02629-SI. 📖

Additional source: *Bay City News Service*

## Puerto Rico DOC Fires 97 Guards, Suspends More Than 100

Puerto Rico's revolving door of corrupt prison guards is spinning a little faster.

In October 2011, the U.S. commonwealth's Department of Corrections announced plans to terminate 97 guards and suspend more than 100 others due to illegal drug use, contraband smuggling or unjustified absences from their jobs.

Sheila Padin, spokeswoman for the Puerto Rico DOC, said the firings and suspensions were the result of an ongoing investigation within the department. Jesus Gonzalez Cruz, the recently-appointed Corrections Secretary, notified the guards

by letter of their termination or suspension, according to Padin.

The disciplinary sanctions shouldn't affect prison operations, she said, since 325 new guards had graduated from the Puerto Rico DOC academy in June 2011 and another 260 guards were expected to graduate in the near future.

In April 2012, a Puerto Rico prison transport guard was found guilty in the drowning deaths of eight prisoners when their van drove into floodwaters. [See: *PLN*, Oct. 2012, p.49]. 📖

Source: *Associated Press*

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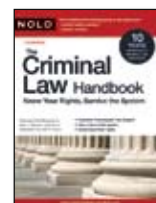
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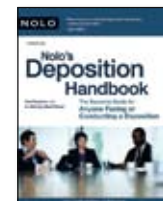
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## News in Brief

**Afghanistan:** On June 7, 2012, 31 prisoners escaped from a prison in Sar-e-Pul province after Taliban fighters blew a hole in the side of the facility. Three prisoners were killed and 28 wounded in a resulting gun battle with guards. Sixteen prisoners were captured shortly after the break-out; the others remained at large. Prior mass prison escapes occurred in Afghanistan in April 2011 (involving 500 prisoners at the Sarposa Prison) and in 2008 (1,200 prisoners, also at Sarposa).

**Arizona:** Approximately 300 prisoners at the Arizona State Prison in Kingman staged a peaceful walkout on June 23, 2012, citing objections to the DOC's grooming requirements. A prison official at the privately-run facility, which is operated by Management and Training Corp., spoke with the protesting prisoners, who then returned to their dorm in the Hualapai unit.

**Arizona:** On August 14, 2012, Betty Smithey, 69, the longest-serving female prisoner in the nation, was granted parole and released. Smithey had served 49 years for the 1963 murder of a 15-month-old girl she was babysitting. Originally sentenced to life without parole, her sentence was reduced to 48 years to life by Governor Jan Brewer. "It's wonderful driving down the road and not seeing any barbed wire," said Smithey, who suffers from numerous medical problems and walks with a cane. "I am lucky, so very lucky."

**California:** A controversial trailer to a movie called "Innocence of Muslims," which portrays Islamic prophet Mohammed as a fraud, womanizer and child molester, began circulating on the Internet in July 2012. The video resulted in demonstrations in numerous predominantly-Muslim countries, including Libya, where U.S. Ambassador Chris

Stevens and others were killed in an attack on the U.S. embassy on September 11, 2012. The man behind the movie trailer, who used the alias Sam Basile and falsely posed as an Israeli Jew, turned out to be 55-year-old Nakoula Basseley Nakoula (aka Mark Basseley Youseff) – a Christian and former federal prisoner on supervised release. Nakoula was arrested in Los Angeles on September 27, 2012 for violating the terms of his release, including using an alias without prior approval. He was ordered held without bond. Nakoula had previously served time in federal prison for check fraud.

**California:** Henry Marin, 27, a former Los Angeles County sheriff's deputy, was sentenced to two years on June 25, 2012. His downfall? A burrito stuffed with heroin, which he tried to deliver to a prisoner at the Airport Branch Courthouse in February 2010. Marin, who pleaded no contest

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to drug smuggling, said he was unaware that the burrito, which he obtained from an undercover investigator, contained heroin. As part of his plea agreement a conspiracy charge was dismissed.

**Columbia:** Over 11,000 prisoners in 21 facilities went on a hunger strike in August 2012, demanding that the government declare a state of emergency in the nation's prison system, form a National Board of Consultation that includes prisoner representation, end overcrowding and unsanitary prison conditions, and provide adequate medical care. At the La Picota prison in Bogota, prisoners refused to be counted or locked in their cells. An estimated 134,000 people are held in Columbia's prison system, which has a capacity of only 78,000.

**Connecticut:** On July 5, 2012, Danbury police chief Alan Baker said a "clerical error" had resulted in the omission of an arrest report related to Maureen Baird, 51, the federal prison warden at FCI Danbury. Baird's January 21, 2012 arrest report was not entered in the police arrest log; she was charged with DUI in April 2012 after several anonymous complaints to the police department. According to Baker, a police employee "simply forgot" to enter Baird's arrest in the log. Baird's DUI charge was related to a one-car rollover accident in which a responding

police officer noticed a bottle of vodka in her vehicle. According to hospital records, she had a blood-alcohol content level of .252 – over three times the legal limit. Baird was admitted into an alcohol diversion program in October 2012; her DUI charge will be expunged upon completion of the program.

**Connecticut:** Retired Cheshire corrections officer Craig Cantin, 51, was arrested on August 6, 2012 for allegedly soliciting sex from a 15-year-old boy. According to the victim, Cantin claimed he was working undercover and offered \$30 for a sexual act. He was charged with risk of injury to a child, patronizing a prostitute, impersonation of a police officer and breach of peace, and jailed under a \$25,000 bond.

**Florida:** Due to flooding at the Escambia County Jail in June 2012, 177 prisoners were transferred or released. Fifty were released on time served, 48 who had already been convicted were sent to the state prison system, 35 bonded out, 18 were transferred to other agencies due to detainers, 15 federal prisoners were released to the U.S. Marshals Service and charges were dropped against six other prisoners. "At no time has an inmate been released who was serving a sentence. Releasing and transferring inmates happens on a daily basis," stated Escambia County Sheriff's Office public

information officer Mike Ward.

**Florida:** Two federal prison guards employed at FCI Marianna, Steven M. Smith and Mary S. Summers, were indicted on June 26, 2012 on charges of bribery, conspiracy and smuggling contraband. Smith and Summers are accused of trying to deliver cell phones, tobacco, a lighter, a music player and synthetic marijuana to prisoners in exchange for cash and pre-paid money cards. They face up to 15 years if convicted.

**France:** According to an August 22, 2012 news report, prisoners at the Saint-Martin-de-Re prison who were allowed to plant flowers and vegetables in the exercise yard also planted marijuana. Prison officials said the cannabis plants had grown to about 2½ feet before they were discovered. "When you don't know what you are looking for it is easy to confuse them with other plants," said Christophe Beaulieu, with the prison guards' union.

**Georgia:** On August 9, 2012, state prisoner Laderick Cornellius Chappel, 33, was murdered at the Georgia Diagnostic and Classification Prison in Jackson. He was stabbed and then thrown from the second floor of his unit, and died due to blunt force trauma from the fall. The Georgia Bureau of Investigation charged five prisoners with armed robbery and murder in connection with Chappel's

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## News in Brief (cont.)

death: William Woodrow Wells, 21; Dante Ray Myles, 27; Niko Lamar Swann, 23; Demarcus D. Crew, 19; and Justin O'Neal Clinkscales, 27.

**Indiana:** Former Wabash Valley Correctional Facility guard Jon Dobbins, 27, was one of 40 people indicted on federal charges related to a prison-based drug ring that involved the sale of heroin, methamphetamine and other drugs. The August 15, 2012 indictments included several state prisoners, including Oscar Perez and

Justin Addler; prosecutors allege that they coordinated the drug ring using smuggled cell phones. The drug ring reportedly operated at the Westville Correctional Facility and Pendleton Correctional Facility in addition to Wabash. Dobbins was charged in federal court with intent to distribute a schedule II non-narcotic controlled substance. He had been fired on July 15, 2012 following his arrest on two felony and three misdemeanor state charges, including drug-related offenses and resisting law enforcement and battery.

**Maryland:** Federal Bureau of Prisons (BOP) supervisor Susan A. Pratt, 46,

was indicted on July 24, 2012 for receiving bribes from moving companies in exchange for giving them BOP business. Pratt, who worked in the BOP's Relocation Services section, was responsible for handling moves and payments for moving expenses for BOP employees transferred to new locations. She allegedly received meals, spa services and free moves from four moving companies between 2007 and 2010. A superseding indictment in September 2012 charged her with six counts of unlawful payment to a public official and four counts of non-government compensation. ■

## Criminal Justice Resources

### ***ACLU National Prison Project***

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: [www.aclu.org/national-prison-project-journal-fall-2011](http://www.aclu.org/national-prison-project-journal-fall-2011)) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. [www.aclu.org/prisons](http://www.aclu.org/prisons)

### ***Amnesty International***

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. [www.amnestyusa.org](http://www.amnestyusa.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***The Exoneration Project***

The Exoneration Project is a non-profit organization dedicated to working to free prisoners who were wrongfully convicted. The Project represents innocent individuals in post-conviction legal proceedings; typical cases involve DNA testing, coerced confessions, police misconduct, the use of faulty evidence, junk science and faulty eyewitness testimony, and ineffective assistance of counsel claims. Contact: The Exoneration Project, 312 North

May Street, Suite 100, Chicago, Illinois 60607 (312) 789-4955. [www.exonerationproject.org](http://www.exonerationproject.org)

### ***Family & Corrections Network***

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. [www.fcnetwork.org](http://www.fcnetwork.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) publishes the FAMMgram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### ***Innocence Project***

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### ***Just Detention International***

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### ***Justice Denied***

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions and how and why they occur. Their content is available online, and includes all back issues of the Justice Denied magazine and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. [www.justicedenied.org](http://www.justicedenied.org)

### ***National CURE***

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### ***November Coalition***

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. [www.november.org](http://www.november.org)

### ***The Sentencing Project***

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. [www.sentencingproject.org](http://www.sentencingproject.org)



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**The Criminal Law Handbook: Know Your Rights, Survive the System**, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

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**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

**A Dictionary of Criminal Law Terms (Black's Law Dictionary® Series)**, by Bryan A. Garner, 768 pages. **\$39.00.** This handbook contains police terms such as preventive detention and protective sweep, and phrases from judicial-created law such as independent-source rule and open-fields doctrine. A good resource to navigate your way through the maze of legal language in criminal cases. 1088

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**Prisoners' Self-Help Litigation Manual**, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 960 pages. **\$39.95.** The premiere, must-have “Bible” of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Highly recommended! 1077 ☐

**How to Win Your Personal Injury Claim**, by Atty. Joseph Matthews, 7th edition, NOLO Press, 304 pages. **\$34.99.** While not specifically for prison-related personal injury cases, this book provides comprehensive information on how to handle personal injury and property damage claims arising from accidents. 1075 ☐

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